

## Moot 2024 case

### Main Platform Workers<sup>1</sup> and Teleworkers protection in Vichtery

#### I. Background

Vichtery ratified the Revised European Social Charter on 07 December 2022, accepting the paragraphs that are mentioned in the table of the country-profile. It also accepted the 1995 Additional Protocol providing for a system of collective complaints. It has not yet made a declaration enabling national NGOs to submit collective complaints. Vichtery is also EU member starting from 2016.<sup>2</sup>

The digitalisation of the economy, with all its series of technological innovations that are reshaping both the nature and the organisation of work across Europe, has impacted Vichtery's labour market as well, raising concerns amongst labour market stakeholders, mostly voiced by legal scholars, analysts, researchers, health professionals, NGOs, and trade unions. Most of the critics, though not denying the current and potential benefits brought by the 'Industrial Revolution 4.0.' (for labour market included), pointed out from the outset the risks of digitalization for those who work: job displacement due to automation, rapid skills obsolescence, use of intrusive surveillance technologies to monitor work, and use of AI-algorithmic-based technologies in recruiting and profiling, which are outside the workers' control, risk of burn-out and mental strain due to growth of the 'always on' culture, blurring boundaries between work and private life, diminished unionization as a result of 'granulation' of the workforce, etc.. Trade unions have highlighted in particular the threat of an inflow of precarious contractual arrangements coming from the area of work performed through digital labour platforms, in the absence of an articulated national social policy intended to proactively address the new challenges raised by the digitalisation of work.

The debate on the topic has heatedly reignited lately. Two years after the Covid-19 crisis, most surveys conducted by various European and national statistical institutions seem to confirm Trade Unions' concerns, by revealing the following trends within the Vichterian Labour market, resulting from the digitalisation of work:<sup>3</sup>

- 1) a significant increase in the percentage of teleworkers, from 9% of tele-employees at the end of 2020, to 16 % at the end of 2022.<sup>4</sup>

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<sup>1</sup> Workers who are working 20 hours or more per week or earning more than 50 percent of their income through platforms ('The platform economy in Europe – results from the second ETUI Internet and Platform Work Survey', ETUI, 2022)

<sup>2</sup> 'Vichtery' is only a fictitious state name that is used in ANESC's Moot Court cases. There is no connection between Moot cases from an edition to another.

<sup>3</sup> Surveys targeted people who regularly perform work through mobile applications or online platforms, i.e. teleworkers and so-called 'main platform workers' (MPWs).

<sup>4</sup> According to Vichterian law (Telework Law, adopted in 2018), the teleworker is an employee who, on a regular and voluntary basis, fulfills the duties specific to his/her job in a place other than the workplace organized by the employer, using information and communication technology. Teleworkers enjoy in Vichtery full protection provided by labour laws. Moreover, Telework Law provides their right to disconnect at the end of working hours.

- 2) a tripling in the percentage of the workforce engaged in platform work as a main job (`main platform working` = working at least 20 hours/week or earning more than 50% of their income through platforms) from 2,1% at the end of 2020 to 6,3 % at the end of 2022; the number of main platform workers (MPWs) is expected to double by the end of 2025 and to remain in an uptrend.<sup>5</sup>
- 3) a broadening of the spectrum of activities performed by digital platforms, which, subsequently, led to the diversification of the profile of the workers involved. Thus, the prevalence of `on-location` services that require no specialization (such as food-delivery or ride-hailing) at the end of 2020 was replaced at the end of 2022 by a wide variety of services mediated through platforms, delivered either on-location or online and requiring from low to moderate and high-level work skills.<sup>6</sup>
- 4) 88% of MPWs perform tasks/provide services that require low, low-medium, and medium skill levels, and 12% provide high-skilled services. Most of the MPWs providing low and low-medium-skilled services are over-qualified for the work they do.

In terms of work management, contractual arrangements, and work quality, surveys revealed that:

- while the key feature of digital platforms is the algorithmic matching of supply and demand for paid work within a large virtual pool of people and companies, they differ when it comes to the party who determines how work is allocated, the content of the tasks/services, the deadlines, and the prices, or to the work assessment mechanisms.<sup>7</sup> Platform models built around low or moderately-skilled tasks not only connect supply with demand but also set the prices, the contractual relationship is established between the platform and the platform worker (PW) under a form of agreement which is set by the platform. In these types of platforms, workers are requested to commit to certain working time slots and are then assigned specific tasks, usually at short notice (including during antisocial hours, depending on the nature of the activity performed), sometimes with `sanctions` if they do not perform the work accordingly.<sup>8</sup> Direct interferences in the way the work is carried out varies, depending on the specific nature of the latter. Performance is evaluated through automated systems, i.e. AI-based algorithms which combine multiple factors, the workers not having access to information on how the algorithms work. On the other side, platforms built around highly skilled tasks (around 10%) only mediate between customers and PWs, the main contractual relationship is established directly with the customer when the parties are interested. The manner, the time within which an activity is

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<sup>5</sup> Work on the platform is not specifically regulated by Vichterian law (see *infra*)

<sup>6</sup> Examples range from micro-tasks performed online (such as object classification, tagging, reviewing content, etc.), on-location services (cleaning, gardening, childcare, healthcare), to professionalized services, such as IT programming, graphic design, content writing, translation, accounting services, etc.

