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# European legal framework for “digital labour platforms”

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## Foreword

The European labour market is experiencing radical changes, fuelled by digitalisation, flexibilisation, restructuring, and demographic dynamics. Moreover, the digital economy is changing societies and altering socio-economic interactions. Understandably, all these trends have a strong impact on the organisation of work and, above all, on the relationships between employers and employees (or between workers and clients). More recently, a spotlight has been shone on the phenomenon of working in the so-called “collaborative economy”, described as the most visible portion of a broader trend towards de-standardisation of employment relationships and de-mutualisation of risk.

In a nutshell, labour platforms allow individuals, families or companies in need of a service to hire a worker who is willing to offer the relevant activity, whether manual or creative, under the guise of enhanced flexibility. By taking into account this significant heterogeneity, which may entail intense juridical implications, a common business model could be traced consisting in the “instant” matching of demand and supply of labour, facilitated by digital tools (mostly apps on smartphones and online platforms) that make it easy to manage a large and “low-cost” workforce, lowering transaction costs, barriers to entry and information asymmetries.

While it is correct to maintain that, at least in theory, digital labour platforms may expand competitiveness, increase choice and create growth opportunities, a series of concerns has been raised on the potential erosion of rights, and the non-compliance with employment law standards. Moreover, digitally mediated working templates blur boundaries between traditional classifications such as work and rest periods, amateurism and professionalism, subordination and autonomy. This model touches on the foundation of traditional social protection and social security systems.

From a regulatory perspective, platform labour represents a “moving target”. Building on the results of the wide-ranging investigation into concrete working conditions in three selected subsectors, namely passenger transport services, professional crowdsourcing, on-demand work at the client’s premises, the crucial question that needs answering is whether the existing legal frameworks provide adequate responses to the current (digital) challenges. To gain a better understanding, standard methods of social science research and legal analysis will be combined to outline regulatory and contractual templates, which can easily accommodate modern organisational patterns.

Accordingly, the aim of this study is to contribute to the comprehensive research on digital labour platforms by investigating the existing legal frameworks and understanding related challenges for policy makers. Ambitious expectations are being pinned new technologies making work and lives considerably innovative and cannot be let down. Still employment rights must not be sacrificed on the altar of flexibility. The goal, indeed, is to develop sustainable digital ecosystems and social institutions where high-quality employment and competitiveness mutually reinforce.

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## **Abstract**

This report maps a kaleidoscopic array of platform-mediated working arrangements, by clustering the findings into three main subsets (passenger transport services, professional crowdsourcing, on-demand work at the client's premises). Many initiatives taken by the European institutions and aimed at promoting decent work in the collaborative economy are analysed including (i) the European Commission's Communication 356/2016, (ii) the principles enshrined in the European Pillar of Social Rights, and (iii) the ruling by the European Court of Justice on the nature of the service provided by *Uber*. After exploring the existing legal framework in several European countries, this study goes into the issue of the legal status of platform-based or -mediated workers by analysing what is at stake in pending litigations on the proper classification. In the end, this report is meant to contrast the sense that new realities of work have outgrown legal concepts. The application of existing regulation must be reinforced, in order to avoid the risk that platform workers are considered by default as falling in a normative vacuum. In the end, creating a level playing field between the traditional and the digitally-enabled companies is the only way to reap full benefits of the on-going digital transformation.

## **Executive summary**

This research focuses on emerging digital platforms which enable the matching of labour demand and supply, through highly efficient infrastructure connecting a vast number of workers, employers and clients instantaneously. Such far-reaching vicissitudes hold great perils, but also huge potential. The report intends to “normalise” the discourses surrounding the digital transformation of work and the rise of non-standard forms of employment, by contrasting the sense that new realities of work have outgrown legal concepts.

### ***Policy context***

Only few European States have adopted specific regulations to address the numerous issues stemming from the advent of the platform economy: the model is mercurial in nature and a hefty intervention may provoke its premature asphyxiation. Accordingly, before proposing one-size-fits-all or horizontal regulatory schemes, it would be useful to validate the appropriateness of existing labour law categories, by delving into labour law fitness to these new realities without ignoring the sheer heterogeneity of this phenomenon. While specific legislative and regulatory responses to these issues lag behind, the research reviews legislation as well as national practices with regard to platform-facilitated arrangements and new forms of (web-based or -mediated) work. Against this background, European initiatives aimed at promoting decent work in the collaborative economy receiving a high level of research attention include: (i) the European Commission’s Communication 356/2016, (ii) the principles enshrined in the European Pillar of Social Rights, and (iii) the ruling by the European Court of Justice on the nature of the service provided by the ride-hailing company *Uber*. Moreover, existing regulatory schemes, ranging from European Directives on atypical employment to casual work templates such as zero-hours or voucher-based contracts, are investigated.

### ***Key conclusions***

Labour platforms are quickly and partly redesigning the way work and firms are organised, by developing at the fringes of regulation. Contrary to what is often said, it is argued that the employment relationship and, more in general, current legal formats are not undergoing an irreparable crisis. In brief, it is demonstrated how it is feasible to temper the impulse to digital distinctiveness with actions to safeguard workers’ rights.

In addition to this, it cannot be underestimated that the lack of compliance with labour-related, fiscal and social security duties constitutes platforms’ main competitive advantage vis-à-vis their competitors. This regulatory arbitrage results in an aggravation of existing conceptual tension and, what is worse, in an exacerbation of social precariousness as platform workers have very limited access to labour protection.

Before proposing one-size-fits-all or horizontal regulatory schemes, it would be useful to validate the appropriateness of existing labour law categories, by delving into labour law fitness to these new realities without ignoring the sheer heterogeneity of this phenomenon. Indeed, several tools could already be used to regulate platform-based or -mediated working patterns.

### ***Main findings***

The (new) world of work is characterised by an increased tendency towards relationships that are not based on direct employment contracts. Although the description of specific circumstances does not allow for generalisations, a multi-stage scrutiny might provide a complete picture of the question. To fully appreciate the variety of services that fall under the notion of platform-mediated labour, this report maps a kaleidoscopic array of app-distributed employment arrangements, by clustering the findings into three main subsets (passenger transport services, professional crowdsourcing, on-demand work at the client’s premises).

Scrutinising the concrete operation of the on-demand platforms could help scholars, practitioners and policymakers in addressing more complex issues concerning the scope of employment law and, broadly, the state of play of the social compact. The operation of a set of European as well as global platforms will be described throughout five different dimensions. In doing so, the relation between a worker and the platform is considered along five main key phases: (i) access to the platform and registration, (ii) selection process and hiring, (iii) performance execution and command power, (iv) rating and ranking, monitoring power (and deactivation), (v) payment rewards for completed tasks.

This report goes into the issue of the legal status of platform-coordinated workers by analysing what is at stake in pending litigation on the proper classification. Recent and potential outcomes are sketched. Although firms engage with “providers”, arguably and invariably classified as self-employed, on a hyper-volatile basis, many of them exert some degree of managerial powers, albeit in a more sophisticated form, over the transacted activity, while avoiding the obligations of direct employment.

Available research reveals pervasive directives, reinforced surveillance, constant assessment, arbitrary disciplinary action and very little or no margin in deciding how to complete a task. The model does not contain any entitlement such as overtime, paid holiday leave, maternity leave, sickness payments and statutory minimum wages. Furthermore, workers are excluded from fundamental principles and rights at work such as freedom of association, collective bargaining or protection against discrimination or unfair dismissal.

Therefore, this apparently new pattern has to be on the radar for several reasons. Firstly, the “platformisation” of labour relations may reshape and revive traditional outsourcing practices. Secondly, it could contribute to a formalisation of informal economy. Thirdly, it might speed up the erosion process of both traditional categories and protections – allowing companies to gain a competitive advantage over traditional competitors that comply with labour law provisions. Thus, such hybrid arrangements call into question the suitability and effectiveness of the current employment legislation.

The modalities in which digitally enabled work is performed differ much from one another. While focusing on the “distribution channel” (*i.e.* platforms) is convenient for academic purposes (even though it is not a legal criterion for distinction), regulating app-mediated work as an entirely unique category deserving new notions, new concepts, new regulations should be avoided: the design of specific legislation only targeting platforms makes little sense, at least in the area of labour law and social security.

Therefore, reaffirming the major binary divide between workers genuinely self-employed and those in an employment relationship would be helpful in the attempt to reduce labour market segmentation and rising inequalities. It can be argued that platform-mediated arrangements are particularly keen sites for investigating how classical legal notions and formats can adapt to new dynamics. Understandably, another answer might be closing legal loopholes that incentivise exploitative conducts by a marginal group of deceitful companies.

Some old issues gain new attention in the age of digital transformation of work. “Surgical” regulatory interventions shall help the collaborative economy companies to improve their business model, building a new phase of “shared social responsibility”. In this sense, the current European attitude is perceived as a fair balance between supporting entrepreneurs’ confidence and implementing workers’ protections, but considerable efforts need to be done in order to ensure a stable and sustainable future.



# 1 A taxonomy of digital labour platforms.

The European labour market has experienced radical changes in the last years, fuelled by digitalisation, flexibilisation, restructuring, and demographic dynamics. Understandably, all these trends have a strong impact on the organisation of work and, above all, on the relationships between employers and employees (or between workers and clients). Whilst creating potentially new opportunities for workers, such as a better-quality work-life balance, casual arrangements might determine shortcomings, such as unstable or rapidly changing schedules. Moreover, digitally mediated working templates blur boundaries between traditional classifications such as work and rest periods, amateurism and professionalism, subordination and autonomy. More recently, a spotlight has been shone on the phenomenon of working in the so-called “collaborative economy”, described as the most visible portion of a broader trend towards de-standardisation of employment relationships and de-mutualisation of risk <sup>(1)</sup>. While it is correct to maintain that, at least in theory, digital labour platforms may expand competitiveness (but also competition), increase choice and create growth opportunities, a series of concerns has been raised on the potential erosion of rights, protections and social security. Though, researches have mostly provided anecdotal evidence and knowledge is based on interviews and personal first-hand experiences.

