

Martin Risak

Fair Working Conditions for Platform Workers

Possible Regulatory Approaches at the EU Level

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AT A GLANCE

- The study explores different possible regulatory approaches at the EU level to ensure fair working conditions in the platform economy. As platform work is often performed cross-border with at least one party residing in a country other than the other party, regulation at the EU level in the form of a directive («Platform Work Directive») is the most appropriate means to ensure adequate protection of platform workers. Article 153 (2) (b) TFEU is the appropriate legal basis to set minimum standards for fair working conditions in the platform economy.
- At the heart of such a «Platform Work Directive» should be a rebuttable legal assumption that the relevant underlying contractual relationship constitutes an employment contract between the platform worker and the platform. This regulatory measure would establish a connection to the employment law of the country where the work is actually performed and would thereby facilitate application of national employment law in the realm of the platform economy.
- A solution based on the introduction of an intermediary category such as the so-called «economically dependent worker» at the EU level is rejected. Implementation of such a proposal would lead to evasive strategies being adopted by employers, leaving those persons previously protected with less protection in the end. Instead, the author argues, those self-employed persons who are economically in a situation comparable to that of employees should also be considered to fall within the scope of protection afforded by the envisaged Platform Work Directive.

»Although there is a general impression, which is fostered by official academic and journalistic opinion, that all of this is happening because of the rise of scientific technology and development of machinery, this process of degradation of work is not really dependent upon technology at all.«¹

BACKGROUND

A. TERMINOLOGY

Before analysing the different problems persons working in the platform economy are confronted with and then exploring possible regulatory solutions at the EU level, I will first briefly explain the terminology used in this study. This is necessary, as this segment of the economy is new, and uniform definitions and concepts have yet to be developed. Because this study is on EU law, the most obvious starting point is a Communication from the European Commission entitled »A European agenda for the collaborative economy«². It adopts the notion of the »collaborative economy«, defining it as follows:

»business models where activities are facilitated by collaborative platforms that create an open marketplace for the temporary usage of goods or services often provided by private individuals. The collaborative economy involves three categories of actors: (i) service providers who share assets, resources, time and/or skills – these can be private individuals offering services on an occasional basis (»peers«) or service providers acting in their professional capacity (»professional services providers«); (ii) users of these; and (iii) intermediaries that connect – via an online platform – providers with users and that facilitate transactions between them (»collaborative platforms«). Collaborative economy transactions generally do not involve a change of ownership and can be carried out for profit or not-for-profit.«³

This emphasis on collaboration has been criticised as clouding the difference between commercial and non-profit, commons-based platforms. On platforms for commons-based peer production, collaboration is more important than

competition and the fruits of labour are freely shared with everybody, including people outside the platform. Such platforms are part of the commons and it is crucial to distinguish them from the majority of platforms in the so-called »sharing economy« that in fact sail under false colours and pretend to be about sharing, when they are actually about rent extraction or wage labour.⁴

This study considers this critique to be justified and the term »platform economy« to more aptly describe the phenomenon of outsourcing tasks to a large pool of workers via the intermediary of an Internet platform.⁵ I shall therefore adopt the concept outlined in a study entitled »Brave New World of Work? (title in German: *Schöne Neue Arbeitswelt?*)« by *Biegoń/Kowalsky/Schuster*.⁶ The authors use the term »platform economy« to designate the dominant position of a platform in this manner of organising work involving at least three actors: Platform workers providing a service via the platform, users who are the final recipients of the service and the Internet platform itself.

B. LABOUR PLATFORMS' MODE OF OPERATION⁷

Historically, the main advantage of hierarchical employment relationships over contracts with independent

¹ *Braverman*, The Degradation of Work in the Twentieth Century, Monthly Review 1982/1, as published in Labour and Monopoly Capital – 25th Anniversary Edition, Appendix 2 (1974, 1998) 319.

² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions »A European agenda for the collaborative economy« from 2 June 2016, COM (2016) 356 final.

³ COM (2016) 356 final, 3.

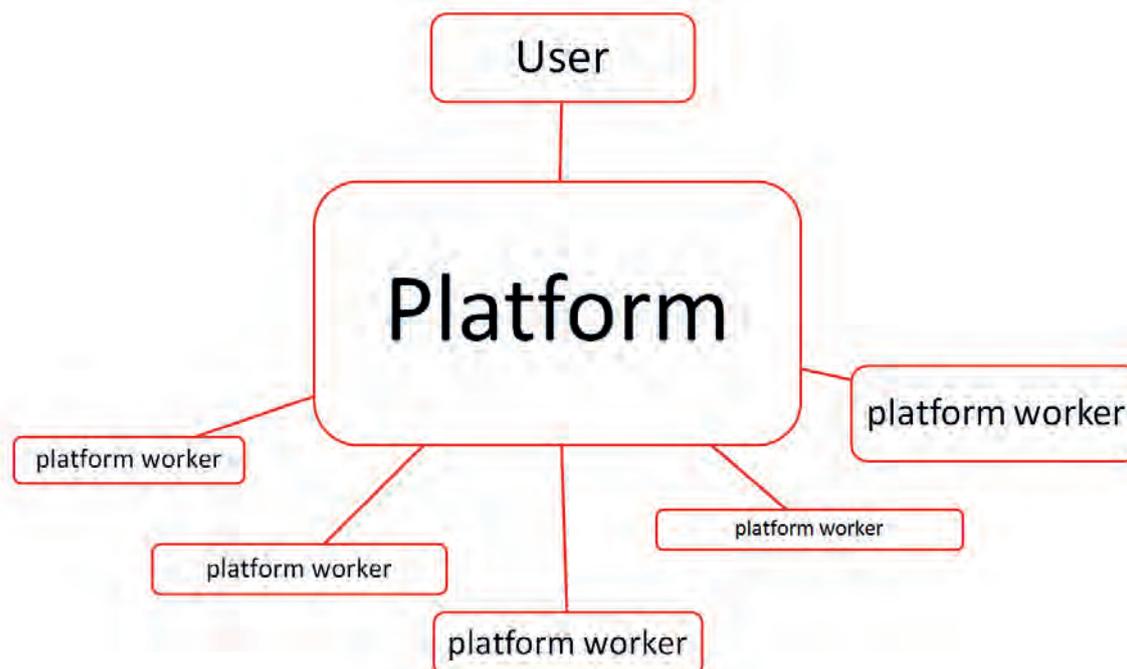
⁴ Cf. *Schmidt*, Digital Labour Markets in the Platform Economy – Mapping the Political Challenges of Crowd Work and Gig Work (2017) 9; also critical *Smorto*, Critical Assessment of the European Agenda for the Collaborative Economy (2017) for the European Parliament's Committee on the Internal Market and Consumer Protection; see also the study commissioned by the European Parliament – Directorate General for Internal Politics by *Forde et al.*, The Social Protection of Workers in the Platform Economy (2017) 19 et seqq. (referred to hereafter as *European Parliament*, The Social Protection of Workers in the Platform Economy).

⁵ Similar *European Parliament*, The Social Protection of Workers in the Platform Economy, 21; *European Parliament*, Opinion on a European Agenda for the Collaborative Economy (2017/2003 (INI)).

⁶ *Biegoń/Kowalsky/Schuster*, *Schöne Neue Arbeitswelt? – Wie eine Antwort der EU auf die Plattformökonomie aussehen könnte* (2017).

⁷ This and the following subchapter mostly build on my previous work on this topic, see *Prassl/Risak*, Uber, Taskrabbit, and Co.: platforms as employers? Rethinking the legal analysis of crowdwork, *Comp. Labor Law & Policy Journal* Vol. 37, 619–651.

Figure 1
Persons involved in the platform economy



contractors has been employers' higher degree of control, and the resulting decrease in transaction costs, whether these be accrued in the search, selection or training of workers.⁸ An increasing desire for flexibility while at the same time lowering the cost of labour and shifting risk away from the employer, on the other hand, has been the driving force behind the more recent rise of different forms of atypical work, including agency work, part-time work, and fixed-term employment.⁹

Platform work is a rather novel combination of these factors in that platforms attempt to increase flexibility for the user and reduce the cost of »empty« or unproductive moments, whilst at the same time maintaining full control over the production process in order to keep transaction costs at a minimum. In order to meet these seemingly contradictory goals, two preconditions must be met: first, the crowd must be large enough in order to always have individuals available when needed, and to maintain enough competition between platform workers to keep prices low. This is usually achieved through platforms' large and active crowds, with different platforms specialising in different segments of the platform economy.