<sup>7</sup> **Surveys didn't cover ride-hailing digital labour platforms, these being regulated in Vichtery by a special law that has been recently adopted**

<sup>8</sup> A typical illustration of this dynamic is the on-location service of food delivery: couriers are not subject to any obligation to be available to perform the delivery service, but as soon as they accept an order, they are obliged to show up at the restaurant, pick up the order, confirm this fact in the application, identify delivery address location and deliver the order within a specific timeframe, under a penalty of 15 to 30 euros. The couriers are also required to wear platform insignia.

provided, and the price are mutually agreed upon by the customer and the PW; the rating is subsequently provided by the platform based on the customer's assessment, the PW having access to it.

- 95% of Vichterians MPWs are engaged in platform work as self-employed, with civil contracts (referred to as `independent service providers` - ISPs - in Vichterian legislation), while only 5% work as part-time/full-time employees with employment contracts (ruled by Labour Vichterian Code); 30% of MPWs are part-time employees (outside the platform) who supplements their income by providing platform activities under civil contracts.

- 55% of MPWs earn less by the hour than the net hourly minimum wage in Vichtery.<sup>9</sup>

- 70% of MPWs work between 50 and 60 hours per week via platform.<sup>10</sup>

- 41% of MPWs' working time is unpaid time; the accumulation of unpaid working time comes from tasks related to researching, waiting for assignments, reviewing ads, etc...

- MPWs are exposed to significant risks for their physical and mental health (*technostress*). Although platforms do not compel PWs to accept tasks or to take offers, studies revealed that many MPWs are inclined to work everywhere or all the time, with all related risks of exhaustion (*burn-out*) and erosion of boundaries between professional and private life. Drastic monitoring/rating algorithms applied by platforms once the task is accepted combined with the automated decision-making system, which are both outside PWs' control, make way for high levels of psychological pressure among MPWs. In addition, prolonged periods in sitting posture are expected to induce sustained pressure on the trunk, neck, and upper limbs, increasing the risk of chronic muscular pain. PWs providing on-location services (such as bike deliveries) are exposed to work-related physical risks.

- as regards the *teleworkers* (who are employees under the national law (see *supra*, the 4th footnote), surveys report extensive monitoring practices performed by many employers through ICT (information and communication technology), such as Keylogger-type programs<sup>11</sup>, that are perceived as abusive and extremely stressful by 70% of Vichterian teleworkers.

In terms of trends and digital workforce dynamics:

- there is a growing tendency among Vichterian companies to outsource tasks (which were formerly carried out by employees) to platform workers. Digital platforms are seen by companies as a great opportunity to be relieved of burdens and conditioning imposed by labour laws (fiscal contributions included<sup>12</sup>) and to significantly extend their options with respect to the workforce, in terms of much higher flexibility and lower costs;

- a similar trend, but the other way around, has been revealed among both standard employees and teleworkers who are increasingly inclined to abandon labour law protection and

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<sup>9</sup> The monthly minimum net wage in Vichtery is currently 1405€ :

<sup>10</sup> **According to Vichterian Labour Code (which applies to employees), maximum legal working time cannot exceed 48 hours per week, including overtime (only exceptionally the duration of working time, overtime included, may be extended beyond 48 hours per week, provided that the average working hours calculated over a reference period of 4 calendar months do not exceed 48 of hours per week).**

<sup>11</sup> Keylogger is a form of malware that records the list of all programs used by the employee and the words typed on the computer keyboard, allowing the employer to retrace all messages sent by e-mail, the web addresses visited, the activity on the visited sites etc.).

<sup>12</sup> **In Vichtery, employees' social insurance and health insurance contributions are paid by the employer, while self-employed persons (ISPs) pay their contributions.**

to 'migrate' towards civil contractual arrangements concluded with digital platforms which are perceived as providers of income and highly-flexible work opportunities. In addition, many of them believe that Vichterian companies would offer better remuneration for tasks and services provided via platforms than the net salary corresponding to the same kind of work since they (the companies) will be relieved of the burden of contributions.

## ***II. Trade unions' complaints and the Government's response***

**A.** The main Vichterian trade unions reiterated their strong concerns regarding the true nature of activities and services provided by MPWs. In their view - except for the small percentage of those who are genuinely self-employed and able to determine contractual terms – most of the MPWs are bogus self-employed who more frequently than not provide precarious work disguised as 'independent activity', thus being deprived by labour-related rights and by legal protection against work-related risks affecting their health and safety.<sup>13</sup> Moreover, they lack voice and representation and have no access to collective bargain, since Art. 5 of the Vichterian Law on Social Dialogue does not give the possibility to independent service providers (ISPs) to form trade unions.