To begin with, navigating definitions is an intricate assignment when it comes to describe digitally enabled forms of work in the so-called “platform economy”, known in everyday parlance also as the “gig-economy” <sup>(2)</sup>. At first glance, the list of labels grows day by day, together with the number of businesses and people involved in this sector. In this report, notwithstanding the nuances of meanings, “platform economy” <sup>(3)</sup>, “on-demand economy”, and “collaborative economy” will be used interchangeably <sup>(4)</sup>. Whilst representing seducing buzzwords, these formulas have reached a large consensus and they are therefore well suited to indicate a rather specific economic segment. At the same time, it has to be acknowledged that these labels cover various kinds of economic actors that might have widely different normative and social implications, while sharing a significant number of features. Therefore, referring to them as a monolithic category causes many commentators and practitioners to be confused about what exactly is being described or studied.

Due to difficulties in measuring the relevant ecosystem, there is still little statistics and scant knowledge about its dimensions <sup>(5)</sup>: different methodologies may result in divergent assessment <sup>(6)</sup>. Nevertheless, many analyses seem to point out unanimously that the collaborative economy is constantly on the rise. This economic segment seems to be growing by 25% a year. According to more generous estimates, its value in Europe exceeds €20 billion <sup>(7)</sup>. A very detailed document <sup>(8)</sup> finds that the platform economy

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<sup>(1)</sup> Defined as the trend of “*passing some of the risks of the enterprise onto the worker*”. See FREDMAN S. (2006), *Precarious Norms for Precarious Workers* in FUDGE J. and OWENS R. (Eds.), *Precarious Work, Women and the New Economy*, Oxford, p. 187.

<sup>(2)</sup> The term “gig” evokes artists jumping from a concert to another.

<sup>(3)</sup> See 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, COM/2016/0356 final (hereinafter “the Communication”).

<sup>(4)</sup> Although the plethora of online platforms sees itself as a part of this trend, the label of “sharing economy” is now disgraced for misrepresenting the reality, after a preliminary moment of excitement. For a complete overview of definitions, see SELLONI D. (2017), *New Forms of Economies: Sharing Economy, Collaborative Consumption, Peer-to-Peer Economy* in EAD., *CoDesign for Public-Interest Services*, Cham, p. 15.

<sup>(5)</sup> Suffice here to highlight here the distinction between active and non-active accounts or the use of multiple identities to register on different platforms.

<sup>(6)</sup> Consistent estimates are hard to come by. The value of the collaborative economy in the EU varies from survey to survey, from report to report. For a review of many intrinsic problems, see HARDIE M. (2016), *The feasibility of measuring the sharing economy*, UK Office for National Statistics (describing “a number of challenges faced when attempting to measure [this phenomenon], including classifying activit[ies], capturing sharing activity between individuals and measuring non-monetary transactions”).

<sup>(7)</sup> Reports have revealed how online platforms are not generating sufficient income. Moreover, it has to be said that “[v]ery few of the digital platform companies currently make profits, but the very high market capitalisation of these companies obviously means that the stock market believes that they will do so sometime in the future”. See EUROFOUND (2017), *Non-standard forms of employment: Recent trends and*

amounts to nearly €4 billion in revenues and has intermediated €28 billion of transactions (85% of this value being gained by the providers/workers). According to a recent Eurobarometer survey, 52% of all EU citizens are aware of the services offered by the sharing economy <sup>(9)</sup>. In addition to that, it should be said that participation in the collaborative economy is “*relatively small – but growing*”: between 5% and 9% of European citizens have already participated in this framework, making no more than €1000 (the median of earning stands at around €300) <sup>(10)</sup>. According to a report commissioned by the European Commission <sup>(11)</sup>, there would be approximately 100,000 active workers in the European platform economy, representing 0.05% of the total workforce. Before venturing on the task of scrutinising platforms more in depth, it should be borne in mind that their potential has not been all unleashed yet. More importantly, workers do not address platforms only for amateur purposes; on the contrary, a significant proportion relies on these intermediaries for their principal source of income, according to a survey carried out by ILO on crowd-workers <sup>(12)</sup>.

In considering the background, scholars have identified three main reasons explaining the rise of the platform- or app-based workforce: (i) the need to cope with short-run fluctuations on the demand side, (ii) the desire to reduce labour costs, (iii) the urgency to meet market pressures on short-term results and efficiency <sup>(13)</sup>. In order to grapple with the constant evolution, this contribution will look into the atypical forms of work which are channelled via digital infrastructures <sup>(14)</sup>. Classifying models in this field has attracted a lot of consideration, as recent studies on this topic have classified several typologies of platforms as well as of digitally enabled work arrangements. Legal scholars tend to “*focus separately [...] on online and offline workers, because their places of work (remote versus face-to-face) and relationships with clients (telemediated versus direct) create very different patterns of work, exposing them to different risks*” <sup>(15)</sup>. Setting a detailed categorisation could help in selecting the most salient realities to be assessed from a legal standpoint.

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*future prospects*, Background paper for Estonian Presidency Conference ‘Future of Work: Making It e-Easy’, 13-14 September 2017, p. 22.

- <sup>(8)</sup> VAUGHAN R. and DAVEIO R. (2016), *Assessing the size and presence of the collaborative economy in Europe*, PwC UK, *Impulse paper for the European Commission*. The report identifies five key sectors (peer-to-peer accommodation, peer-to-peer transportation, on-demand households service, on-demand professional services, collaborative finance). The study indicates that there are 275 collaborative economy platforms in 9 states (Belgium, France, Germany, Italy, Poland, Spain, Sweden, The Netherlands, and UK).
- <sup>(9)</sup> EUROPEAN COMMISSION (2016), *The use of collaborative platforms*, Flash Eurobarometer, No. 438. Survey requested by the European Commission, Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs and co-ordinated by the Directorate-General for Communication.
- <sup>(10)</sup> A preliminary survey implemented in the UK, Sweden, Germany, Austria and the Netherlands in the first two quarters of 2016 will be expanded in November 2017.
- <sup>(11)</sup> DE GROEN W. P. and MASELLI I. (2015), *The Impact of the Collaborative Economy on the Labour Market*, CEPS Special Report No. 138. The empirical strategy based on the frequency of Google searches for words related to online platforms is the same carried out in HARRIS S. D. and KRUEGER A. B. (2015), *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The “Independent Worker”*, The Hamilton Project. It is worth noting, however, that the estimate is “*significantly less than the 0.4% to 1% of employees that is assumed to be participating in the US*”. Simply put, the platforms appeared later in the EU and “[took] more time to develop due to fragmented markets and regulation, as well as the fact that labour is more protected and sector concerns may be more regulated”, see DE GROEN W. P., LENAERTS K., BOSCH R. and PAQUIER F. (2017), *Impact of Digitalisation and the On-Demand Economy on Labour Markets and the Consequences for Employment and Industrial Relations*, Study prepared for the European Economic and Social Committee, Brussels, p. 9, n. 4.
- <sup>(12)</sup> See BERG J. (2016), *Income Security in the On-Demand Economy: Findings and Policy Lessons from a Survey of Crowdworkers in Comp. Lab. L. & Pol’y J.*, 37(3) (reporting the main results of a survey which shows that almost 40% of respondents – out of a sample of crowdworkers on the Amazon Mechanical Turk and on Crowdflower – rely on platforms as their principal source of sustenance).
- <sup>(13)</sup> DOKKA J., MUNFORD M. & SCHANZENBACH D. W. (2015), *Workers and the Online Gig Economy*, The Hamilton Project.
- <sup>(14)</sup> GILLESPIE A., RICHARDSON R., VALENDUC G. et al. (1999), *Technology Induced Atypical Work-Forms. Report for the Office of technology assessment of the European Parliament (STOA)*, Brussels.
- <sup>(15)</sup> HUWS U., SPENCER N. H. and JOYCE S. (2016), *Crowd Work in Europe. Preliminary Results from a Survey in the UK, Sweden, Germany, Austria and The Netherlands*, Foundation for European Progressive Studies. Nonetheless, outlining an inflexible dichotomy between these two forms of work is not convincing. See DE STEFANO V. (2016), *Introduction: Crowdsourcing, the Gig-Economy, and the Law in Comp. Lab. L. & Pol’y J.*, 37(3), p. 461.

Admittedly, many commentators agree on dividing this broad array into two main models: (a) crowd-sourcing, and (b) work on-demand via platform or app <sup>(16)</sup>. In an attempt to resolve this definitional dilemma, a preliminary distinction between crowdsourcing and work on-demand can be drawn by taking into account the place of performance of work and considering the mechanisms through which work is requested or obtained. At the same time, different approaches in emphasizing the major characteristics of these schemes may lead to alternative categorisation. Without going too far on this point, platforms may be classified taking into account several characteristics: (i) the dimension of the platforms, distinguishing between a global or local presence, (ii) the site of the execution, differentiating between online tasks and “real world” tasks, (iii) the content of the “gigs”, distinguishing between creative, routine or manual jobs, (v) the service offered, distinguishing between “task specific” and “generalist” platforms, (vi) the nature of the performances, distinguishing between “low-skill” and “high-skill” activities <sup>(17)</sup>, (vii) the way of adjudication (contest vs. procurement), (viii) the system of payment (free bid versus fixed rate). Besides, looking at the location, work on-demand can be split into transport services and household services.

