

PUBLIC CONSULTATION

DRAFT LAW PROCEEDING TO THE AMENDING OF EMPLOYMENT LEGISLATION IN THE FRAMEWORK OF THE WORTHY WORK AGENDA

This document aims to present the main concerns of Bolt Food, Glovo and Uber Eats as digital platforms specialising in home delivery with the proposal presented to Parliament regarding the regulation of platform work in Portugal, namely through the "[Proposed law amending employment legislation in the framework of the worthy work agenda](#)"¹, now under public consultation, and to present a sectoral proposal based on operational knowledge and the experience of other countries.

Thus, we would like to try to demonstrate the limitations and negative impacts of the intended path, dividing our exposition into two parts: (1) analysis of the problems; (2) design of possible solutions.

1. Analysis of the problems

a) The serious causes and consequences of adding Article 12-A to the Employment Code

We understand the Government's intention to regulate platform work by means of a presumption of workmanship that helps to determine the existence of a work contract in this context, while also determining when this workmanship does not exist. Understanding that the Government wants to strengthen the regulation of the sector, we believe that regulation and greater clarity are the best way to take advantage of the economic opportunities generated by work through platforms and minimise limitations that this new way of working presents.

Therefore, as representatives of the digital delivery platforms sector, we are concerned that the proposal in public consultation does not focus on criteria to determine the existence, or not, of an employment relationship. A law passed along the same lines as the text currently under consultation could make it impossible to work through platforms as a self-employed person, even if the relationship was de facto one. Employment cannot be assessed based on merely instrumental criteria, part of an operational model of platforms and not determining whether there is a real subordination in the relationship with those who use them to access job opportunities. Especially, when most of the activities that take place through platforms also take place in the analogue market, without the intervention of digital intermediaries.

And the platforms are just that. A technological instrument inserted in the development of the digital economy. And, therefore, there can be no recognition of employment where it does not

¹Available at: http://bte.gep.msess.gov.pt/separatas/sep33_2021.pdf

exist. In a context where an appeal is made to all economic agents, public and private, to be part of the movement towards digital transition, here is a technological tool that digitalises businesses almost instantaneously, makes the management and activity of couriers and commerce/restaurants much more efficient and effective, and allows for an increase in sales, and there is a presumption of employment between the supplier of the technology and the respective provider. The Government has thus chosen to regulate ways of operating rather than relationships with the characteristics of an employment relationship.

Platforms like ours were created to provide a service that helps couriers, restaurants and traders to better fulfil their professional mission and develop their activity, even if this professional mission and activity can obviously be carried out without any recourse to platforms.

On the other hand, there is no known study on which of the current or future providers the presumption will apply. Is it estimated that the courts will consider that the presumption will apply to a student who decides to try this activity only once and does not give up on the first day or will they consider that a minimum period is required? Does the presumption apply to those who only provide services to platforms for short and spaced periods (e.g. one weekend in each quarter)? The practical application of this regime requires an appropriate dividing line between a supply of services and the situation in which the presumption should operate.

What is the Government's goal - worthy work - will ultimately become the setting of a serious precedent for the principles of employment law.

Moreover, the Government presents a list of "characteristics" without indicating the *quantum* that will be necessary to verify in order for the presumption to occur, which will certainly originate several interpretations by the courts and will take several years until a unification of jurisprudence occurs. Meanwhile, the economic agents - platforms, couriers, restaurants, retailers - operating in a sector marked by rapid growth and innovation are left with their plans conditioned, on hold and without certainty, while they await the normal pace of justice. This course of action clashes with the Government's stated ambition to make Portugal a country known worldwide as a digital territory, something especially important after the drop of six positions in the 2021 International Institute for Management Development (IMD) Global Competitiveness Ranking.

b) Analysis of economic and social impact

It being clear that employment issues cannot be confused with economic policies and options, it is important to draw attention to the potential impacts of this proposed introduction of Article 12-A.

First of all, it is important to draw attention to such impact due to the fact that the Government has not shown that it has analysed them from an economic viewpoint, from the perspective of their suitability to achieve the intended goal, and also from the standpoint of Portugal's ability to continue to attract foreign investment in the information technology sectors and to be a country with an ecosystem that attracts innovative companies. The proposal under analysis was not

preceded by any study assessing the impact and consequences on the Portuguese socio-economic panorama.

The forced change of status that would result from the Government's proposal harms, in the first place, the workers, who do not want the proposed changes. According to a study prepared by ISCTE Executive Education on the social and employment impact of digital platforms in Portugal, with an important sample of more than 2000 couriers, 90% said they had improved their living conditions after starting to collaborate with digital platforms. 87% said that they intend to continue working as self-employed². According to the same study, the main reasons why couriers use platforms are precisely the hourly flexibility and the ability to generate additional income.

These findings gain resonance on a European scale. A study by Copenhagen Economics³ on 24 European countries, including Portugal, indicates that two thirds of couriers identify the "flexibility to work when and where they want" as the main reason for working through delivery platforms. Moreover, most of the couriers surveyed prefer a flexible working model to fixed jobs. Almost 70 percent would not swap their flexibility for fixed hours, even in a scenario where this hypothetically increased their income by at least 15 percent. This study also predicts that up to 250,000 of the currently active couriers would no longer work in home delivery, while up to 75,000 European couriers could be discouraged from being part of the workforce altogether. In this scenario, these workers would collectively face income losses of up to €800 million in revenue as a result of such policies. The study also points to increased costs for the user, as well as reduced job opportunities for couriers and reduced turnover for restaurants, both of which earn lower incomes.