Secondly, instead of the command-and-control systems inherent in »traditional« employment relationships, users and platforms rely on »digital reputation« mechanisms to guide the selection of platform workers and ensure efficient performance control. Individual models vary, but the fundamental approach is consistent: platform

workers are awarded points, stars or other symbols of status by the user after completing a task. Quality control itself can thus be crowd-sourced by the platform to its customers or other users in order to determine the performance levels of each individual platform worker.

Platform work offers significant potential upsides for (at least some of its) workers, first and foremost in terms of flexibility: platform workers can – at least in theory – decide when to work, where to work, and what kinds of tasks to accept. Platform work might therefore be more compatible with other duties, such as childcare. The flexibility and potentially limited nature of individual engagements can also help the underemployed, providing additional income to their regular earnings, and even allow those excluded from regular labour markets to find opportunities for gainful employment. Finally, there are successful small entrepreneurs, focused on particular niches or offering special skills, for whom platform work has become a profitable source of new business.

At the same time, however, it is important to note that working conditions for the vast majority of platform workers appear to be poor, irrespective of the work being delivered.¹⁰ The lack of unions or organising instances, the oligopoly of but a few platforms offering certain kinds of tasks, and constant economic as well as legal insecurity result in a massive imbalance of bargaining power, manifesting itself primarily in low wage-rates and heavily lopsided terms and conditions in platform use agreements. In the case of web-based cloud work, global competition and dislocated physical workplaces further aggravate these problems, as a lack

⁸ Coarse, *The nature of the firm*, *Economica* 1937, 386.

⁹ Eurofund, *Third European survey on working conditions (2000)*; *European Parliament, Atypical Work in the EU (SOCI106EN, 1998)*.

¹⁰ De Groen/Maselli, *The Impact of the Collaborative Economy on the Labour Market*, CEPS Special Report No. 138 (2016).

of regulation leads to what some have referred to as »digital slaves«¹¹ working away in their »virtual sweatshops«.¹²

Two problems in particular are repeatedly highlighted: low wages, and workers' dependence on their ratings with a particular platform. As regards the former problem, to take one example, some reports suggest that the average wage on Amazon's *Mechanical Turk* is less than 2 US dollars per hour,¹³ considerably below the US minimum wage. A related aspect is insecurity as regards payment: in accordance with the general terms and conditions of so-called microtasking platforms, users have the right to reject the work without having to state a reason or provide payment, whilst still receiving the fruits of a platform worker's labour.

Various systems of »digital reputation«, or rating mechanisms, which is one of the core elements of platform work, raise a second set of difficult questions: A customer-input-based system of stars or points not only puts platform workers in a state of permanent probation, but also restricts their mobility, as it ties them to particular platforms. Because more attractive and better-paid tasks are often only offered and assigned to those who have the best reputation, and as a worker's digital reputation cannot be transferred between individual platforms, it will be difficult to change platforms – a fact which also further impairs the bargaining position of platform workers.

C. FORMS OF PLATFORM WORK

There is a virtually unlimited de facto variety of forms characterising the emergence of online platforms, both in terms of crowdsourcing in general (e. g. crowdfunding or the allocation of non-labour resources such as accommodation), and crowdsourcing of labour, or platform work in particular. It is therefore neither useful nor indeed feasible to construct an overall taxonomy of crowdsourcing platforms. For the purposes of this study, however, a few fundamental distinctions may be made. *Schmidt*¹⁴ has drawn a map of commercial digital platforms in general and on commercial digital labour platforms in particular to categorise digital labour markets in the digital economy. First he excludes non-profit, commons-based platforms from the scope of his research. This study will also focus on commercial platforms, as it is more likely that these will the

platforms workers use to earn at least a part of their living and where the risks outlined above will be more pronounced. The strategies for ensuring fair labour conditions in the platform economy outlined below will be applicable to all forms of labour platforms. One may also contemplate making exceptions for non-profit, commons-based platforms where risks for platform workers are low or may not even exist due to the design of the platform model.

From the perspective of labour law, an important aspect is the distinction between platforms that organise labour either internally or externally, depending on whether the pool of prospective platform workers (the crowd) comprises a company's internal workforce or simply any number of individuals registered with a given platform. With external crowdsourcing, the crowdsourcer generally uses commercial platforms that already have an active crowd of registered workers. In this study, I solely explore external crowdsourcing, as internal crowdsourcing is generally arranged within the context of existing employment relationships, and therefore poses fewer fundamental legal problems,¹⁵ regardless of whether the platform is operated by an independent enterprise or by the company itself.¹⁶

Work crowdsourced to an external pool of platform workers can be seen as clustered along a spectrum of services and arrangements:

- On one end, we find physical services to be undertaken in the »real« (offline) world, so-called »location-based gig work«. Here the platform worker usually comes into direct contact with the user. Examples include transportation delivered via apps such as *Uber*, domestic services (cleaning, repair work, &c) delivered via platforms such as *Helping*, and clerical work (e. g. customer service or accounting) provided by platforms like *UpWork*.
- On the other end of the spectrum, there is digital work delivered in the virtual world, usually via an interface provided by the platform. This form of platform work is dubbed »web-based cloud work« by *Schmidt*¹⁷ referring to the space where it is actually delivered (the so-called cloud). The tasks involved here may be very simple, repetitive activities involving low pay and highly standardised or automated processes. These so-called »microtasks« include digital labelling and the creation of image descriptions, categorising data and products, and the translation or proofreading of short texts; with larger tasks often broken down into smaller subtasks to be worked on independently. They are then posted on platforms, where platform workers can find and complete them. The leading platforms for this kind of »cognitive piece work«¹⁸ include Amazon's *Mechanical Turk* and *Clickworker*.

¹¹ *Rosenblum*, The Digital Slave – That would be You, Huffingtonpost 5.6.2013 <http://www.huffingtonpost.com/michael-rosenblum/the-digital-slave-that-wo_b_3222785.html>.

¹² *Dibbell*, The unreal estate boom, *Wired Magazine* 1/2003 <www.wired.com/2003/01/gaming-2>; *Dibbel*, The Life of the Chinese Gold Farmer, *NYT Magazine* 17.6.2016 <http://www.nytimes.com/2007/06/17/magazine/17lootfarmers-t.html?_r=2&oref=slogin>.

¹³ Cf. *Ross et al.*, Who are the crowdworkers? Shifting Demographics in Amazon Mechanical Turk, Paper prepared for Chi 2010 <<http://dl.acm.org/citation.cfm?doid=1753846.1753873>>; *Felstiner*, Working the Crowd: Employment and Labour Law in the Crowdsourcing Industry, 32 *Berkeley J. Emp. & Lab. L.* (2011) 143.

¹⁴ *Schmidt*, Digital Labour Markets in the Platform Economy – Mapping the Political Challenges of Crowd Work and Gig Work (2017) 5 et seqq.; see also *European Parliament*, The Social Protection of Workers in the Platform Economy, 28 et seqq.