In particular, this report will concentrate its attention on three main subgroups of concrete working performances in the platform economy: (i) passenger transport services, (ii) professional tasks completed online <sup>(18)</sup>, (iii) manual services carried out on the household’s premises, whether domestic or commercial (See Figure 1 for a complete picture). The research will review national practices and legal cases as well as legislations introduced with regard to labour platforms and new forms of (web-based or -intermediated) work. In doing so, attention will be drawn to eight European states, namely Belgium, France, Germany, Italy, Ireland, Spain, Sweden and United Kingdom, selected for language reasons and availability of data as well as knowledge about legislative, judicial and entrepreneurial or collective initiatives. In the name of completeness, the very first distinction is between labour platforms and platforms that facilitate access to goods, property and capital <sup>(19)</sup>. Among the latter, one can list capital platforms (such as the British *Funding Circle* <sup>(20)</sup>), pure rental services (such as *AirBnB*, *HomeAway* <sup>(21)</sup> or *Turo* <sup>(22)</sup>), peer-to-peer car sharing services (such as the French *BlaBlaCar* <sup>(23)</sup>) and peer-to-peer marketplace for exchanging goods (such as the Spanish *Grownies* <sup>(24)</sup>). Understandably, this analysis will not address this type of platforms.

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<sup>(16)</sup> BERG J. and DE STEFANO V. (2015, July 10), *Regulating work in the ‘gig economy’*, retrieved from <https://goo.gl/cs3tXp>.

<sup>(17)</sup> ZITTRAIN J. (2009, July 12), *The Internet creates a new kind of sweatshop*, retrieved from <https://goo.gl/UBUfjs> (describing “a pyramid of sorts, with services designed to tap serious (and rare) smarts at the top, and others to enlist anyone with a brain wave at the bottom”).

<sup>(18)</sup> See Huws U. (2009) *The making of a cybertariat? Virtual work in a real world* in *Socialist Register*, 37, p. 2 (claiming that the formula “non-manual work” would have denied “the physical reality of pounding a keyboard all day”).

<sup>(19)</sup> DRAHOKOUPIL J. and FABO B. (2016), *The platform economy and the disruption of the employment relationship*, *ETUI Policy Brief*, No. 5., p. 2. See also FARRELL D. and GREIG F. (2016), *Paychecks, Paydays, and the Online Platform Economy: Big Data on Income Volatility*, *JP Morgan Chase Institute*. Also in this pattern, “there is some work to be done, such as driving the vehicle by the car owner or the guest’s accommodation by flat owners”. A different dividing line could be mere sharing of costs vs. profit-seeking motive. See also BOCK A.-K., BONToux L., FIGUEIREDO DO NASCIMENTO S., SZCZEPANIKOVA A. (2016), *The future of the EU collaborative economy – Using scenarios to explore future implications for employment*, *JRC Science for Policy Report*.

<sup>(20)</sup> *Funding Circle* is a platform connecting small and medium enterprises with lenders and investors.

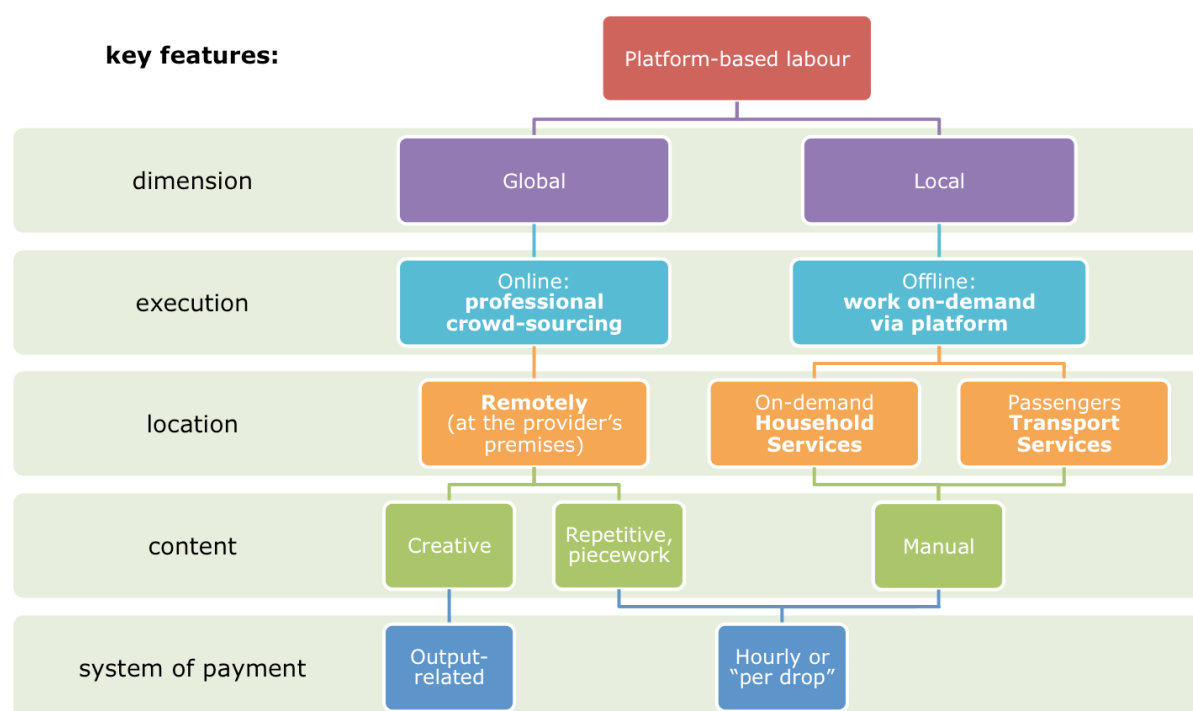
<sup>(21)</sup> *AirBnB* is probably the most known hospitality service. It matches hosts and guests enabling the lease or rent of short-term lodging. It was founded in the U.S.A. *HomeAway* is a vacation rental platform.

<sup>(22)</sup> *Turo*, formerly *RelayRides*, is a company that operates a peer-to-peer car-sharing marketplace. It allows private car owners to rent out their vehicles via an online platform.

<sup>(23)</sup> *BlaBlaCar* is a platform connecting drivers with idle seats with travellers or passengers paying a contribution to the costs for long-distance or city-to-city routes. Founded in France. See AURIEMMA S. (2017), *Impresa, lavoro e subordinazione digitale al vaglio della giurisprudenza* in *RGL*, I, p. 281 (explaining how its business model can be distinguished from other services in the same sector by virtue of the cost-sharing mechanism).

<sup>(24)</sup> *Grownies* is a peer-to-peer marketplace for goods and clothes for young children. Founded in Spain.

**Figure 1.** Typologies of (labour) platforms.



Source: Authors' own elaboration.

In order to get a better understanding of the "new" employment trends emerging across Europe, a preliminary remark is needed. It is nearly impossible to enclose a very complex phenomenon into rigid schemes, at least in the embryonic stages of platform development. Each platform is organised in such a peculiar way that studying, and even regulating, this issue with a "one-size-fits-all" approach results unfeasible. By taking into account this significant heterogeneity, which may entail intense juridical implications, a common business model could be traced consisting in the "instant" matching of demand and supply of labour, facilitated by digital systems (mostly apps on smartphones and online platforms) that make it easy to manage a large and "low-cost" workforce. In a nutshell, platforms allow individuals, families or companies in need of a service to hire a worker who is willing to offer the relevant activity, under the guise of enhanced flexibility ("Be Your Own Boss" was one of *Uber's* mottos). Dissimilarities among companies, as will be demonstrated in the following paragraphs, go much beyond.

The aim of this study is to contribute to the comprehensive research on digital labour platforms understanding legal frameworks and related challenges for policy makers. In particular, after defining the main categories of platforms, this report will provide an overview of regulatory frames applying to them. The operation of a set of European as well as global platforms will be described throughout five different phases. Furthermore, labour law issues arisen from these "atypical" or "casual" work arrangements will be analysed. To this end, the attention will be devoted to potential or on-going legal controversies regarding classification of workers which in turn impacts on working conditions, fair treatment, and collective rights in these legal regimes<sup>(25)</sup>. After looking at those requirements that platform companies have to comply with, measures taken by different Member States will be discussed. This paper concludes by illustrating potential outcomes from litigation cases impacting on the employment status issue and, briefly, policy implications at stake.

<sup>(25)</sup> See also *Commission Staff Working Document, 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.*

## 1.1 Crowdsourcing and work on-demand via platform.

Clearing up any misunderstanding on this issue, it is essential to acknowledge the professional nature of the performances rendered through labour platforms<sup>(26)</sup>. There has been a sustained attempt to present "gig work" as something related to generosity, altruism or rather volunteerism, thus excluded from the field of labour law. Irrespective of the reason behind the decision to engage with these economic activities, the accomplishment of contingent tasks shall not be considered merely as an act of good neighbourly relations or a spare-time activity. Clearly, this "understatement" cannot apply to duties such as driving car, cleaning flats, translating documents, drawing up a budget and completing secretarial work<sup>(27)</sup>, just because they are "intermediated" through the Internet. To this extent, a clean-up exercise is due. Using euphemisms such as "Runners", "Riders", "Taskers", "Clickers", "Authors", "Hourlies" or even "Friends" is a clear attempt to hide the fact that human labour is at stake. The aim of this "newspeak" is to counterfeit the reality or, at least, to gather arguments to be sustained in a potential lawsuit.

After an introductory comment, it has to be pointed out that professional crowdwork (or "crowdsourcing"<sup>(28)</sup>) includes services completed solely on computer and delivered remotely, encompassing a wide variety of activities, clerical or repetitive (so-called "click work") as well as creative and intellectual ones, such as conceiving marketing campaigns or proofreading academic contributions<sup>(29)</sup>. The list of dominant performances, also labelled as "human intelligence tasks" (HITs on *Amazon Mechanical Turk*), is rather long, ranging "from data entry and admin work over graphic design and coding to legal and business consulting"<sup>(30)</sup>. The pattern involves routine performances (*ClickWorker* is an example) executed from the provider's house – or from any place equipped with Wi-Fi – and delivered electronically to a "crowdsourcer"<sup>(31)</sup>. These activities can be simply performed by humans, but are still too complicated to be accomplished by computer algorithms. Platforms can *decomponetise* work into a broad range of tiny jobs that can be disseminated, claimed and performed<sup>(32)</sup>.

