TRIGGERING A REBUTTABLE PRESUMPTION/REVERSAL OF BURDEN OF PROOF

Introduction

The criteria that would be used to determine if a rebuttable presumption of employment or a reversal of burden of proof would apply, and when it would apply, will define the impact of either measure.

In our view, one of the key objectives of the Commission’s proposals should be to bring greater clarity and certainty to the issue of when any potential measure would apply. Clarity in this regard is in the interests of workers themselves, who should not have to take legal action to determine their status; platforms, who want to operate in a stable regulatory environment; and the wider EU economy, as uncertainty could deter investment.

The criteria should in our view be clear enough that individuals can unilaterally establish how it applies to them, without seeking information from the platform; while reducing the need for litigation against platforms, which is costly for all parties.

European Court of Justice precedent

We believe that the criteria established by the ECJ in the case of B vs. Yodel Delivery Network Limited (April 2020) would meet the above requirements, would serve to fight bogus self-employment and therefore are the most suitable criteria for triggering any measure under consideration.

The criteria established by the ECJ are easy for an individual to establish unilaterally and serve to establish an indication of subordination or control if not met, while providing much increased legal certainty.

In its preliminary ruling issued by the ECJ in the case of B vs. Yodel Delivery Network Limited in April 2020, the court stated that an independent contractor should be prevented from being classified as a worker provided that they have the discretion to:

- use subcontractors or substitutes to perform the service which he has undertaken to provide;
- accept or not accept the various tasks offered by his putative employer, or unilaterally set the maximum number of those tasks;
- provide his services to any third party, including direct competitors of the putative employer, and
- fix his own hours of ‘work’ within certain parameters and to tailor his time to suit his personal convenience rather than solely the interests of the putative employer.

Inversely, in this instance, if an individual did not enjoy all of these benefits of self-employment, a rebuttable presumption of employment/reversal of burden of proof could be triggered.
These criteria go to the heart of subordination and control and have the advantage of already benefitting from legal standing across the EU. An individual that believes themselves to be incorrectly classified could easily demonstrate that their contractual arrangement and the reality of their working situation does not meet the four criteria and therefore be able to trigger the measure.

Unsuitable triggers

We are aware of two additional potential triggers under discussion:

1. Presence of an algorithm to assign/manager work of an individual.
2. Determining or setting upper limits on remuneration.

We believe that both are unsuitable and would lead to unforeseen negative consequences, for riders in particular.

1. Presence of an algorithm
Considering the presence of an algorithm to be a suitable trigger is based on an assumption that the algorithm constitutes subordination and exerts control. Critical to a judgement on subordination would be the rules by which an algorithm operates, as opposed to the existence of an algorithm in of itself.

We do not believe that the simple employment of an algorithm, which optimises and automates processes, de facto demonstrates subordination or control. The fact that an algorithm assigns work to an individual is inherent to the very nature of the business operated by any platform and the services being provided and does not necessarily mean individuals are not given a great deal of latitude to conduct their work; this is specifically found to be the case by the ECJ in the case referred to above.

Deliveroo's algorithms

The algorithms Deliveroo uses to make offers of work to riders is based on objective criteria only, such as location of the restaurant, location of the rider, customer demand and the vehicle type the rider is using. These criteria are utilised in order to assess which rider is likely to be able to deliver the order in the quickest possible time and which should therefore be offered the order. No performance metrics or personal characteristics are ever taken into consideration by our algorithm. Riders are free to reject any offer of work, without penalisation or consequence. For that reason, we do not believe that our algorithm could be considered to constitute subordination or control.

Additionally, considering the presence of an algorithm, rather than the factors the algorithm makes decisions on, as a suitable trigger will create major legal uncertainty as companies where self-employed individuals interact with any algorithm in the course of their work would be at risk of seeing those individuals reclassified as employees.

This would disincentivise investment in optimisation of processes through algorithms and could have an impact in sectors far wider than those related to platform work.
2. Determining or setting upper limits on remuneration
We would be concerned that using price setting as a trigger would have unintended consequences.

We have considered the possibility of allowing riders to set their own prices, but where companies have tried to allow more riders to determine and set their remuneration levels in other markets it has led to a race to the bottom, with riders outbidding each other with the lowest fare in order to secure the delivery. For this reason, it is not something that we have pursued.

Additionally, if riders were to determine their own fares, it would take time as they competed amongst each other, time that they could otherwise spend delivering orders and earning money.

In a dynamic market, where self-employed riders have the opportunity to work for multiple competing platforms at a given time, no one party is in a position to determine or set the price unilaterally. Riders have the ability to reject fares that they do not want and work for a competitor without repercussion for doing so. In fact, riders reject 50% of orders the first time they are offered. Riders rejecting offers can also lead to an increase in the remuneration offered for a delivery. While riders do not set their remuneration levels directly, they do therefore shape it in an aggregate way.

In summary, if companies were incentivised to allow riders more control over remuneration levels, we would anticipate it leading to negative outcomes for riders themselves.