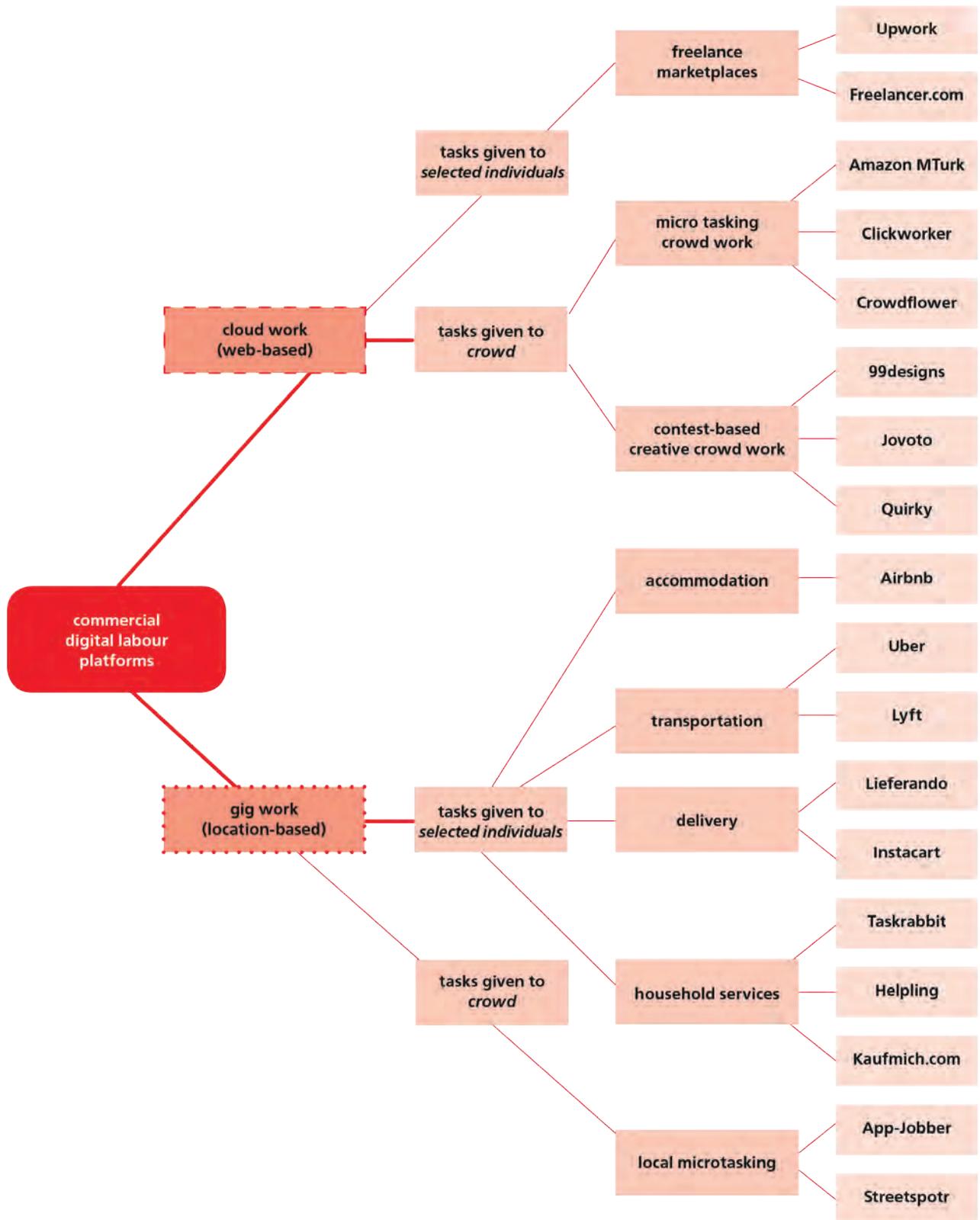
¹⁵ Cf. *Klebe/Neugebauer*, Crowdsourcing: Für eine handvoll Dollar oder Workers of the crowd unite?, *Arbeit und Recht* 2014, 4.

¹⁶ Cf. *Eurofound*, New forms of employment 110.

¹⁷ Digital Labour Markets in the Platform Economy 7.

¹⁸ *Schmidt*, The Good the Bad and the Ugly, in *Benner* (ed.), *Crowdwork*, 378.

Figure 2
Categorisation of digital labour markets in the platform economy



Source: Schmidt, Digital Labour Markets, 7

These distinctions between location-based gig work and web-based cloud work are of importance from the regulatory point of view, as the former can be captured by conventional means much more easily than work in the virtual realm that takes place at two places at once: first in the off-line world, where the worker is actually physically present, and at the same time in the digital cloud, where he/she works and where the work is received by the user. This has to be taken into account when developing solutions for the problems resulting from platform work.

II

LABOUR AND SOCIAL LAW GOVERNING PLATFORM WORKERS – CHALLENGES FACED BY THE EU

A. THE LEGAL DEFINITION OF PLATFORM WORK¹⁹

1. THE UNDERLYING BASIC ISSUE: EMPLOYEE OR SELF-EMPLOYED?

One of the very purposes of employment and labour law is to draw a distinction between genuinely self-employed persons who are able to take care of themselves and those requiring protection against many of the problems outlined above, bringing the latter group within its protective scope. Most jurisdictions and also the EU itself have developed a more or less elaborate legal framework regulating employment relationships positing that there is an imbalance of bargaining power in negotiating pay and conditions of work.²⁰ This usually includes the right to organise, to bargain collectively and to take collective action as well as individual rights like minimum wages, sick pay, or protection against unfair dismissal. Self-employed persons, on the other hand, do not enjoy any of these rights, and they may even be prohibited from negotiating mutual arrangements over basic terms and conditions such as minimum remuneration, as this might contravene competition or anti-trust laws.²¹

It is therefore important to analyse where the line is drawn between the status of an employee and a self-employed person.²² The conventional analytical approach, however, was developed in the context of bilateral employment relationships and therefore has problems when it comes to analysing platform work given the involvement of an intermediary or platform in addition to the platform

workers and users. In order to highlight the problems resulting from a binary contractual analysis of multi-partite contracts, mainly two questions need to be explored:

- Who are the contractual partners? As already noted, above, platform work involves at least three parties (the user, the platform and the platform worker); yet it is often not clear into which contractual relationships (if any) they enter.
- If a contractual relationship has been entered into, the question arises as to its classification: What is the nature of the contract between the respective parties? The answer to this question requires an overall assessment of the actual situation, and is of considerable practical importance: employment law protection is not afforded to genuinely independent contractors.²³

The following paragraphs sketch out the definition exercise to be undertaken in an analysis of platform work and explore the potential (bi-partite) relationships underlying these work arrangements.²⁴ In addition to the question as to the platform workers' legal status, a second problem emerges: even if putative employees have been classified as such, they may have difficulties identifying their employer, which could be the platform or indeed the user.

2. THE CLASSIFICATION EXERCISE

a) Contractual relationships between users and platform workers

The first question to be addressed concerns the existence of a direct contractual relationship between the user and

¹⁹ This chapter builds on my previous work on this topic, see *Prassl/Risak, Uber, Taskrabbit, and Co.: platforms as employers? Rethinking the legal analysis of crowdwork*, *Comp. Labor Law & Policy Journal* Vol. 37, 619; *Risak, Crowdwork*, *ZAS* 2015, 13 et seqq.; *Risak*, in *Lutz/Risak, Arbeit in der Gig-Economy*, 47 et seqq. See also *Waas, Crowdwork in Germany*, in *Waas/Liebman/Lyubarsky/Kezuka, Crowdwork – A Comparative Law Perspective* (2017), 150 et seqq.

²⁰ *Freedland/IP Davies, Kahn Freud's Labour and the Law* (1983), 14, 69.

²¹ Cf. ECJ Case C-413/13 *FNV Kunsten* (2014) ECLI:EU:C:2014:2411.

²² See also *European Parliament, The Social Protection of Workers in the Platform Economy*, 67 et seqq.

²³ See also on the significance of an employment relationship or contract of employment *European Parliament, The Social Protection of Workers in the Platform Economy*, 71 et seqq.

²⁴ See also *European Parliament, The Social Protection of Workers in the Platform Economy*, 74.

the platform worker. In some models, no such contract is in place: a contractual relationship might only exist between the platform worker and the platform, for example in cases where results are delivered to the platform, which in turn also performs the quality check and pays the platform worker directly. In other constellations, a direct contractual relationship exists between the platform worker and the user – sometimes even despite a lack of direct communication or any other form of contact between these two parties. Many platforms actually only assert that they are acting as a broker or agent when contracting with platform workers in these scenarios.