Online tasks call for special mention. At the moment, consumers as well as policy makers end up in overlooking the fact that a large portion of online activities is run by humans. To this extent, *Clickworker's* presentation is disarming: "As much as modern computing power has increased, there are still many things only humans can do. (...) *Clickworker* gets tasks done that computers can't process, won't process, (because the cost of programming or equipment is too high) or those you can't do because you don't have enough human resources to complete the project on time and on budget"<sup>(33)</sup>. As it may be clear, humans are behind the digital curtain. Artificial intelligence has been described,

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<sup>(26)</sup> A detailed taxonomy of the online labour market is developed in CODAGNONE C., ABADIE F. and BIAGI F. (2016), *The Passions and the Interests: Unpacking the 'Sharing Economy'*, JRC Science Policy Report, Luxembourg.

<sup>(27)</sup> LIEBMAN W. B. and LYUBARSKY A. (2016), *Crowdwork, the Law, and the Future of Work*, in *Perspectives on Work*.

<sup>(28)</sup> The journalist Jeff Howe coined the term "crowdsourcing" in 2006. See HOWE J. (2006, June), *The Rise of Crowdsourcing*, retrieved from <https://www.wired.com/2006/06/crowds/> (describing "the act of taking a job traditionally performed by a designated agent (usually an employee) and outsourcing it to an undefined, generally large group of people in the form of an open call").

<sup>(29)</sup> The most common activities on *Amazon Mechanical Turk* include, but are not limited to: building and cleaning databases, testing software, validating search results, labelling items, transcribing audio clips and recordings, harvesting email, editing documents, conducting surveys, recognising irony, placing ad on videos, and detecting obscene images.

<sup>(30)</sup> OECD (2016), *New forms of work in the digital economy*, Digital Economy Papers, No. 260, available at: <https://goo.gl/0b3c4t>, p. 17.

<sup>(31)</sup> See EUROFOUND and INTERNATIONAL LABOUR OFFICE (2017), *Working anytime, anywhere: The effects on the world of work*, Luxembourg – Geneva.

<sup>(32)</sup> MILLAND K. (2017), *Slave to the keyboard: the broken promises of the gig economy* in *Transfer*, 23(2), p. 229. See also CEFKIN M., ANYA O. and MOORE R. (2014), *A perfect storm? Reimagining work in the era of the end of the job* in *Ethnographic Praxis in Industry Conference Proceedings*, 1, p. 4.

<sup>(33)</sup> *Clickworker's* presentation.

in a way, as anything but “artificial”<sup>(34)</sup>, since it is powered by human labour which can be employed beyond the capabilities of current technology. According to the World Bank, “microwork” is becoming a significant part of digital work, allowing “broader access to specialized skills, more flexible and faster hiring processes, and 24-hour productivity”<sup>(35)</sup>. It consists in executing a variety of tasks including recommendations for e-commerce website, detecting inappropriate materials online (from hate speech to pornography), providing customer assistance via chats and forums. Moderation of user-generated content on websites is another widespread application. In this case, legal implications could be even more serious (i.e. child labour hidden behind avatars, the risk of forced labour and “gold farming” in developing countries’ sweatshops<sup>(36)</sup>), in addition to concerns regarding health and safety measures. Hence, crowdsourcing is supposed to have two different upshots: on one hand, it provides the possibility to perform jobs that were not previously accessible locally or to specific groups of workers. On the other, it leads to a global mobility of existing jobs. Whether these dynamics may have an impact on job creation or rather destruction is still not evident, further research is needed on this specific point.

Coming now to the second model, the expression “on-demand work via platform or app” refers to services executed locally (mostly on the customer’s premises), such as delivery (*Foodora*), maintenance (*Etece.es*), handyman (*TaskRunner*), cleaning services (*Helping*), and baby-sitting, to mention only the most important<sup>(37)</sup>. Transportation services, although not precisely delivered at the customer’s premises, belong to this category<sup>38</sup>. Anyway, literature has focused mostly on the ride-hailing sector, as this one represents the most blatant manifestation of risk and opportunities, and exemplifies the dominant double narrative concerning platform-based economy. Needless to say, *Uber* – a very metonym for the sector<sup>(39)</sup> – has inveigled its way into popular culture with shocking speed, giving the birth even to a new verb<sup>(40)</sup>.

It would be fair to say that most of these workers are excluded by some, or even the entirety, of the essential protections due to employees (subordinate workers), such as sick or holiday leave, full insurance, pension, superannuation or similar scheme, or minimum rates of pay and working time. In addition to this, costs associated with equipment, maintenance, reparations are at the provider’s own charge: no reimbursements for these expenses are due. More often than not, the “participation

<sup>(34)</sup> PRASSL J. (forthcoming), *Humans as a service*, Oxford. In an open acknowledgment in 2013, former *Waymo* and *Uber* engineer Anthony Levandowski, with such complete disregard for human dignity, presented a Google team in India made up of what he called “human robots”, who were cataloguing images from Street View application. See BRADSHAW T. (2017, July 9), *Self-driving cars prove to be labour-intensive for humans*, retrieved from <https://on.ft.com/2uHBiJq>.

<sup>(35)</sup> See KUEK S. C., PARADI-GUILFORD C., FAYOMI T., IMAIZUMI S., IPEIROTIS P., PINA P. and SINGH M. (2015), *The global opportunity in online outsourcing*, Washington, DC, p. 3 (explaining how “[i]ndustry experts suggest that these firms currently have combined annual global gross services revenue of about \$120 million; together they form about 80 per cent of the microwork market”).

<sup>(36)</sup> CHERRY M. (2016), *Virtual work and invisible labor* in CRAIN M., POSTER W. and CHERRY M. (Eds.) (2016), *Invisible Labor: Hidden Work in the Contemporary World*, Oakland, CA, p. 83 (arguing that “ensuring non-coerced or non-child sources of labor are just as salient here as they are in other forms of labor”). See also CASILLI A. (2016), *Is There a Global Digital Labor Culture? Marginalization of Work, Global Inequalities, and Coloniality*, Paper presented at the 2<sup>nd</sup> symposium of the Project for Advanced Research in Global Communication (PARGC), Philadelphia.

<sup>(37)</sup> The distinction is not clear-cut, as other platforms, such as *Freelancer*, allow selecting workers for both virtual and real world services. From coding and design to “help with my garden maintenance” and “clean my house or business”. See <https://www.freelancer.com/freelancers/>.

<sup>(38)</sup> ADAM D., BREMERMAN M., DURAN J., FONTANAROSA F., KRAEMER B., WESTPHAL H., KUNERT A. and TÖNNES LÖNNROOS L. (2016), *Digitalisation and working life: lessons from the Uber cases around Europe*, EurWORK, European Observatory of Working Life.

<sup>(39)</sup> *Uber*’s impressive success further inspires other platform-based companies. It very often happens to come across passionate entrepreneurs launching the “*Uber* but for X”. It is indeed useful as an expository example, due to the “replicability” of its business model. Nevertheless, caution has to be exercised towards the ride-hailing company

<sup>(40)</sup> In France the word *Ubérisation* has become a synonym of casualisation. It was said, and quite rightly too, that “[f]ew companies offer something so popular that their name becomes a verb”, see *Uberworld* (2016, September 3), retrieved from <https://econ.st/2bKeQVA>. Indeed, the company has become a dominant metonym for the decline of labour-intensive industries, and hence for “reinventing” jobs.

agreement" (*i.e.* non-negotiable contract) specifies that the worker performs his duty as an independent contractor (self-employed worker). A very popular clause points out that providers use the platform at their own risk. Undervaluing the fact that most of labour related, fiscal and social security costs are not paid is detrimental, all the more so because digital platforms sometimes exert strong prerogatives involving persistent monitoring power, unilateral arrangement of terms and condition and deactivation privilege, as explained in the following section.

Therefore, this apparently new pattern has to be on the radar for several reasons. Firstly, the "platformisation" of labour relations may reshape and revive traditional outsourcing practices. Secondly, it should contribute to a formalisation of informal economy, by "*replacing word-of-mouth methods of finding work, and unrecorded cash-in-hand payments by traceable online payments*" <sup>(41)</sup>. Thirdly, it might speed up the erosion process of both traditional categories and protections – allowing companies to gain a regulatory arbitrage over traditional competitors that comply with labour law provisions.

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<sup>(41)</sup> Huws U. (2016, June 1), *Logged In*, retrieved from <https://goo.gl/ik6BWL>.

## 2 Understanding the platforms' business models.

Having set the perimeter of this phenomenon, the platform's business model will be now scrutinised thoroughly. In this regard, in 2016 the European Community took the stance defining the scope of the notion of collaborative economy as "*business models where activities are facilitated by collaborative platforms that create an open marketplace for temporary usage of goods or services often provided by private individuals*"<sup>(42)</sup>. In most cases, this model consists in chopping up a multipart work into its smallest components and submitting each of them to always available and geographically dispersed "legions" of workers. Many platforms for clerical services are operating globally as they can profit from the almost universal knowledge of the English language; others instead are mediating casual work locally, sometimes contributing to reduce undeclared employment (incredibly widespread in certain sectors such as janitorial services). Understanding the platforms' business model might help ascertaining whether workers are employed or self-employed, as explained in section 4.