These far-reaching consequences are in line with what happened in Spain following the entry into force of the so-called "Rider Law" on 12 August 2021. The changes imposed on platforms, workers and commercial users such as restaurants and retailers have so far resulted in the destruction of thousands of job opportunities, higher costs for traders, reduced service availability for customers and legal uncertainty⁴. The entry into force of the legislation also led Deliveroo, one of Europe's leading home delivery platforms, to abandon the Spanish market in November, leaving 3,500 couriers without access to job opportunities through its platform and removing competitiveness from the Spanish market as a whole, with corresponding consequences for the country's economy.

² <https://eco.sapo.pt/2022/05/20/apenas-10-dos-estafetas-das-plataformas-se-dedicam-a-tempo-inteiro-a-esta-atividade/>

³ Ver: <https://expresso.pt/economia/2021-11-17-Esforco-europeu-para-reforcar-vinculos-laborais-pode-afastar-250-mil-estafetas-das-entregas-de-comida-diz-estudo-3bca0c8f>. Complete study available at: <https://www.copenhageneconomics.com/publications/publication/study-of-the-value-of-flexible-work-for-local-delivery-couriers>

⁴ On the impact of the "Rider Law" see, for example, the open letter sent to the European Commission by the main Spanish relay associations available at: <https://media.euobserver.com/46e876479bacfe3005ffe2ccf98da9ca.pdf>

In another example of the consequences of such forced changes, in the canton of Geneva, in September 2020, couriers were banned from using home delivery platforms as self-employed workers. As an immediate effect of this change, 77% of couriers were left without access to job opportunities through the platforms. Of the small minority who signed employment contracts after trying out the new model, 72% of couriers said they would prefer to continue working as self-employed if they could⁵. More than a year later, in November 2021, job creation in Geneva was still well below pre-changes, with 79% of couriers who lost access to platforms in September 2020 still unemployed 6 months later and a 67% reduction in couriers employed after a year⁶.

The studies presented and the examples of Spain and Geneva clearly show that imposing these changes will lead to economic losses throughout the sector, starting with the relays that the proposal aims to defend. Estes exemplos não devem ser ignorados na procura de soluções equilibradas que combinem flexibilidade e melhores proteções, beneficiando as economias locais.

According to the National Statistics Institute, between 2017, the year in which home delivery platforms arrived in Portugal, and 2020, only in the activity of "Other postal and courier activities", that is, in strictly defined home delivery services, employment more than doubled, with more than five thousand net jobs having been created, more than four thousand companies, and the sector's turnover having increased by 62% (data from March 2022). It is these results, which are expected to continue to grow in the future, that are at stake in this proposal.

2. Possible solutions - employment based on sound criteria adapted to the work framework through platforms

In fact, electronic platforms are posing new challenges in the extension of relationships classically defined by the traditional employment contract, and in some countries in Europe (some by going too far, others by postponing the issue) have led to a need for standardisation of the regime.

Currently, Portuguese legislation already provides for a presumption of labour in the Employment Code. In other words, whenever the assumptions of the employment relationship are met, regardless of the formal nature of that relationship, the relationship will be considered an employment relationship, producing its effects from the moment those assumptions are met. In other words, the current regime makes the material aspects prevail over the formal aspects.

All these questions lead to one single answer: boundaries must be set in two legal relationships that will always coexist - the employment relationship and that of the independent service provider. The path of creating a presumption of employment applicable exclusively to those who perform tasks in the context of a service provided through electronic platforms is not the most

⁵More information at: <https://medium.com/uber-under-the-hood/independent-couriers-reaction-to-employee-reclassification-learnings-from-Genebra-e3885db12ea3>

⁶ More information at: <https://medium.com/uber-under-the-hood/assessing-the-impact-of-courier-reclassification-in-Genebra-1-year-on-restaurant-demand-and-work-b85ac573b804>

accurate solution to contribute to a correct delimitation of the boundary, since working through a platform should not be a condition for a worker to be under one regime or another, just as one does not provide work only in one sector or another.

Moreover, the criteria of presumption of employment chosen by the Portuguese Government do not follow the existing criteria in judicial decisions such as those of the decision of the Court of Justice of the European Union of April 2020 in the case of B vs. Yodel Delivery Network or those existing in other jurisdictions.

We do not believe that the presumption model should be rejected outright as a contribution to create conditions to prevent possible abuses in the scope of service provision through electronic platforms. In the meantime, the Assembly of the Republic should seek to densify an adaptation of the generic presumptions contained in article 12 of the Employment Code to the framework of employment through digital platforms, assessing the employment relationship and not merely describing characteristics of the services provided by platforms, essentially outlawing independent work in this context.

In addition to this, in December 2021, the European Commission published a legislative proposal that will aim to regulate employment relations in the field of digital platforms. With this discussion in full development, the introduction of additional legislation at national level will mean more confusion and less stability for all those involved in the sector - not only couriers, but also restaurants and retailers, end-customers and the platforms themselves, which in the end may be confronted with conflicting legislation between the national and European levels. We advocate the need to work at European level to promote predictable and harmonised standards, as was also repeatedly requested by the same Spanish relay associations in their second letter to the European Commissioner for Employment and Labour Social Rights⁷. In this context, we echo the European association of the platform sector, Delivery Platforms Europe, which points out that the European Commission itself admits that the reclassification of couriers as workers could lead to losses of income on the part of couriers, as well as the loss of flexibility so valued by them⁸, as shown in multiple international cases described in the previous pages.

We believe that with an open dialogue we will be able to build the necessary bridges to find solutions in line with the existing challenges in Portugal and in this sector. For our part, we will always be available for constructive dialogue.

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⁷ Available at: <https://media.euobserver.com/46e876479bacfe3005ffe2ccf98da9ca.pdf>

⁸ <https://deliveryplatforms.eu/statement-on-the-european-commissions-platform-work-proposal/>