As regards legal classification of the relationship between the platform workers and users, we have to take into account that the relationship usually only lasts for a very limited time (e.g. for a ride or the fulfilment of a micro-task) and that contractual partners often change frequently. The contract will therefore – depending on the applicable tests in each jurisdiction – very likely not be deemed to be an employment contract, but rather a contract for services, as the platform worker is not integrated into the user's business, the influence of the user on the work performed is limited and there is no economic dependency on this contractual relationship alone.²⁵ The general working situation of the platform worker is therefore atomised into a large number of small contracts for very short time spans with different partners, each of which might refuse to provide platform workers with employment law protection, although in these cases the overall situation might suggest the contrary should be the case.

b) Contractual relationships between platforms and platform workers

In nearly all scenarios, there will be some form of contractual relationship between platform workers and the platform in addition to any possible direct contracts between the user and the platform worker. At the very least, platform workers need to register and undertake an obligation to provide the platform with correct and updated information. If they agree to perform a task or job posted on the platform, the terms and conditions of the platform apply; platform workers might also be asked to provide the platform with feedback on the users.

Any additional rights and obligations strengthen the case for employee classification. By registering with a platform, platform workers communicate that they are in principle available for work offered through that channel. Whilst there is frequently no general obligation to accept any particular tasks, reputation systems built on the number of positive ratings, for example, nonetheless put platform workers under pressure to work as much as possible to gain and maintain a positive rating. This puts platform workers' supposed freedom to accept tasks in a very different light. The underlying contract might therefore be

classified a contract of employment or a contract for services, depending on the applicable tests in each jurisdiction. The flexible nature of the arrangement often constitutes a serious hurdle to classification as an employee, however.

If the crowdsourcing platform merely serves as the intermediary, providing solely the infrastructure to allow a legal relationship to come about between the platform worker and the user along the lines described above, it might be classified as no more than a placement service or temporary agency work; however, the lack of integration into the user's business as well as the (supposed) lack of managerial prerogative and control by the user often negates the latter. If, on the other hand, the work is performed for the platform instead of the user,²⁶ such a legal relationship could in principle be deemed to constitute an employment relationship.

But even if this is the case, challenges crop up: in platform work arrangements, tasks are often very short in duration – with the resulting relationships potentially being characterised as a series of temporary employment relationships which shift the risk of business downturns from users and platforms to individual workers, not unlike on-call work or zero-hours arrangements.²⁷

c) Contractual relationships between the user and the platform

The final contractual relationship involved is that between the user and the platform. If there are direct contractual relationships between the user and platform workers, the platform will at least provide brokerage services. In addition, this may include other tasks such as pre-selection of platform workers, division of tasks into smaller assignments, payment processing, provision of a framework contract or quality control. On the other hand, the platform itself may be responsible for providing services using the platform workers for performance.

d) Platform work as a special form of agency work

It has been pointed out that platform work resembles agency work at least with regard to the fact that three parties are involved – the user undertaking/user, the platform/temporary work agency and the platform worker/temporary agency worker.²⁸ It would therefore appear warranted to examine whether platform work is actually

²⁶ It is also possible to arrive at this assessment if it is concluded that, despite a bogus direct legal relationship between the platform worker and the user, the relationship actually exists between the platform worker and the platform due to the real economic content and the fact that the platform manages the relationship on its own behalf.

²⁷ A Adams/Freedland/Prassl, The »Zero-Hours Contract«: Regulating Casual Work, or Legitimizing Precarity?, *Giornale di Diritto del Lavoro e di Relazioni Industriali* 2015, 529.

²⁸ Risak, in Lutz/Risak, *Arbeit in der Gig-Economy*, 356; De Stefano, The rise of the »just-in-time workforce«: On-demand work, crowdwork and labour protection in the gig-economy, *Conditions of Work and Employment Series No. 71* (2016) 8.

²⁵ For an overview, see e.g. Casale, *The Employment Relationship: A Comparative Overview* (2011).

just a special form of temporary agency work and to apply specific legislation, i. e. at the EU level the Directive on Temporary Agency Work 2008/104/EC. This may be the case if the platform acts as a temporary-work agency and if the platform worker is to be classified as an employee of the platform.²⁹ Hence, an employment contract or an employment relationship has to exist between the platform and platform workers and the platform then has to assign them to temporary work under user supervision and direction.³⁰ Only then do the provisions regulating temporary agency work apply; in all other cases, especially if the platform worker is not to be classified an employee or if the user does not exercise supervision and direction this will not be the case. Classification as temporary agency work requires the existence of an employment contract or employment relationship as a precondition. It does not resolve the questions as to who the contractual partners are or under what contract the work is performed. Furthermore, it does not facilitate enforcement of the rights of platform workers; hence, other solutions need to be found.

B. PROBLEMS AND POSSIBLE SOLUTIONS

This brief discussion of the exercise that has to be performed in order to categorise the contractual relationships underlying platform work already shows how complicated and even messy such a legal analysis can be. It becomes clear that even though there are numerous arguments affirming the existence of an employment relationship, it can be very difficult for platform workers to prove this in a court of law. This is due to the complexity of the web of contracts underlying platform work and the sheer impossibility for platform workers to obtain an insight into the internal workings of the platform. In addition to all this, it is not apparent who the employer is and whether there is an ongoing employment relationship or just a sequence of fixed-term contracts.

One of the reasons for this obscure picture is that the conventional analytical approach was developed in the context of two-party employment relationships. Traditional analysis would thus split the three-party arrangements underlying platform work scenarios into a series of bilateral contractual relationships and attempt to classify each relationship separately. The economic situation of platform workers, however, is not accurately reflected in the sum total of these fragments of contracts. Looking only at individual relationships one at a time without at the same time taking into account their interwoven nature due to the crowdsourcing platform is akin to determining the nature of cloth by looking only at its differently coloured threads of wool without taking into account the knitting

pattern. The conventional analytical approach, as it were, tends to ignore complex multi-party relationships and analyses the resulting fragments without reference to the broader context and economic effects of platform work.

Together with *Jeremias Prassl*,³¹ I have pointed out four different ways to deal with the challenges involved with platform work. We started out with an approach that focuses on who the employer is based on a functional concept developed by *Prassl*³² asking who can best meet the responsibilities deriving from employer functions. Another approach broadens the notion of employee, which up to now has been primarily based on organisational criteria³³ and less on economic dependency on a single or few contractual partners. A third solution could be the introduction of an intermediate category that already exists in a number of Member States,³⁴ including into EU law. The last regulatory avenue explored by us is the special statutory regulation of platform work, similar to temporary agency work. In this study, I explore the latter, as it focuses on regulatory approaches, and because I attach considerable importance to the development of a special directive dealing with the specific issues connected with platform work.

It must be pointed out, however, that the different ways of dealing with the legal and social problems of platform work are complementary rather than mutually exclusive. They also resolve underlying problems in a different manner: while an expansion of the notion of the employee, for example, would bring more platform workers under the protective scope of employment law, this solution fails to clearly resolve issues connected with multiple-party work relationships. In any case, some form of statutory regulation dealing with the special problems involved with platform work is essential. Due to the fact that platforms are Internet-based and therefore transnational in its nature, platform work is often performed cross-border with at least one party residing in a different country than the other ones,³⁵ regulation at the EU level in the form of a directive appears to be the most appropriate means to ensure the proper protection of platform workers and to improve the quality of platform work by creating a level playing field for those platforms that endorse an approach that is worker-friendly, rather than ones based on low labour costs and value-extraction.

³¹ The Legal Protection of Crowdworkers: Four Avenues for Workers' Rights in the Virtual Realm, in *Meil/Kirov* (eds.), *Policy Implications of Virtual Work* (2017), 273 et seqq; and also *Prassl/Risak*, *Working in the gig economy – flexibility without security?*, in *Singer/Bazzani* (eds.), *European Employment Policies: Current Challenges* (2018), 67 et seqq.

³² The concept of employer (2015).

³³ This is also the case with the rulings of the European Court of Justice, which has developed a line of jurisprudence originating with the landmark ruling handed down by the European Court of Justice (ECJ) in *Lawrie-Blum*, 66/85, EU:C:1986:284.

³⁴ Cf. *Waas/Heerma von Voss*, *Restatement of Labour Law in Europe*, Vol I – *The Concept of Employee* (2017); *European Parliament*, *The Social Protection of Workers in the Platform Economy*, 84 et seqq.

³⁵ E. g. the transportation platform Uber in the Netherlands and drivers and customers in Spain in the case *Elite Taxi* pending before the European Court of Justice; cf. Opinion of the Advocate General *Szpunar* C-434/15, *Elite Taxi*.