As already flagged above, looking at labour platforms as a unified whole could be inappropriate as well as misleading. Despite the common features, such as the enabling role played by ICT tools, much dissimilarity can be traced. In this paragraph, an attempt will be made to highlight shared hallmarks of this autonomous but heterogeneous archetype. As far as the business model is concerned, the "digital matching firms" at hand can be characterised focusing on a list of principal factors. First and foremost, the massive use of advanced information technology, typically the combination of widespread broadband, user-friendly digital application and increasingly effective features to facilitate transactions and keep the organisation lean; then the reliance on customer-based feedback systems for quality check as well as the reliance on workers using their own equipment (be they personal computer, bicycles or cars, whether leased or owned) to provide a service<sup>(43)</sup>. As mentioned, the interrelationships between actors could be described as triangular, being the platform (which controls intellectual property rights and governance) a connecting system between buyers ("requesters", according to the internal jargon) and workers ("sellers" or "providers").

At least in theory, the activities carried out by platforms may be classified as intermediation between the aforementioned contracting parties. In addition to the main service, ancillary activities may be supplied such as facilitation of payments, assistance in the course of the relevant performance, internal dispute resolution mechanisms or arbitration panels. It is tantamount to acknowledge that the fundamental feature at the basis of the platform business model is the involvement of individual providers offering services personally and mostly for the same platform (but not for the same client), although being classified as autonomous workers. An arrangement as such has the merit of lowering transaction costs (costs of finding the appropriate profile, negotiating an agreement and enforce it), barriers to entry and information asymmetries – at least on one side. Moreover, thanks to the reduction in agency costs, an "assetless company" might arrange production inputs without incurring in the costs of formal property rights, excluding those related to software, patents, and other intangible assets. That is why tech companies are often able to scale very rapidly, thanks to a shift from asset control to resource orchestration. In particular, such a way of arranging a digital infrastructure results in the "pulverisation" of the stable employment relationship. Undeniably, it is more convenient for clients and employer to engage workers on a task-by-task basis rather than hiring them as employees. Many reports confirm that much of the advantage of new platform- and app-based players derives from their failure to comply with labour or social security regulations<sup>(44)</sup>. On a closer inspection, this peculiar model allows the

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<sup>(42)</sup> 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, COM/2016/0356 final (hereinafter "the Communication").

<sup>(43)</sup> See TELLES R. Jr. (2016), *Digital Matching Firms: A New Definition in the "Sharing Economy" Space, Economics and Statistics Administration Issue Brief*, 1, available at: <https://goo.gl/ZP9KqD>.

<sup>(44)</sup> In order to be effective, this system implies the presence of a fungible and constantly available workforce. See EUROFOUND and INTERNATIONAL LABOUR OFFICE (2017), *Working anytime, anywhere: The effects on the*



management of a contingent workforce mobilised on a 'just in time' basis, thus responding to demand peaks and shifting the impact of fluctuations on the worker's shoulders.

At first glance, platforms constitute a promising example of a two (or multi)-sided market where participants are rapidly connected via desktop and/or mobile Internet. This organisation has reversed the traditional 'pipe'-based business model – even though it would be better to compare this new scheme to the network enterprise<sup>(45)</sup>. On a closer inspection, this model has existed for decades. What is new is the penetration of (immaterial) infrastructures which determine frictionless transactions, not to mention the "*quantitative leap and exponential growth*" in data and metrics that, collected, refined and analysed, can "train" the internal algorithm thus resulting in an even more prompt and successful matching function<sup>(46)</sup>. The basic structure is the same in completely different sectors, it replicates the original model of a virtual "bulletin board" such as *Craigslist* or *eBay*, which are essentially advanced database<sup>(47)</sup>. While a traditional firm organises labour and other physical or immaterial resources minimising transaction costs internally (according to the "make" vs. "buy" option, as theorised by Coase<sup>(48)</sup>), platforms generate value by simplifying and supporting the interplay between providers and users/consumers. Each successful interaction guarantees a 10 up to 20% transaction fee to the benefit of the platform. At the same time, platforms have the possibility to save fixed costs as well as to shed variable costs of production. Platforms do not incur in high fixed costs, which results in large economies of scale. Accordingly, the only activities that are "internalised" are middle management, sales and marketing functions. This is how economies of scope can be combined with economies of scale and specialisation<sup>(49)</sup>, leading to a high-performing model of hierarchical outsourcing<sup>(50)</sup>. Indeed, as argued, "*firms are able to make use of outsourcing without renouncing to hierarchy in the management of the relevant business relationships by means of extra-legal mechanisms*"<sup>(51)</sup>.

Contrary to what usually happens in value chain models, platforms make profits thanks to the expansion of the ecosystem in a "circular and iterative" progression. Hence, a shift occurs from mass production to large-scale networks, thanks to the involvement of individual providers. As is well known, network effects increase proportionally with the growing number of participants on the same side of the market (direct effects) or the opposite side (indirect effects). There appear to be different pricing strategies for supply

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*world of work*, Publications Office of the European Union, Luxembourg, and the International Labour Office, Geneva.

<sup>(45)</sup> On the contrary, classical "pipeline businesses" operate by controlling a linear series of activities from the inputs to the outputs (the value-chain model) and the process of production. Therefore, the main activity consists in transforming inputs at one end of the chain into the finished product. See VAN ALSTYNE M. W., PARKER G. G. and CHOUDARY S. P. (2016), *Pipelines, Platforms, and the New Rules of Strategy* in *Harvard Business Review*, 94(4), pp. 54-62.

<sup>(46)</sup> VALENDUC G. and VENDRAMIN P. (2017), *Digitalisation, between disruption and evolution* in *Transfer: European Review of Labour and Research*, 23(2), p. 121-134.

<sup>(47)</sup> Early studies analysing the role of the Internet in enabling labour performances date back to 2001, see AUTOR D. H. (2001), *Wiring the labor market* in *The Journal of Economic Perspectives*, 15(1), p. 25 (demonstrating how the employer-employee matches would have been carried out on virtual venues rather than on-site, making one's location irrelevant on the global scale). See also TODOLÍ-SIGNES A. (2017), *The 'gig economy': employee, self-employed or the need for a special employment regulation?* in *Transfer: European Review of Labour and Research*, 23(2), p. 205 (describing platforms as "a new type of company which claims to be a database").

<sup>(48)</sup> COASE R. H. (1937), *The nature of the firm* in *Economica*, 4(16), pp. 386-405.

<sup>(49)</sup> GOLZIO L. (2005), *L'evoluzione dei modelli organizzativi d'impresa* in *Dir. rel. ind.*, 2, p. 313. See also PIORE M. and SABEL C. (1984), *The second industrial divide*, New York.

<sup>(50)</sup> As regard platform-specific investments, drivers must own a vehicle to be eligible to drive. For instance, *Uber* usually assists its drivers in the relationship with an affiliated leasing company and sometimes intervenes directly if the driver becomes delinquent in his payments. More recently, the company has also designed a pilot insurance plan launched in partnership with *Aon PLC* to help cover on-the-job accidents. See GEE K. (2017, August 8), *In a Job Market This Good, Who Needs to Work in the Gig Economy?*, retrieved from <http://on.wsj.com/2uBSChM>.

<sup>(51)</sup> For a description of this phenomenon, admittedly in a different context, see DE STEFANO V. (2009), *Smuggling-in flexibility: temporary work contracts and the "implicit threat" mechanism*, *ILO Working Document*, 4, p. 1.

and demand and asymmetric or surge pricing<sup>(52)</sup>, not to mention the promotional stratagems offering discounts and bonus for the launch of services<sup>(53)</sup>. Conversely, the end service (or, in the European Commission's words, the underlying service – which is the very service sold by the platform) is externalised to individual service providers. As a consequence, also marginal costs of online platforms are low.

Yet, it could be said that “[n]o form of economic or social structure is ever entirely new”<sup>(54)</sup>. Therefore, “Uberisation” does not redefine the notion of the firm. Rather this phenomenon marks the shift from a bureaucratic control to a more sophisticated, technocratic and invasive one. Hybrid forms adopted in the platform economy can be situated formally halfway between those in market system (i.e. relationships driving “*the hardest possible bargain in the immediate exchange*”) and those in network system (characterised by “*indebtedness and reliance over the long haul*”) (55). On a closer inspection, these relations may also be strongly shaped within the bureaucratic structure of authority, in line with the hierarchical model<sup>(56)</sup>. At the end of this scrutiny, it has become clear that, while orthodox economic models of the firm, based on micro-analytic transactional equilibria, are well placed to identify a general framework, they fail to adequately describe the quite confusing and entangled reality of platform firms<sup>(57)</sup>. Accordingly, a fourth “breed” can be used to conceptualise the Uber-like firms’ prevalent business model: a system combining complementary features belonging to dissimilar prototypes but in different configurations.

## 2.1 An in-depth analysis on working conditions in three sub-sectors: a multi-stage analysis.

Understanding the way the performance is carried out is pivotal, as – in the light of the principle of the “primacy of facts” explicitly enshrined in many national legal systems – substance has to be preferred over form<sup>(58)</sup>. To explore working conditions on platforms, secondary data from academic sources, non-structured interviews and reports has been combined with publicly available information (“terms of service” as well as independent investigations). By mapping information exchanged on closed-membership groups and dedicated online forums, scrutinising workers’ conditions is one of the most effective ways to collect information on legal regimes. The aim is to generate insights into a representative portion of the growing multitudes of platform-facilitated arrangements by accumulating disaggregated information about a range of different variables that help to differentiate these working formats along various dimensions. In order to describe the concrete operation of digital labour platforms, five key elements embedded in the research question have been considered, focusing on their crucial legal implications in terms of employment status classification: (i) access to the platform and registration, (ii) selection process and hiring, (iii) command power and performance execution, (iv) monitoring and rating (and deactivation), (v) payment rewards for completed tasks. A

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<sup>(52)</sup> It seems that platform will be soon able to discriminate on the basis of the individual's willingness to pay. See EZRACHI A. and STUCKE M. E. (2015), *Online Platforms and the EU Digital Single Market*, University of Tennessee Legal Studies Research Paper, No. 283, p. 9.