From the trade unions' standpoint, the existing trends highlighted by the survey endanger the job stability of those who perform similar tasks as MPWs, but under employment contracts, and the fact that a significant number of employees are ready to leave the legally protected area of employment contract and willingly assume the risk of becoming bogus self-employed workers, exposing themselves to vulnerability and precariousness, can mostly be explained by the disastrous way the Vichterian Government addressed the cost-of-living crisis which struck Vichtery in the last two years (as an example, despite the record level of 14,23% reached by inflation in 2022, the average net salary increased only by 9 %<sup>14</sup>).

On top of that, according to Trade unions, even if indirectly, the Vichterian law technically denies MPWs the possibility to denounce before the courts or the labour inspectorates the true nature of their bogus self-employment contracts concluded with the platforms.

Thus, in the Vichterian legal system, it is **Art. 17 of the Fiscal Code** which lays down criteria for identifying an *independent activity* carried out by a natural person (as opposed to the dependent one that is associated exclusively with the employment relationship regulated by the Labour Law<sup>15</sup>). According to Art. 17, in order for a generating-income activity carried out by a natural person to be classified as 'independent' it has to meet at least 4 of the following criteria:

- a) the natural person is free to choose the place and the way of carrying out the activity;
- b) the natural person is free to work for more than one client (i.e., there is no exclusivity clause in carrying out the activity);

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<sup>13</sup> **Under Vichterian law, only employees are automatically insured in the social health insurance system. Self-employed (ISPs) are not implicitly insured, so they cannot benefit from paid medical leave unless they opt for insurance in the social health insurance system. Either way, ISPs are not entitled to paid days off, rest breaks, and annual leave.**

<sup>14</sup> Currently 2804€.

<sup>15</sup> The Vichterian law still follows the binary approach: employees and independent contractors. New forms of flexible employment, such as employee sharing, job sharing, voucher-based work, portfolio work, crowd employment, collaborative employment, etc. are not regulated by Vichterian law.

- c) the inherent risks<sup>16</sup> of the activity are assumed by the natural person carrying out the activity;
- d) the activity is carried out by using the patrimony of the natural person who performs it;
- e) the activity is carried out by the natural person by using his/her intellectual capacity and/or physical performance, depending on the type of activity;
- f) the natural person belongs to a professional body;
- g) the natural person has the freedom to carry out the activity directly, with employed personnel, or by contracting third parties under the law.

Trade unions and most scholars consider that the terms in which Vichterian Fiscal Code portrays `independency` are obsolete and more suitable for the Fordist era rather than the 21st century gig economy, and the very fact that the manifestly precarious work performed by most of the MPWs meets (at least!) the four criteria required by Art. 17, thus getting to be legally qualified as `independent` work, fully proves the point. Trade unions are urging the legislator to align the Vichterian legal framework to labour market's realities.

With respect to the *teleworkers*, Trade unions blame the national legislation which, in their opinion, led to such abusive practices. Thus, although Vichterian teleworkers enjoy employee status (and, consequently, the full protection of labour laws), **Art. 7 of Telework Law** specifically allows employers to check their activity during working hours through information and communication technology (except cameras), under only condition of prior information.<sup>17</sup>

**B.** According to the Government, criteria laid down by Art. 17 of the Fiscal Code are based on the updated concept of `worker`, as it was gradually developed by CJUE's case law. In addition, Work on Digital Platforms is a global trend, unrelated to inflation and recorded almost everywhere in the world, which reflects the existence of a small percentage of the population who willingly chose to explore the opportunities brought by digitalisation to experiment with more autonomous forms of earning a living.

As regards monitoring the teleworkers, employers cannot be deprived of their control prerogatives when it comes to their tele-employees (teleworkers). They are entitled to ensure that the teleworkers truly perform their activities during working hours, especially since these activities require by definition information and communication technology.<sup>18</sup> The legal provisions pointed-out by Trade unions are reasonable.

The worrying results of the surveys and the government's response prompted the main Vichterian Trade Union Confederation organized in the Telecommunications sector of activity (TCVS), to take further action. It contacted the International Union of Workers (UNIW) – an international trade union organisation holding participatory status with the Council of Europe, whose main statutory goal and well-known world-scale activity are focused on promoting and protecting workers' rights.

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<sup>16</sup> Such as the inability to adapt in time and with the lowest costs to the variations of the economic-social environment, deterioration of the financial situation etc. (the examples are provided by the law).

<sup>17</sup> Which is not possible with regular employees in respect of whom Labour Code imposes certain restrictions when it comes to monitoring their activities at the workplace.

<sup>18</sup> See *supra*, footnote 4

UNIW accepted the challenge and is now preparing a well-founded collective complaint against Vichtery, based on the European Social Charter's provisions.

For its part, the Vichterian Government has been informed about TCVS's initiative and it's mobilized several top Vichterian lawyers and specialists in Social Rights and the European Social Charter, who are ready to defend Vichtery before the European Committee of Social Rights.