²⁹ This is at least necessary at the EU level, as the Temporary Agency Work Directive 2008/104/EC only applies to workers (Article 3 para 1 (a)), i. e. any person who in the Member State concerned is protected as a worker under national employment law.

³⁰ Cf. the definitions in Article 3 of the Temporary Agency Work Directive 2008/104/EC; *Biegoń/Kowalsky/Schuster*, *Schöne neue Arbeitswelt*, 10.

C. THE INTERNATIONAL DIMENSION OF PLATFORM WORK

In cases concerning cross-border contractual relationships, Regulation (EC) Number 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I Regulation)³⁶ applies. According to this Regulation, the governing principle is the freedom of choice regarding applicable law (Article 3). However, this is limited when it comes to consumer contracts (Article 6) and employment contracts (Article 8). In these cases, the level of protection must not fall below that which would be provided in the absence of choice.

However, no consumer contract exists in the case of platform work, as the associated contracts can be attributed to platform workers' professional or commercial activities, which does not align with the legal definition laid down in Article 6 of the Rome I Regulation.

In the event that platform workers can be deemed employees, Article 8 of the Rome I Regulation stipulates that the parties' choice of law cannot lead to employees being deprived of the protection that they would otherwise have in the absence of any choice. Therefore, the (relatively speaking) mandatory provisions of the state's labour law in which the work is normally performed are applicable at the very least. This circumstance alone underscores the importance of correct classification of platform workers and stresses the importance of a uniform regulatory approach at the EU level.³⁷

³⁶ OJ L 177, 4 July /2008, 6–16.

³⁷ Cf. *Risak*, *Crowdworking: Towards a »New« Form of Employment*, in *Waas* (ed.) *New Forms of Employment in Europe* (2016), 100; *Waas*, in *Waas/Liebman/Lyubarsky/Kezuka*, *Crowdwork*, 158 et seqq.



POSSIBLE REGULATORY SOLUTIONS AT THE EU LEVEL

In this chapter, possible regulatory solutions at the EU level are sketched out in awareness of the difficulties facing lawmakers in such legislation. On the one hand, legislation needs to specify the role and responsibility of platforms in a transparent way in order to provide platform workers certainty with regard to their legal position in this constellation, while on the other it needs to avoid suffocating those platform models that are based on genuine self-employment of platform workers (and thus not necessarily in need of statutory protection). This latter concern, however, should not in my view constitute a hindrance to, or pretext to avoiding, protection of persons genuinely in need of protection. Finally, it should also be noted that any platform-specific legislation needs to avoid falling into the trap of technological exceptionalism, and recognise that, fundamentally speaking, platform work should first and foremost be regulated as work.

In my view, it is necessary to regulate platform work already at an early stage to foster the positive innovative potential of this segment of the economy while at the same time countering harmful and abusive business practices before they have solidified and set a low standard that makes changes very hard to achieve. We need to come up with smart solutions that are able to achieve two regulatory aims at the same time: first of all, they have to be flexible enough to react to future developments while at the same time not suffocating start-ups and new business models and, secondly, provide workers with the protection they require.³⁸

In this context, it is useful to recall the findings of the OECD in its Economy Survey Austria of July 2017³⁹ (the bold-faced print has been added by the author):

*»Against this backdrop, **it is important to protect crowd-workers against precarious working conditions** and to offer them social protection coverage without jeopardising the flexibility inherent to these new forms of employment. From a*

*legal perspective, these new forms of work present a formidable regulatory challenge as they combine elements of standard employer-employee relationships with elements that typically characterise independent contractors or self-employed.«
»(...) **Clarifying this legal status is necessary, also to reduce legal uncertainty and the costs of legal disputes. In addition, existing regulation needs to be enforced properly to prevent employers from using legal flaws to misclassify workers in order to reduce non-wage labour costs.**«⁴⁰*

And, again, the necessity of flexible solutions is affirmed:

*»From the government's or legislator's perspective, the wide range of areas and heterogeneity of crowd-workers make a one-size-fits-all solution elusive. Prassl and Risak (2017) argue that marginal adjustments to existing labour law, including refining the notion of employee and extending the scope of some individual employment rights to the self-employed, would be sufficient to regulate new forms of employment. Harris and Krueger (2015) propose to create a new status of »independent workers« as a hybrid form which provides some protection including the right to organise and collectively bargain wages but not others such as dismissal protection or overtime pay. In any case, **very specific questions will need to be addressed by legislators including the portability of ratings, the monitoring power of platforms over workers via GPS and a minimum of social protection.**«⁴¹*

Before exploring possible solutions, a preliminary question needs to be asked: on what legal basis can a European initiative addressing labour law and social security aspects of platform work be developed?

³⁸ Cf. Lutz/Risak, Arbeit in der Gig-Economy, 355 et seqq.; Prassl/Risak, in Meil/Kirov, Policy Implications of Virtual Work 293; C(2017) 6121 final 7.

³⁹ OECD, Economy Survey Austria 2017 (2017), 108 et seqq.

⁴⁰ OECD, Economy Survey Austria 2017, 109.

⁴¹ OECD, Economy Survey Austria 2017, 110.

A. EU COMPETENCE

The appropriate legal basis for the regulation of platforms focusing on fair working conditions for work performed by platform workers would be Article 153 (2) (b) TFEU, which provides for the adoption of directives setting minimum requirements with respect to *inter alia* »working conditions« as set out in Article 153(1) (b) TFEU. As a matter of fact, it explicitly establishes that directives are the legal instrument to be used to establish minimum requirements governing working conditions to be gradually implemented by Member States.

There are strong voices, especially in the German and Austrian jurisprudence literature,⁴² that forward a number of convincing arguments stressing that under this article not only workers in the stricter sense of the word may be covered, but also self-employed persons in a similar economic situation and in need of protection. I endorse this approach and in the following discuss the benefits of an extension of the protective scope of labour law to cover vulnerable self-employed platform workers (cf. chapter III.C.).

As regards subsidiarity, the rights established by the proposed regulatory activities are justified at EU level insofar as action solely by Member States in response to platform work would not necessarily provide the same level of protection for platform workers and would risk increasing divergences between Member States with potential competition on the basis of social standards. Business would therefore continue to compete on an uneven playing field, which would hamper the operation of the internal market.⁴³ This is especially the case in the platform economy, as the underlying contractual relationships is very often transnational due to its virtual dimension. It is therefore very likely that at least one party in this tripartite relationship has a seat or domicile in a different state than the other ones. This transnational nature of platform work in and of itself thus justifies regulation at the EU level.

The proposed regulatory activities of the EU are also in line with the principle of proportionality because they are based on a minimal degree of harmonisation of Member State systems which respects Member States' competences to set higher standards. In line with Article 153(2)(b) TFEU, such regulatory activities would support and complement the activities of the Member States by laying down minimum requirements for gradual implementation.⁴⁴

⁴² *Rebhahn/Rainer*, in Schwarze (ed.), EU-Kommentar³ (2012) Art. 153 AEUV para. 13; *Franzen*, in *Franzen/Gallner/Oetker* (eds.), Kommentar zum Europäischen Arbeitsrecht² (2017) Art. 153 AEUV para. 8.

⁴³ Cf. similar arguments were used for the Proposal for a Directive on transparent and predictable working conditions in the EU, COM (2017) 797 final, 7.

⁴⁴ Cf. similar arguments were used for the Proposal for a Directive on transparent and predictable working conditions in the EU, COM (2017) 797 final, 7.