<sup>(53)</sup> This model turns customers into “ambassador” who are offered credits if they are able to successfully convince friends to join the platform on both sides. See SRNICEK N. (2016), *Platform capitalism*, New York, p. 46 (arguing that “[p]latforms often use cross-subsidisation: one arm of the firm reduces the price of a service or good (even providing it for free), but another arm raises prices in order to make up for these losses”).

<sup>(54)</sup> As noted by COHEN J. E. (forthcoming), *Law for the Platform Economy* in U.C. Davis Law Review, p. 2.

<sup>(55)</sup> See POWELL W. W. (1990), *Neither market nor hierarchy: network form of organization* in *Research in Organizational Behavior*, 12, p. 302.

<sup>(56)</sup> For a complete analysis of these arrangements, see Part 3.

<sup>(57)</sup> GRIMSHAW D., MARCHINGTON M., RUBERY J. and WILLMOTT H. (2005), *Introduction: Fragmenting Work Across Organizational Boundaries* in MARCHINGTON M., GRIMSHAW D., RUBERY J. and WILMOTT H. (Eds.), *Fragmenting work: Blurring organizational boundaries and disordering hierarchies*, Oxford, p. 17 (arguing that “it is more plausible to regard ‘market’, ‘hierarchy’, and ‘network’ as concepts that have proven valuable in differentiating elements or dimensions of organising practices within and between organisations, rather than as alternative designs of economic organisation”).

<sup>(58)</sup> See, for the Italian context, Cass. No. 13375 September 11, 2003, FI, 2003, I, 3321; Cass. No 4533 April 10, 2000, FI, 2000, I, 2196.

sort of chronological order will be followed in unfolding this multi-stage process, starting with the registration and ending with the payment.

### 2.1.1 Access to the platform and registration.

To gain access to the “fleet” providing services through the platform, a worker needs a smartphone equipped with high-speed connection. When registering, a prospective worker has to provide biographical data (including age, location, highest degree, title, grade, language skills, hobbies and know-how<sup>(59)</sup>) and a bank account where the money will be conveyed. The weaker contracting party has only two options or, even better, a “take-it-or-leave-it offer”: he or she may (i) adhere to the terms as drafted *en bloc* or (ii) reject the clauses entirely. The worker cannot negotiate terms and conditions, as electronic standard contracting forms – a kind of adhesion-styled agreement<sup>(60)</sup> – allows only to click on “I Agree”. These long and complex forms contain a variety of clauses encompassing several aspects of the relevant relationship, from forum selection to dispute resolution, from worker classification to limitations of liability. Amidst such form that many users might have not even read, workers can make inquiries and usually receive template responses. These difficulties are likely to be worsened by the fact that workers may lack direct channels of communication and are deprived of a collective voice, thus leading to the impossibility to have an impact on the decision-making that shapes labour processes.

One can identify a certain uniformity between platforms<sup>(61)</sup>, and the unilateral standard-setting activity may prove to be an effective way for platforms to auto-regulate the relationship. Noticeably, the wording seems to be conceived in order to remain ambiguous and prevent a negative outcome in case of lawsuit. In the European legal system, this private standard-setting may also affect the assessment of the employment status of workers. For instance, food delivery platforms usually require: being 18 or older, an iPhone 4s or a superior version with a tariff scheme including a data connection, willingness to work on the weekend, work permit, “sense of responsibility” (*sic!*)<sup>(62)</sup>. In addition to this, *Uber* demands documents to verify the eligibility<sup>(63)</sup>. After logging in, the worker is faced with a dashboard containing several elements (i.e. jobs completed, assessment, profile or account, invoices). Speaking of requirements, in the peer-to-peer transport sector, in most Member States the business model adopted by ridesharing platforms is based on licenced drivers<sup>(64)</sup>. In most of the cases, workers are defined “partners” or customers, as they rely on the company’s service to be matched with final customers. Moreover, workers renounce the possibility of challenging their status and covenant to indemnify the platform in case of litigation (such clauses are far from enforceable). Indeed, many companies now include arbitration agreements containing waivers in their terms of service, thus narrowing the opportunity for employee classification lawsuits<sup>(65)</sup>. This results in the fact that crucial question issues related to

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<sup>(59)</sup> Taking the German *Clickworker* as an example, worker can also upload and display “work samples”, including of the sort of information that would have been considered outside the purview of the traditional employer.

<sup>(60)</sup> Moreover, there are realistic reasons for arguing that both worker and costumers do not authentically agree on anything when pushing the “I Agree” button, provided that these kinds of contracts require no explicit manifestation of assent. See DAVIS N. J. (2007), *Presumed assent: The judicial acceptance of clickwrap* in *Berkeley Tech. L. J.*, 22(1), pp. 577-598.

<sup>(61)</sup> IPEIROTIS P. G. and HORTON J. J. (2011), *The need for standardization in crowdsourcing* in *Proceedings of the workshop on crowdsourcing and human computation at CHI*, p. 1.

<sup>(62)</sup> See <https://rider.foodora.it/>.

<sup>(63)</sup> Considering for-hire license, the list shall include documents relating to vehicle registration, certification of commercial automobile liability, insurance policy.

<sup>(64)</sup> Some commentators have suggested that ridesharing services are flourishing in the UK due to the fact that licensing requirements are typically minimal. Some member states (Ireland, France, and Spain) explicitly impose that profits beyond the sharing of the expenses of a ride can only be made by licenced taxi or private hire car drivers. For instance, when the application *UberPop*, which allows non-licensed drivers (*i.e.* private citizens) to offer riders, was banned in Brussels, *Uber* restricted it offer to *UberX* and *UberBlack*, only rely on licensed drivers, though this particular type of license is extremely easy to obtain.

<sup>(65)</sup> The issue pertaining potential conflicts of laws, particularly when transnational contractual parties are operating in different jurisdictions, will be not addressed in this work. Broadly speaking, Rome I Regulation

legal classification are "*decided secretly and lack precedential value*"<sup>(66)</sup>. After logging in, the worker is faced with a dashboard containing several elements (*i.e.* jobs completed, assessment, profile or account, invoices).

### 2.1.2 Selection process and hiring.

Work is allocated through open-calls rather than by direct assignment or sharp job role requirements. The selection mechanism varies from platform to platform. At least three principal models can be described. The "hiring procedure" may be organised (i) as a bid in response to a public auction<sup>(67)</sup> – each worker must specify how fast and for what price he or she could do the job (this often occurs mostly when the task is a creative one), (ii) as an automatic matching operated by the internal algorithm on the basis of the specification of the service required and the worker's profiles, or (iii) in a different approach, the worker may spontaneously apply for the fulfilment of the task. Some "cognitive work" or "high-skill" platforms assist clients in launching a competition for the services required. While many proposals may be submitted, only the "winner(s)" will be paid when clients select the solution they prefer. More commonly, the client indicates the project, workers submit their proposals and, if the solution is selected, they can arrange the details, in few cases negotiating privately. A sense of freedom and flexibility is put forth by assertions like the following: "[as] a Contributor, you and only you decide which and how many tasks to complete, and when and where you complete them. You are free to spend as much or as little time completing tasks as you choose. At no time are you under any obligation to complete a task"<sup>(68)</sup>.

Before getting a request, samples of work (together with a relevant portfolio, if any) can be offered and assessed by experts. This preliminary stage is necessary to obtain the possibility to participate in activities on many crowdsourcing platforms (on *Upwork* or *Clickworker*<sup>(69)</sup>, to name but a few). Similarly, workers aiming to use the German platform *Clickworker* have to submit samples of their work or to undergo a test. They are rated and subsequently offered tasks that match their score. This platform prevents "*unqualified clickworker*" from accessing a set of task in the case they have "*not yet taken the respective assessments*" or because the score falls below the threshold to be reached. Reasons for exclusion include language requirements or skill-specific needs. From a different point of view, it may prove to be hard to engage with a reliable client due to the lack of information. It should also be recalled that workers on challenge-based platforms like *Zooppa* as well as those like *Amazon Mechanical Turk*<sup>(70)</sup> suffer the key

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(Reg. 593/2008) set as a general rule the freedom of the parties to choose the applicable law (Art. 3). However, it explicitly restricts this freedom through provisions laid down by Article 8 introducing the notion of "*objectively applicable labour law*". That is, the law that best suits to the relationship would be applicable if no choice exists. The objectively applicable labour law has priority against the chosen law but only regarding "*provisions that cannot be derogated*", namely the hard part of labour law (*ius cogens*) and not its flexible provisions that could be legally avoided by the parties (*ius dispositivum*). The Regulation offers a set of criteria aimed at determining the objectively applicable law. These criteria are hierarchical and the foremost criterion is the habitual place of work (*lex loci laboris* – Art. 8(2)). The level of protection cannot fall below that which would be provided in the absence of choice. Additional criteria are the place of work engagement (Art. 8(3)) and, ultimately, the place where work is more closely connected (rule of Art. 8(4)). As it has been rightly pointed out, the legal construction of the "*objectively applicable labour law*" concept is the element that should be kept and applied at a platform-mediate labour regulation at an international level. See BREGIANNIS F., BRUURMIJN W. J., CALON E. and ORTEGA M. A. D. (2017), *Workers in the Gig Economy, Identification of Practical Problems and Possible Solutions*, Tilburg University Working Paper.

<sup>(66)</sup> BISOM-RAPP S. and COIQUAUD U. (2017), *The Role of the State towards the Grey Zone of Employment: Eyes on Canada and the United States in Revue Interventions économiques in Papers in Political Economy*, (58), p. 11.

<sup>(67)</sup> Some platforms (such as *Boblr*) charge a publishing fee for the launch of each competition.

<sup>(68)</sup> *Crowdfunder*.

<sup>(69)</sup> In this case, worker must submit mock-up of their work or pass a test. The appraisal attributes a score according to which a worker will be provided with certain types of tasks.

