

# WORKING IN DIGITAL PLATFORMS: COMPARATIVE VIEW

## SUMMARY

1. Introduction
2. EU Directive Proposal
3. Portugal
4. Brazil
5. Italy

## 1. INTRODUCTION

The advancement of technologies and the adoption of globalized and shared economic models have created new forms of provision of work, which is a challenge, regulation-wise.

Work performed on digital platforms is one of these new realities. It is characterized by the decentralization of activities and people, algorithmic management of work, and flexibility in labor relations. As a rule, it involves three parties: the platform provider, the supplier, and the claimant.

Facing these new work models, based on information and communication technologies and the use of digital platforms, the Law is trying to give new answers to regulate this new way of working.

The **Green Paper on the Future of Work**, which was prepared by the Portuguese Government and published in March 2022, is an example of how these concerns are gaining the attention of policy makers.

In this newsletter, specialists from **MACEDO VITORINO** (Lisbon, Portugal) and **DENISE FINCATO** (Porto Alegre, Brazil) briefly present recent legislative initiatives and court decisions regarding the regulation and framework of work performed on digital platforms, under a comparative perspective, involving the legal systems of Portugal, Brazil, and Italy.

## CONTACTS

### GUILHERME DRAY

[GDRAY@MACEDOVITORINO.COM](mailto:GDRAY@MACEDOVITORINO.COM)

### DENISE FINCATO

[DENISE@DENSEFINCATO.COM.BR](mailto:DENISE@DENSEFINCATO.COM.BR)

## 2. EU DIRECTIVE PROPOSAL

A Proposal for a Directive regulating the working conditions of digital platform workers and clarifying the status of these workers was long overdue. That Proposal arrived on December 9, 2021 and is now to be negotiated between the Council (Member-States) and the European Parliament. If approved, it should be transposed within 2 years at the latest.

The Directive creates a list of control criteria to determine whether the platform is (or is not) an employer, and, if at least 2 criteria are met, the platform is legally presumed to be an employer. The criteria that should be taken into account are the following: (i) supervision of work performance by the platform; (ii) restriction of freedom of choice of working hours and/or

periods of absence; (iii) obstacles to performing work for third parties; (iv) imposition of conduct rules and appearance; and (v) fixing remuneration levels (article 4). Under Article 5 of the Proposal, the platform can rebut the legal presumption of employment, and it is up to the platform to prove that there is no employment relationship.

The Proposal intends to increase transparency in the use of algorithms by platforms as well, ensuring human monitoring and the right to challenge automated decisions (article 6).

In addition, the Proposal strengthens the powers of the inspection authorities and obliges platforms to comply with a set of information duties regarding the way work is provided, the number of employees and the contractual conditions applicable (articles 11 and 12).

Finally, article 18 establishes the protection of platform workers against unlawful dismissal. With this, we can say that we will soon have a Europe fully prepared for the Digital Age.

### 3. PORTUGAL

Recently the Portuguese Government, in the scope of the "[Righteous Work Agenda](#)", approved a bill that amends the Labor Code and that meets the provisions of the above-mentioned Directive Proposal, i.e., creates a presumption of employment relationship for work developed in digital platforms (article 12-A).

The presumption is based on the existence of a set of indicators, which include: (i) the digital platform operator sets the remuneration for the work performed on the digital platform or sets maximum and minimum limits for the remuneration; (ii) the digital platform operator processes the payment between the users and the activity provider of the platforms; (iii) the activity provider does not act in their own name, but provides its activity within the digital platform operator's organization; (iv) the communication between the users and the activity provider is carried out and managed by the digital platform operator; (v) the digital platform operator monitors the quality of the results achieved by the activity provider by providing its users with an assessment or rating of the activity; (vi) the digital platform operator monitors in real time the activity performed by the activity provider, including through a continuous geolocation system and algorithmic management; (vii) the digital platform operator exercises powers over the activity provider, including disciplinary powers, and may exclude the activity provider from future activities by deactivating the account when its assessment is considered insufficient. The presumption may be rebutted by the platform operator.

The proposed law, which has not yet been approved, does not cover special regimes that have their own rules already, as such as TVDE, which maintains, for example, the "operator", who limits the recognition of the employment relationship between drivers and platforms.

In Portugal, Law no. 45/2018, of August 10, provides the legal regime for the activity of paid individual transport of passengers in unmarked vehicles from an electronic platform. Innovatively, the Portuguese law introduced a fourth actor in the process. In addition to the electronic platform, the driver and the passenger, there is the TVDE operator, which is the one who provides the remunerated passenger service and, in turn, concludes the contract with the drivers.