B. PLATFORM WORKERS AS EMPLOYEES

Case studies concerning persons working on the platforms Clickworker⁴⁵, Uber⁴⁶, Book a Tiger⁴⁷ and foodora⁴⁸ published in a volume co-edited by myself demonstrate that in many cases it can be cogently argued that, applying the traditional criteria of subordination and personal dependency, platform workers are actually employees.⁴⁹ The proposed Directive on transparent and predictable working conditions obviously follows this line of argument when it states in recital 7 that the definition of »worker« explicitly includes platform workers, provided that they meet the mentioned criteria.⁵⁰

This would result in platform workers being protected by the full range of labour and employment rights. In this context, the peculiarities of the virtual dimension of platform work as well as its organisational principles have to be taken into account: This relates to the high density of control connected with platform work being performed (also) in a digital space as well as the possibilities to discipline platform workers via reputation systems.⁵¹ Often personal performance in the execution of tasks is determined in addition by detailed general rules of conduct as well as time targets. An overall assessment can therefore lead to the finding that the platform worker is not working autonomously, but rather being directed by either the platform or the user and thereby working in subordination and hence must be classified as an employee.⁵²

In addition, the following **criteria** may also serve as **indicators for an employment relationship**, as they relate to typical functions of the employer in platform work environments:

- Access to the platform and/or to tasks posted on it is controlled by the platform and not open to the general public;
- The platform uses a common brand image in the market;
- The platform fixes prices for work performed or stipulates upper or lower limits;

⁴⁵ *Lutz*, Virtuelles Crowdwork: Clickworker, in *Lutz/Risak* (eds.), Arbeit in der Gig-Economy, 62 et seqq.

⁴⁶ *Balla*, Transportdienstleistungen: Uber, in *Lutz/Risak* (eds.), Arbeit in der Gig-Economy 106 ff; cf. the opinion of GA Szpunar in the cases Elite Taxi, C-434/15 und Uber France SAS C-320/16.

⁴⁷ *Warter*, Haushaltsnahe Dienstleistungen: Book a Tiger, in *Lutz/Risak* (eds.), Arbeit in der Gig-Economy, 150 et seqq.

⁴⁸ *Dullinger*, Essenzustellung: foodora, in *Lutz/Risak* (eds.), Arbeit in der Gig-Economy, 186 et seqq.

⁴⁹ Cf. *Barnard*, EC Employment Law (2006), 145 et seqq.

⁵⁰ 2017/0355 (COD).

⁵¹ Similar *Srnicek*, Platform Capitalism (2017), 76.

⁵² *Risak*, Crowdwork, ZAS 2015, 16; *Däubler*, Digitalisierung und Arbeitsrecht, Soziales Recht – Sonderausgabe Juli 2016, 36; *Warter*, Crowdwork (2016) 189.

- The platform processes payments between users and platform workers;
- The platform performs quality controls on the results delivered and/or performance;
- The platform provides its users with ratings of platform workers;
- Communication between users and platform workers is handled by the platform;
- The platform may exclude platform workers from providing future services via the platform (often in the form of deactivation of the respective user account of the platform worker with the platform).

Attempts to classify the legal relationships underlying the platform have shown that it is very hard to gain an insight into how platform work is actually organised and the mechanisms underlying it. This knowledge, though, is of significant importance in proving before a court of law that an employment contract has been concluded. As the platform worker has no means of accessing the information necessary to do this, this is often tantamount to it being impossible to provide a court with the necessary evidence. It will therefore be very hard for platform workers, even if they are employees, to enforce their rights, as they will very likely fail to even be able to demonstrate their employee status due to their lack of information.

1. (REBUTTABLE) LEGAL ASSUMPTION OF AN EMPLOYMENT RELATIONSHIP WITH THE PLATFORM

One possible solution to this core problem characterising the platform economy could be a rebuttable legal assumption to the effect that the relevant underlying contractual relationship to provide platform work is an employment contract between the platform worker and the platform.⁵³ In the end, it is only the platform in its capacity as contractual partner of both the user and the platform worker which organises the service and where all the strings come together that will be in the position to actually provide evidence revealing the exact web of contracts as well as actual practice. These circumstances in my view justify a departure from the otherwise applicable assignment of the burden of proof, which would make it simply impossible for platform workers to demonstrate their employee status. The proposed legal assumption would thereby recalibrate the massive imbalance of information and provide platform workers with the necessary means to actually enforce their rights.

⁵³ This solution was also put forward in *Risak*, in *Lutz/Risak*, *Arbeit in der Gig-Economy*, 356; *Prassl/Risak*, in *Meil/Kirov*, *Policy Implications of Virtual Work*, 291; *Biegorń/Kowalsky/Schuster*, *Schöne neue Arbeitswelt*, 11; and also in *European Parliament*, *The Social Protection of Workers in the Platform Economy*, 103.

An additional solution could be the creation of a list of criteria that indicate the existence of an employment relationship (cf. the criteria outline just above).

These regulatory measures would also facilitate – at least for the time being until evidence to the contrary is provided by the platform – establishing a connection to the law and the forum of the place where the work is actually performed and thereby enable the platform worker to sue his/her employer in the state in which the work is performed and also apply national labour law governing employment.

2. OTHER POSSIBLE CONTENT OF A PLATFORM WORK DIRECTIVE

The legal assumption just outlined could be at the heart of a »Directive on Fair Working Conditions in the Platform Economy«, or for short »Platform Work Directive«.⁵⁴ This Directive would aim at ensuring protection of platform workers and improving the quality of platform work. It should take into account that platform work may contribute to the creation of jobs and to the development of flexible forms of working by introducing creative and innovative business models, but also keep in mind that there is nothing innovative about precarious work. The primary goal thus would be the creation of a level playing field for those platforms that endorse an approach that is worker-friendly rather than one just based on low labour costs. Such a Directive would complement the proposal of 21 December 2017 for a Directive on transparent and predictable working conditions in the EU,⁵⁵ as the Directives on different forms of atypical work (part-time work, fixed-term employment and temporary agency work) do.

A Platform Work Directive might also include the following contents:

- Information obligations similar to the Written Statement Directive 91/533/EEC: The obligation of the platform to provide a written statement without regard to the duration of the relationship informing the platform worker at a minimum about the respective contractual partners and their addresses (as soon as a worker account is established with the platform).

This is also of interest because the European Commission has just proposed a revision of the Written Statement Directive in the framework of the European Pillar of Social Rights⁵⁶ in the form of a directive on transparent and predictable working conditions.⁵⁷ In this proposal

⁵⁴ A less detailed list has already been proposed in *Risak*, in *Lutz/Risak*, *Arbeit in der Gig-Economy*, 356 et seq.; *Prassl/Risak*, in *Meil/Kirov*, *Policy Implications of Virtual Work*, 291; *Biegorń/Kowalsky/Schuster*, *Schöne neue Arbeitswelt*, 11.

⁵⁵ COM (2017) 797 final.

⁵⁶ Commission Staff Working Document Refit, Evaluation of the »Written Statement Directive« (Directive 91/533/EEC), SWD (2017) 205 final 3, 6.

⁵⁷ COM (2017) 797 final.

and the preceding consultation documents,⁵⁸ the Commission for the first time proposes a legal definition for an autonomous notion of worker. Pursuant to Article 2 (1) (a) of the proposed Directive, »*worker means a natural person who for a certain period of time performs services for and under the direction of another person in return for remuneration*«. ^{59, 60} According to recital 7 of the proposed Directive, this explicitly includes platform workers, provided that they meet these criteria.⁶¹

- Establishment that the place of work, especially when dealing with web-based cloud work, is the location where platform workers physically perform their work.
- Establishment – as in the case of agency work (Art. 5 of Directive 2008/104/EC) – of a principle of equal treatment with a corporate user's existing workforce to ensure that jobs are not crowdsourced to platform workers just for the sake of contravening minimum wage and other employment provisions. The basic working and employment conditions of platform workers are therefore to be at least those that would apply if they had been recruited directly by the user to occupy the same job for the duration of their work on tasks or their active search for such – if the general availability is part of the business model, as is the case with many platforms. This would also establish equal treatment of temporary agency workers and platform workers and thus avoid circumvention of the laws protecting them by switching over to platform work.

It should be noted, however, that this equal-treatment approach will very likely only work in cases where platform workers are actually working for a business that would otherwise employ an employee and that instead opts to crowdsource labour. In cases where the user is a consumer and the alternative is contracting directly with a self-employed person (e. g. with a cleaner) avoiding the intermediary (the platform), the equal-treatment principle cannot apply. In these cases, employment contracts are not crowdsourced and a host of other issues arise, not least as regards the application of minimum wages to those platform workers.