<sup>(70)</sup> According to Casilli, *AMT* is "*the most prominent and high-profile example of a platform for micro-tasks*". The first "Mechanical Turk" was designed and implemented by the Hungarian nobleman Wolfgang von Kempelen in the late 1760s. The platform's name pays homage to the eighteenth century mechanical wooden cabinet containing a chessboard, life-sized, adorned with a turbaned mannequin that could compete against human players at the game of chess. A small-bodied chess player was hidden and moved

risk of investing time, coupled with the unlikelihood of winning and the harshness of jumping from a task to another, sometimes even with little or no effectiveness<sup>(71)</sup>. It is worth noting that *Uber* does not disclose the customer's destination until the request is accepted. This "blind" mechanism prevents drivers from competing with one another for passengers. At the same time, platforms such as *AMT* do not provide "any metrics on the hourly rate of the work posted"<sup>(72)</sup>, therefore workers have one choice only, to complete some and calculate the rate in order to understand whether the task is worth doing or not.

### 2.1.3 Command power and performance execution.

As already explained, the managerial powers potentially or concretely exerted by a platform may vary according to the type of the performance. In general, the overriding evidence confirms that peer-to-peer transport services and delivery platforms exercise remarkable supervision, direction, and control over how the ride is completed. For example, cycle couriers – who accomplish their duty personally<sup>(73)</sup> – are strongly recommended to wear a commercial uniform, use their own vehicle<sup>(74)</sup>, show up in a defined hotspot, then log in the app from their smartphone and wait for the first order. While delivering fresh meals from restaurant to the customer's address, they have to follow the "suggested route", in order to carry out their duty as quickly as possible. Anyway, they are required to interact with the company's middle management through internal channels of communication (chat or apps such as "*Staffomatic*")<sup>(75)</sup>. Workers have to pay for all running expenses (petrol, insurance, taxes) and assumes all responsibility should an accident occur.

To this extent, both the (human or algorithmic) management and the final customer are responsible for ensuring and assessing the adherence to the instructions given. In the "on-demand household services" subsector, instead, performances such as cleaning, home repair, furniture assembling, gardening, painting, handyman-like tasks can be commonly executed with a certain degree of autonomy, although workers have to conform to guidelines and instructions. In this case, the dependence experienced by workers is both economic and organisational. Conversely, it is undeniable that workers using platforms such as *GoPillar* or the globally widespread *InnoCentive*<sup>(76)</sup> enjoy a higher degree of autonomy. On the contrary, platforms such as *Amazon Mechanical Turk* and *Crowdfunder* deliver a highly standardised service.

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pawns from inside – so no technology at all, aside from mock cogs and clockwork machinery. The allegorical name represents a telling metaphor for a hoax, i.e. a piece of technology that relies on human energies and intelligence in the "black box". See SCHWARTZ O. (2016, February 29), *Humans pretending to be computers pretending to be humans*, retrieved from <https://goo.gl/MCbNFE>. See also MARVIT M. Z. (2014, February 5), *How Crowdworkers Became the Ghosts in the Digital Machine*, retrieved from <https://goo.gl/rJRXmA>.

- (71) According to an ILO survey, workers may spend up to 18 minutes of unpaid work for every hour worked and paid. BERG J. (2016), *Income Security in the On-Demand Economy: Findings and Policy Lessons from a Survey of Crowdworkers in Comp. Lab. L. & Pol'y J.*, 37(3), p. 557.
- (72) MILLAND K. (2017), *Slave to the keyboard: the broken promises of the gig economy in Transfer, European Review of Labour and Research*, 23(2), p. 230 (explaining how "even poorly paying work gets done just through this process").
- (73) More recently, a new contract has been introduced allowing riders in specific areas to provide the service through a third party. In the light of a "substitution clause", couriers may appoint a third person to complete the task in their behalf. Nevertheless, in day-to-day practice, it truly is very difficult to select a replacement, thus representing a barrier to the recognition of the employment status. In fact, in a potential lawsuit, the burden of prove that those rights did not exist or were not exercised would be on the worker.
- (74) As for *TaskRabbit*, "some clients provide tools and closely supervise the work, whereas others will expect taskers to bring their own cleaning products or use their vehicles for transport-related tasks", see PRASSL J. and RISAK M. (2016), *Uber, Taskrabbit, and Co.: Platforms as Employers – Rethinking the Legal Analysis of Crowdwork in Comp. Lab. L. & Pol'y J.*, 37(3), p. 645 (using the platform to show "how different employer functions are exercised by more than one entity").
- (75) INVERSI C., DUNDON T. and BUCKLEY L.-A. (2017), 'I Don't Work For, I Work With...' *Disposable workers and working time regulation in the gig-economy*, Paper prepared for presentation at the "5<sup>th</sup> Conference of the Regulating for Decent Work Network" at the International Labour Office, Geneva, Switzerland, 3-5 July 2017.
- (76) It enables research labs "broadcast scientific problems" with contests for prizes for solutions in several fields.

This “faceless”, and sometimes “nameless”, employer may sanction behaviours that are not considered compliant with standards or, even worse, are merely valued as lagging behind customer expectations. In some cases, a training phase may be carried out either before starting to work or should the rating fall below the critical threshold. Video-tutorial are commonly used to promote certain best practices. As far as *Uber* is concerned, the driver’s booklet (also referred to as “Community Guidelines”) invites to wear formal attire, suggests to keep low the volume of the radio or to play classy music and recommends offering chewing gums or beverages <sup>(77)</sup>. Interestingly enough, some platforms prevent crowdworkers from subcontracting the relevant task (or a fraction of it) to other workers. This factor may be used to prove the lack of autonomy of the contractual relationship. The irony is that *Amazon Mechanical Turk*, the biggest “human cloud” platform, imposes not to “use robots, scripts or other automated methods to complete the Services”. Similarly, *Crowdfunder* does not allow to employ “Internet bots, web robots, bots, scripts, or any other form of artificial intelligence” <sup>(78)</sup> while *Clickworker* prohibits outsourcing (“Clickworkers are expressly prohibited from subcontracting or outsourcing projects to third parties unless this is expressly permitted by the terms of a project description”) <sup>(79)</sup>.

Some platforms are organising their workforce in shifts in a way contradicting the message about the extreme schedule flexibility. Worse still, schedules are stable from week to week <sup>(80)</sup> thus hampering workers’ elasticity and ignoring their needs in terms of work-life balance. The narrative on the freedom of arranging one’s own timetable has to be firmly demystified for two main reasons. Firstly, while it is correct to argue that workers are free to be online whenever they want, the number of hours they spend online is decisive when it comes to compensation. Moreover, the rates of rides accepted and rides cancelled contribute to define the personal ranking. Lastly, when a system of rotation is applied, the unpredictability of working hours is very problematic and frustrating as it determines long periods of inactivity, sometimes due to miscalculations of the potential demand and to arbitrary, dysfunctional day-to-day scheduling practices <sup>(81)</sup>. Despite the differences in the intensity of “temporal sovereignty” (*i.e.* autonomy), it is evident that, in each of the reviewed sectors, workers must deliver a standardised service. Perhaps most important, this reality contradicts the claim according to which gig-workers should be considered entrepreneurs, enjoying the “freedom from formal constraints such as mandatory working hours” <sup>(82)</sup>. Moreover, ample evidence of the far-reaching negative impact of the “permanent reachability” definitely holds true for crowdworkers. Their constant “stand-by modus” is boosted by platforms using incentives to compel them to be “logged-in” when needed, regardless their actual availability.

#### **2.1.4 Monitoring and rating (and deactivation).**

Traceability of data <sup>(83)</sup> is of utmost importance when it comes to vetting workers and profiling customers (their needs, their locations and – more importantly – their

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<sup>(77)</sup> O’Connor v. Uber Technologies, Inc., No C-13-3826 EMC, 2015. Moreover it imposes “not to shout, swear or slam the car door”.

<sup>(78)</sup> See <https://www.crowdfunder.com/legal/>.

<sup>(79)</sup> See <https://workplace.clickworker.com/en/agreements/10123>.

<sup>(80)</sup> Riders argue that their flexibility declined dramatically since the company has adopted a model based on weekly shifts. A leaflet containing *Deliveroo* workers’ complaints and claims can be found at <https://goo.gl/Y1jPjt> (in Italian).

<sup>(81)</sup> To make things worse, the “open availability” pattern makes it almost impossible to take on second jobs or enrolling in training programs, and thereby contradicts the idea that these schemes may be used to supplement income as a second job. The result may be a “trap”.

<sup>(82)</sup> LEHDONVIRTA V. (forthcoming), *Work alerts and personal bests: Managing time in the online gig economy*, New Technology, Work & Employment.

<sup>(83)</sup> It is worth emphasising that the European Parliament resolution of 15 June 2017 on a European Agenda for the collaborative economy (2017/2003(INI)) “[u]nderlines the importance of collaborative platform workers being able to benefit from the portability of ratings and reviews, which constitute their digital market value, and the importance of facilitating the transferability and accumulation of ratings and reviews across different platforms while respecting rules on data protection and the privacy of all parties involved”. In addition to this, the International Transport Forum, an intergovernmental organisation at the OECD, has proposed that data collected from ridesharing platforms on the service performance of individual drivers

willingness to pay) <sup>(84)</sup>. This issue has nevertheless been particularly salient in the preliminary stage of on-demand economy's development: platforms had been greeted as an enhanced system allowing trust between strangers. Trust, in turn, is based on a sort of "digital market value", whose very building block is the rating assigned to workers. Therefore, it can be said that customers trust the fact that the worker's career (or professionalism) has been regularly traced and he or she can be considered accountable. Several are the tools used to supervise the worker: GPS features on smartphones allow delivery companies to constantly monitor the performance of their couriers, the five-star system guarantees a constant appraisal of driver's conducts, the internal software used to complete click task is inherently meant to track actions. Platforms have essentially deputized their customers to administer the workforce and make meticulous reports on how service is rendered <sup>(85)</sup>. Any provider's act is therefore "transparent" to the eye of the platform, not to mention the possibility of privacy violation, since the workers are obliged "by design" to disclose personal information without a guarantee of confidentiality. The same can be said for the client: sensitive information can be shared with no clarity on their use. To put it bluntly, it can be concluded that technology-mediated channels allow penetrating quality control, sometimes more effective than the one exercised by a traditional employer.