This law put an end to the "regulatory void" existing in the Portuguese legal system, establishing a set of requirements for the exercise of the economic activities in question. The start of business, both of TVDE operator and the platform operator, are subject to licensing by **IMT**, Institute of Mobility and Transport. When it comes to drivers, the law defines a mandatory pre-qualification system, which includes a written contract that regulates their relationship with the TVDE operator, to which the presumption of employment contract in article 12 of the Labor Code applies.

## 4. BRAZIL

In Brazil, there is no specific norm regulating work relations in digital platforms. There are several bills in progress, some establishing and others excluding the presumption of employment relationship (according to articles 2 and 3 of the Brazilian Consolidation of Labor Laws - **CLT**), which can be described by four essential elements: subordination, personal nature, habituality and rewarding.

The recognition of the employment relationship involving the recent hiring models between app drivers and technology platform provider companies is still a new theme in the Brazilian Superior Labor Court (**TST**). Although some "Classes" of **TST** have already issued decisions recognizing the employment relationship between the driver and Uber, others have issued decisions in a different sense, showing that there is no consolidated understanding on the subject in the Brazilian Labor Court.

During the COVID-19 pandemic in 2020, digital platform service providers in the country organized the "*Breque dos Apps*" (*Break of the Apps*), a kind of national strike of service providers, which included organized groups in several cities in Brazil. The protests were attended by service providers who shut down their apps for a few hours. Among the demands that guided this mobilization were the increase in the minimum amount per trip, the request for benefits such as meal vouchers and insurance (*life, accident, and theft insurance*), the end of application blocking and the provision of protective equipment against the COVID-19 virus, such as masks and alcohol-gel.

In January 2022, Law No. 14/297, which regulates specifically the protection of people who provide service through digital platforms during a pre-fixed period qualified as a "public health emergency state" was passed. Among the measures, the law provides that platforms must have accident insurance plus worker compensation, as well as an obligation for service providers diagnosed with Covid-19 to receive financial assistance from the platform for an initial period of 15 days. If companies fail to comply with protection rules, there can be sanctions ranging from warnings to the payment of fines.

On April 22, 2022, the Brazilian Ministry of Health published an ordinance declaring the end of the Public Health Emergency State of National Importance (**Espin**). This ordinance will directly affect some labor rules that were temporarily modified due to the exceptional situation faced in the last two years. Among them are obligations imposed on companies and workers' rights that have been made more flexible and, in this same sense, the termination of Law no. 14/297-22.

The challenge of regulating platform work lies in finding a balance: on the one hand, it is important to protect those who perform their work activity through telematic means; on the other hand, it is important to stimulate companies that, based on free initiative and technological advance, seek to develop their activity based on digitalization.

The Brazilian scenario still presents itself as legally insecure in the face of the development of labor relations in platforms, either due to the inexistence of specific legislation or due to jurisprudential divergence, a fact that generates legal insecurity for workers in the new economy.

## 5. ITALY

In 2015, *Tribunale di Milano* ruled on a dispute between several entities representing the taxi drivers' category and UBER POP (procedure no. 16612). Considering that the service provided through Uber's digital platform grants the possibility, to those who do not have a cab driver's license, to perform a paid transportation service, using the company's application (which acts as an intermediary between drivers and customers), the Court of Milan considered that UBER POP's activity was a case of unfair competition, according to art. 2598 no. 3 of the Italian Civil Code.

*Codice Civile*, in the third paragraph of art. 2598, establishes that whoever makes use, directly or indirectly, of any means that do not comply with the principles of professional suitability and

that can cause damage to a company belonging to another, is practicing acts of unfair competition.

On the other hand, article 82 of the Italian Highway Code defines the limits of the use of the vehicle in favor of third parties, sanctioning the prohibition to use the vehicle for purposes other than those indicated in the registration documents.

Recently, Decree-Law no. 143 of December 29, 2018, which regulates, in addition to the cab sector, *noleggio con conducente* (**NCC**), created new rules for the non-regular public transport system, such as the fact that **NCC** are required to return to headquarters after each trip. Unlike cabs, which stop in specially marked public areas, **NCC** can operate throughout the country, without having marked parking areas.

The law, however, did not regulate Uber at all and, nor, in general, digital platform work.

This provision will now be up to the legislator, who will have to consider the very recent EU directive.

© 2022 MACEDO VITORINO

*This information is provided for general purposes only and does not constitute professional advice.*