- A clarifying note that search time connected to web-based cloud work, i. e. the time platform workers look for tasks, as well as standby time with platforms that expect immediate acceptance when the app is switched on, is deemed to constitute working time and therefore has to be paid;

- Prohibition against recruitment for services that are paid below applicable minimum wages;
- Prohibition of certain clauses like the following:
 - Non-compete clauses during and after being registered with a platform and especially exclusivity clauses that forbid platform workers to contract directly with users;
 - Payment of the remuneration in a moneyless form like bitcoins or vouchers;
 - Possibility to exclude platform workers from being provided with tasks or to deactivate their accounts without good reason and the obligation to provide for an internal complaints and review procedure;
 - Clauses that enable the platform and/or the user to refuse to accept a completed task without having to state a reason and refuse to pay the advertised remuneration or provisions allowing the results of the work to be retained even in such cases (e.g. for purposes of quality control).
- Obligation to inform platform workers as well as users on how the advertised digital reputation (ratings) are attained and what effects their changes might have;
- The possibility to have presumably incorrect ratings reviewed and corrected by an internal procedure;
- Portability of the digital reputation from one platform to another;⁶²
- Obligation of platforms to establish a conflict-resolution procedure that is free of charge for platform workers;
- Establishment that the right to organise in unions, to bargain collectively and to co-determination at the workplace and company level also applies to platform workers;
- Clarification of who is responsible for complying with workplace health-and-safety rules, minimum wages and the payment of taxes and social security contributions; this may also include the joint responsibilities of users wherever appropriate.

As we deal with multi-party relationships, it is important for regulation of platform work to also establish what employer responsibilities have to be met by whom (the platform or the user). In this context, the functional concept of employer developed by *Prass*⁶³ can prove very useful, as the functions of an employer can be subdivided into distinct groups and the performance of a particular subset of employer

⁵⁸ C (2017) 2611 final and C (2017) 6121 final.

⁵⁹ This refers to the recurring so-called *Lawrie Blum* formula of the ECJ originating from the decision handed down in the case *Lawrie-Blum*, 66/85, EU:C:1986:284.

⁶⁰ 2017/0355 (COD); COM (2017) 797 final, 11. C (2017) 6121 final 8, 12; see also SWD (2017) 205 final 21.

⁶¹ 2017/0355 (COD).

⁶² This is also suggested by *OECD*, *Economy Survey Austria 2017*, 137.

⁶³ *The concept of employer* (2015).

functions may suffice to trigger responsibility in this regard. Responsibility should be assigned to each subset of functions, regardless of whether they are exercised in combination with all other functions by a single legal entity, parcelled out between different parties, or shared across multiple entities.⁶⁴ This flexible concept could be integrated into a Platform Work Directive to ensure that the person responsible for certain employer obligations is a person actually in a position to abide by these because such persons perform the relevant employer function. For example, if the platform effectively sets an hourly rate for the platform worker and invoices this, the platform should be accordingly held responsible for compliance with minimum wage law. On the other hand, if a user specifies dangerous working conditions for the same platform worker, a cleaner, for instance use of particularly harsh cleaning substances, health-and-safety liability should be imposed on the user, as she was in charge of exercising control over how the work should be performed.⁶⁵ Interestingly enough, the proposal for a directive on transparent and predictable working conditions in the EU⁶⁶ also specifies that the functions of employer may be fulfilled by more than one entity (Article 2 (1) (b)).⁶⁷

Another important aspect in this context is the enforcement and provision of information to public authorities like labour inspectorates and tax authorities as well as social security providers to ensure that taxes and social security contributions are also paid in the platform economy and that these legal constructions are not used to evade them. This may also apply in cases when platforms are not employers, but payments are processed via them.

C. PLATFORM WORKERS AS SELF-EMPLOYED PERSONS

1. EXTENSION OF THE SCOPE OF PROTECTION

In the case that platform workers are not classified as employees, but rather as genuinely self-employed persons, the question has to be raised as to whether they may still be in need of protection because they are possibly in a situation similar to that of an employee from an economic point of view. Which is to say, the underlying rationale of labour law is the two-fold economic dependence of the employee. First of all, the fact that resources (e. g., material, machinery or an organisation) are typically needed to perform the work, and that employees have, at least historically, depended on the employer to provide such. Secondly, it implies some dependence on the part of employees on »selling« their labour in exchange for remuneration from the employment relationship to earn their living.

⁶⁴ Prassl/Risak, *Comp. Labor Law & Policy Journal* Vol. 37, 647 et seq.

⁶⁵ Cf. Prassl/Risak, *Comp. Labor Law & Policy Journal* Vol. 37, 648 et seq.

⁶⁶ COM (2017) 797 final, 4.

⁶⁷ Article 2 (1) (b) »employer« means one or more natural or legal person(s) who is or are directly or indirectly party to an employment relationship with a worker«.

Regarding EU labour law, however, the ECJ does not cite these economic arguments, focussing instead on the way the work is actually performed. It has been established in case law that the essential feature of the employment relationship is that for a certain period of time one person performs services for and under the direction of another person in return for which they receive remuneration.⁶⁸ It is of major importance that a person act under the direction of his or her employer as regards, in particular, the freedom to choose the time, place and content of the work,⁶⁹ that the employee not share the employer's commercial risks,⁷⁰ and, for the duration of that relationship, constitute an integral part of that employer's undertaking, in this way forming an economic unit with that undertaking.⁷¹

For decades this organisational approach focusing on restricted self-determination when working (in other words, subordination or personal dependence) on the one hand delivered satisfactory results and on the other was practical and relatively easy to apply. This was based on the fact that only those having enough resources were able to become self-employed and that they were able to negotiate for pay that satisfied their needs. On the other hand, those persons working under the close supervision of another person often did not have enough bargaining power when negotiating pay and conditions of work.⁷² In those circumstances, it was rather unproblematic to attribute organisational and economic dependency in the past. This picture, however, has changed due to a number of factors and has led to the emergence of a growing number of self-employed persons: advances in digital technologies, the widespread availability of hand-held devices, and ever-increasing high-speed connectivity have combined with the realities presented by several cycles of economic downturn, shifts in lifestyle, and generational preferences.⁷³ These new »solo-entrepreneurs« and freelancers are very different from actors in the past, where »liberal professions« such as lawyers, architects and other high-skilled professionals had the power to bargain for high remuneration and controlled their own working conditions. Platform workers active in the virtual realms of the gig economy today resemble much more the workers of the 19th century who did not have any alternative other than to sell their labour in a highly competitive market. They compete with a large reserve army of virtual labour unlike those self-employed in liberal professions. They are also similar to traditional employees in that they work in person and thereby sell their labour and not an end product. Finally, they are also vulnerable, as they earn their livelihood by doing this work for only one or a very limited number of immediate

⁶⁸ ECJ in *N.*, C 46/12, EU:C:2013:97, para. 40 and the case-law cited, and ECJ in *Haralambidis*, C 270/13, EU:C:2014:2185, para. 28.

⁶⁹ ECJ in *Allonby*, C-256/01, EU:C:2004:18, para. 72.

⁷⁰ ECJ in *Agegate*, C 3/87, EU:C:1989:650, para. 36.

⁷¹ ECJ in *Becu and Others*, C 22/98, EU:C:1999:419, para. 26.

⁷² *Freedland/JP Davies*, Kahn Freud's *Labour and the Law*, 14, 69.

⁷³ *Lobel*, *The Gig Economy & The Future of Employment and Labor Law*, USD Legal Studies Research Paper Series, Research Paper No. 16–223, 2.

contractual partners (*viz*, the platforms). The only difference between them and traditional employees is the fact that they are formally free to work at whatever task and whenever they choose – but this freedom may often be no more than theoretical due to an economic situation which does not leave them a lot of alternatives to selling their labour in a certain way to certain contractual partners.⁷⁴

Against this background, it makes sense to extend a range of employment rights, not least the rights to organise, to bargain collectively, and to take collective action to this vulnerable group of self-employed persons. At first glance, this might appear to conflict with European Union competition and anti-trust law, as Article 101 TFEU forbids all agreements and concerted practices which have as their object or effect the prevention, restriction or distortion of competition: collective agreements could be characterised as a restriction on competition between employees, thus contravening that provision. The ECJ has held, however, that agreements entered into within the framework of collective bargaining between employers and employees and intended to improve employment and working conditions must, by virtue of their nature and purpose, be regarded as not falling within the scope of Article 101(1) TFEU.⁷⁵ In my view, it is therefore crucial to either re-define the notion of the employee or take specific legislative initiatives in order to extend collective bargaining rights to this group of self-employed persons with their limited bargaining powers.⁷⁶

In the context of platform work, I would therefore **suggest including self-employed persons who are economically in a situation comparable to employees within the scope of at least the special regulation for platform work as outlined above.**⁷⁷ If the economic situation of the employee is the reason why these rights and entitlements have been developed in the first place, it is hard to argue why the scope should not be extended to apply to persons in the same situation only because they are not formally integrated enough into the business of their contractual partners. This approach has also been suggested by the trade unions in the course of the two-phase consultation with the social partners on a possible revision of the Written Statement Directive.⁷⁸ The present proposal, however, does not provide for such an inclusion of (vulnerable) self-employed persons. As the stated proposal of the European Commission is very wide in scope and it

⁷⁴ *Risak/Lutz*, Gute Arbeitsbedingungen in der Gig-Economy – was tun?, in *Lutz/Risak* (eds.), *Arbeit in der Gig-Economy*, 358.

⁷⁵ ECJ in *Albany*, EU:C:1999:430, para. 60; *Brentjens*, EU:C:1999:434, para. 57; *Drijvende Bokken*, EU:C:1999:437, para. 47; *Pavlov and Others*, C 180/98 to C 184/98, EU:C:2000:428, para. 67; *van der Woude*, EU:C:2000:475, para. 22; *AG2R Prévoyance*, C 437/09, EU:C:2011:112, para. 29; *FNV Kunsten Informatie en Media v Staat der Nederlanden*, ECLI:EU:C:2014:2411, para. 23.

⁷⁶ Cf. *European Parliament*, The Social Protection of Workers in the Platform Economy, 103 and European Parliament resolution of 15 June 2017 on a European Agenda for the collaborative economy (2017/2003(INI)) para. 41.

⁷⁷ Cf. *European Parliament*, The Social Protection of Workers in the Platform Economy, 100.

⁷⁸ Cf. COM (2017) 797 final, 8.

encompasses all employment relationships, it can be argued in the context of the platform economy that boundaries are especially blurred with this specific form of organising work. Therefore, self-employed persons who are economically in a situation comparable to employees have to at least be included within the scope of protection in legislation concerning persons working in the platform economy.

2. INTRODUCTION OF AN INTERMEDIATE CATEGORY?

Another option to protect platform workers that has recently been mooted especially in the US is for law to perhaps recognise an intermediate category of workers lying between employee and independent contractor.⁷⁹ In this way, so the argument goes, the level of protection may be graded, and the fact that personal integration of some crowdworkers is less intense and that they enjoy a certain level of flexibility and freedom can actually be used to their advantage.

Quite a lot of arguments along these lines have been forwarded and debated lately.⁸⁰ In my view these do not warrant further pursuit – at least at the EU level, where such an intermediate category does not exist yet.

At the EU level, the question posed in the 2006 Green Paper as to whether there is a need for a »floor of rights« relating to working conditions for all workers regardless of the form of their employment contract was answered in the negative. Most Member States and social partners were subsequently opposed to the introduction of any third intermediate category, such as the so-called »economically dependent worker«, alongside the categories of dependent workers and independent self-employed persons. Even in Member States where such a concept already exists in national law, such as Italy, there were reservations about whether an unequivocal definition could be devised at European level.⁸¹ The recent Communication of the European Commission launching a consultation on a European Pillar of Social Rights mentions the increasing appearance of »grey zones«, such as »dependent« and »bogus« self-employment, leading to unclear legal situations and access barriers to social protection. It is therefore still unresolved whether this option will be followed up at a later stage of the process to establish a European Pillar of Social Rights,⁸² although it seems unlikely that the Member States will be more open to this option now than they were ten years ago. Whatever avenue is taken, there will definitely be a need

⁷⁹ *Lobel*, USD Legal Studies Research Paper Series, Research Paper No. 16-223, 10; *Harris/Krueger*, A Proposal for Modernizing Labor Laws for Twenty-First Century Work: The »Independent Worker«, Hamilton Project, Discussion Paper 2015-10 (2015).

⁸⁰ Cf. *De Stefano*, The rise of the »just-in-time workforce«: On-demand work, crowdwork and labour protection in the gig-economy, *Conditions of Work and Employment Series No. 71* (2016) 20; *Biegoń/Kowalsky/Schuster*, *Schöne neue Arbeitswelt*, 8 et seq; *Prassl/Risak*, in *Meil/Kirov*, *Policy Implications of Virtual Work*, 286 et seqq.

⁸¹ COM (2007) 627 final, 7.

⁸² COM (2016) 127 final, Annex I, 4 et seq.

to protect individuals in the »grey zones«, which also include self-employed platform workers, and such persons need to be either included in an expanded notion of employee or be assigned to a newly introduced intermediate category. I recommend the first option, because it avoids two classes of employees. The introduction of an intermediate category could well lead to evasive strategies being opted for by employers, thereby undermining the concept of employee and leaving persons formerly afforded complete protection with less protection in the end.⁸³

⁸³ Cf. *De Stefano*, The rise of the »just-in-time workforce«, 20.

IV

EXECUTIVE SUMMARY

The multi-party relationships underlying platform work make its legal analysis a complicated affair. Although numerous good arguments exist for establishing an employee status for platform workers, it can be very hard for them to prove such in a court of law. In any event, for those platform workers who cannot be classified as employees, little protection is afforded even though they are often in need of it.

There are a number of different ways to deal with the challenges involved with platform work. One approach focuses on who the employer is. This is based on a functional concept developed by *Prassl*, which asks who can best meet the responsibilities deriving from employer functions.⁸⁴ Another approach is to broaden the notion of employee, which up to now has been primarily based on organisational criteria and less on economic dependency on a single or several contractual partners. A third solution could be the introduction of an intermediate category in EU law. This already exists in a number of Member States. The last regulatory avenue explored is the **special statutory regulation of platform work** in form of a »Directive on Fair Working Conditions in the Platform Economy«, or for short, the »Platform Work Directive«.

It must be pointed out, however, that the different ways of dealing with the legal and social problems of platform work are complementary rather than mutually exclusive. They also succeed in solving the underlying problems in differing degrees: while an extension of the notion of the employee, for example, will place more platform workers within the protective scope of employment law, this solution does not clearly or neatly resolve those issues connected with multiple-party work relationships or other peculiarities of platform work. In any case, some form of statutory regulation dealing with the special problems involved with platform work is essential. As platform work is often transnational in its nature, regulation at the EU level in the form of a directive appears to be the right way to ensure proper protection of platform workers and improve the quality of platform work by creating a level playing field for all platforms.

At the heart of a »Platform Work Directive«, there should be a **rebuttable legal assumption** that the relevant underlying contractual relationship in the provision of platform work is an employment contract between the platform worker and the platform. Another solution could be the creation of a list of criteria that indicate the existence of an employment relationship.

A Platform Work Directive might also include information obligations on the part of the platform, a clarifying note concerning the place of work, the establishment of a principle of equal treatment and special definitions of working time covering search time and standby time. Other elements could include prohibitions against recruitment for services that are remunerated below applicable minimum wages as well as certain contractual clauses; special provisions on digital reputation (ratings) including their portability to another platform. Of essence is the establishment of the right to organise in unions, to bargain collectively and to co-determination at the workplace and company level also applying to platform workers along with specification of who is responsible for employer obligations including the joint responsibilities of users wherever appropriate. Another important aspect is the enforcement and the provision of information to public authorities like labour inspectorates and tax authorities as well as social security providers to ensure that taxes and social security contributions are also paid properly.

In the context of platform work, **self-employed persons** who are economically in a situation comparable to that of an employee should also be included **within the scope of protection** of at least the special regulation on platform work.

I would recommend extending the protective scope of labour law and would advise against the introduction of an intermediate category, thus avoiding two classes of employees, which might lead to evasive strategies on the part of employers and undermine the concept of employee, leaving persons who used to be fully protected with less protection in the end.

⁸⁴ This concept of employer has now also been adopted in the proposal of the European Commission for for a Directive on transparent and predictable working conditions in the EU, COM (2017) 797 final.

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