As far as on-demand professional services are conceived, providers may take screenshots of the provider's monitor or track their keyboard strokes thanks to software specialized in real-time surveillance, also assigning "control" tasks to double-check the quality of the service <sup>(86)</sup>. Even the amount of time a crowdworker has to complete a task can be set and monitored: "[a] countdown timer displays the "Remaining Time" on each work page. You must complete the job before the time runs out, i.e. reaches zero. If this happens the job will be cancelled and will be lost for you[;] skipping a job ensures that you will not be offered this individual job again, at least not within the next few minutes. As a result, if few jobs only are available for you, you might not be offered any other jobs". Ride-hailing app, for instance, relay rides to another driver, if it is not accepted within 15 seconds. Platforms exchanging high-skill activities have developed a two-stage control system. Before submitting the job to the client, a corrector checks, amends and evaluates the proposal. In this case, the "current rating is an average of the last 25 evaluations [the worker] received for the jobs you submitted. When the corrector decides whether the job goes back to [the worker] for reworking he has to include this evaluation and a comment listing the improvements that need to be made" <sup>(87)</sup>. Changes in the rating based on the comments can be followed in the "work history". However, such situation is temporary. A short time later, positive evaluations can increase your rating while negative evaluations can decrease it.

On top of that, electronic ratings and reviews (defining the individual position in the internal ranking) can grow up or fall down on the basis of the capricious customer satisfaction systems, affecting the likelihood to be selected and hired in the future or to be assigned the best paid tasks. Furthermore, the worker's account can be deactivated determining, in the most serious cases, the exclusion from the platform, which seriously impairs his "career". Unofficial sources refer that *Uber* driver's account can be suspended when his or her rating falls below 4,6 out of 5, though this condition can vary by city.

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might be used by regulators, possibly as a partial substitute for licensing. See DARBÉRA R. (2015), *Principles for the regulation of for-hire road passenger transportation services*, OECD International Transport Forum.

<sup>(84)</sup> Data consists of two parts: firstly, data owned by the platform (e.g. the route determined through digital maps) and, secondly, "data processed in the form of inferred information" (e.g. the locations of their passengers' work places and homes can be extracted from historical data). Data are being collected from drivers and not from passengers and therefore can be mined even without the consent of passengers. See YARAGHI N. and RAVI S. (2017), *The Current and Future State of the Sharing Economy*, *Brookings Impact Series*, No. 03.

<sup>(85)</sup> ROSENBLAT A. and STARK L. (2016), *Uber's Drivers: Information Asymmetries and Control in International Journal Of Communication*, 10(27), pp. 3758-3784.

<sup>(86)</sup> Software such as *Worksnaps*, *Worksmart* or *Interguard* sends regular screenshots from contractors' computers so that clients can check and monitor the workflow or measure the time taken to complete a task.

<sup>(87)</sup> See <https://www.clickworker.com/faq/>.

Ratings are averaged to mirror their last 500 trips. In particular, the platform places drivers on notice of the kinds of conducts that may result in a negative consequence, namely low ratings, high cancellations rates, low acceptance rates (below 90%). As already mentioned, the exclusion from the platform can be brutal or improvement courses can be offered. In this case, a worker has to "provide proofs of the steps [he has] taken to improve". Understandably, rating system may determine an indirect lock-in effect. As this portfolio cannot be transferred to another platform, a crowdworker is *de facto* tied to a specific platform. Switching to a rival company is costly as it would mean losing "the advantage of having good ratings" <sup>(88)</sup>, thus entailing further concerns on the ownership of this amount of data.

In addition to this, crowd-workers are faced with the volatility of customers' preferences. Currently, many online crowdworking operators' terms of service allow unsatisfied customers to retain a product without compensating the worker, with no explanation <sup>(89)</sup>. This could potentially lead to opportunistic or biased behaviours <sup>(90)</sup> or to an even more condescending approach by workers, justified by the fact that they need to keep their evaluation above the threshold <sup>(91)</sup>. At the same time, should amendments be needed, the worker must edit the work within a certain deadline, past which he or she loses the right to be paid. The uncertainty is therefore exacerbated. Albeit incomplete about consequences, the AMT clause is more than revealing: "If a Requester is not reasonably satisfied with the Services, the Requester may reject the Services" <sup>(92)</sup>. Ratings from clients, as previously clarified, impact on the personal career and can determine whether or not the worker receives further tasks. There is no appeal. Workers are rarely allowed to challenge rejections they believe are groundless, unfair, or fraudulent. While it is true that the evaluation is made *after* the execution of the performance, thus conflicting with the idea of the constant provision of managerial power, it could be said that the implicit threat of receiving a bad rating compresses the autonomy of the worker and governs his conduct.

### 2.1.5 Payment rewards for completed tasks.

It can be said that the jobs created are insecure and extremely low-paid, for most workers it is part of a piecemeal existence. In many cases, fares constantly fluctuate or are altered without workers having any say or control, making the overall remuneration hardly predictable <sup>(93)</sup>. Special attention merits the severe income instability, as "the system of remuneration and charging commissions often lacks clarity" <sup>(94)</sup>. Low and erratic incomes are justified by the fact that there is a pronounced oversupply of labour, leading some workers to cut their rates below what they consider reasonable.

Two are the main models when it comes to put a price on a web-enabled work performance: either the platform or the worker can set the payment rate, while – in almost all cases – the platform handles the payments. Moreover, it could be said that

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<sup>(88)</sup> WAAS B. (2017), *Crowdwork in Germany* in WAAS B., LIEBMAN W. B., LYUBARSKY A. and KEZUKA K., *Crowdwork – A Comparative Law Perspective*, Frankfurt, p. 154.

<sup>(89)</sup> FELSTINER A. (2011), *Working the Crowd: Employment and Labor Law in the Crowdsourcing Industry* in *Berkeley J. Emp. & Lab. L.*, 32, p. 153.

<sup>(90)</sup> See SILBERMAN M. S. and IRANI L. (2016), *Operating an Employer Reputation System: Lessons from Turkopticon, 2008-2015* in *Comp. Lab. L. & Pol'y J.*, 37(3), p. 505.

<sup>(91)</sup> The problem lies in the fact that algorithms might end up perpetuating human biases. See CHERRY M. A. (2016), *People Analytics and Invisible Labor* in *St. Louis U. L. J.*, 61, p. 12 (explaining how "if customer ratings are as vulnerable to bias as research suggests, it is likely that minority drivers will be more likely than white drivers to be deactivated, but the deactivation itself looks like an automatic event, divorced from a person with bias"). For a comprehensive review on "workforce analytics", see KIM P. T. (2017), *Data-driven discrimination at work* in *Wm. & Mary L. Rev.*, 58, pp. 857-936.

<sup>(92)</sup> See 3.A and 3.B.

<sup>(93)</sup> One of the latest examples is an application introduced by *UberEats*, which has cut the "trip reward" from initially £5 to £4 for weekday lunch and weekend dinner times, and to £3 for weekday dinner and weekend lunchtimes. See O'CONNOR S. (2016, September 8), *When your boss is an algorithm*, retrieved from <https://on.ft.com/2cJHEUA>.

<sup>(94)</sup> DE GROEN W. P. and MASELLI I. (2016), *The Impact of the Collaborative Economy on the Labour Market*, Centre for European Policy Studies, p. 10.



compensation on a piece-rate basis is the norm (by the job or even by the task, from cent amounts to two-digit euro sums) <sup>(95)</sup>. More rarely, performances are remunerated on an hourly basis, rarely with a "minimum rate" <sup>(96)</sup>. When work is charged by the hour, the monitoring activity is even more invasive. Accordingly, a relationship can be established between the qualitative nature of the work and the payment scheme. When prices are set by the platform, routine tasks have a fixed or variable fee and the fare is calculated on current market factors. The platform can sometimes use specific estimators. Contrariwise, creative activities are organised as a contest or a "lottery" where "even those who don't become 'winners' have to transfer all their intellectual property rights to the platform" <sup>(97)</sup>. In very few cases, rates of pay are negotiated between the individual worker and the client or workers can freely set and advertise a charge for specific activities.

With regard to food-delivery apps, two different payment structures can be found: a piece-based remuneration or an hourly based one. In the first case, understandably, workers are pushed to complete as many deliveries as possible within an hour, in a way increasing competition and diminishing the sense of solidarity among colleagues. In the second case, on top of a fixed hourly compensation, bonuses related to the number of completed deliveries can be assigned. Moreover, platforms such as *Uber*, which pays on a per trip basis, cuts their transaction fee after passing a certain number of rides. This incentive-based promotional system is aimed at encouraging drivers to stay online and available. Worse still, platform-coordinated workers are usually not allowed to solicit or accept tips: acceptance of gratuities cultural practices is inflexibly discouraged <sup>(98)</sup>. In order to circumvent such obstacles, workers and customers have started gaming the platforms: after a preliminary contact, they tend to interact directly, bypassing the intermediary.

Interestingly enough, *Amazon Mechanical Turk* pays out cash only to American and Indian bank accounts, being these the two main national communities of workers using such platform. More than ten years after it was started, if workers are based in a different state, they get paid in the form of credits or Amazon.com gift cards to be used on the e-commerce section of the same website. As a consequence, workers may only buy physical item and have to pay delivery charges – a win-win situation for the platform. On Clickworker, instead, when a certain amount is reached, money goes to the bank or to a personal *Paypal* account. Most workers work from 10 to 20 hours a week, earning about \$ 80 a month. Some workers who use the platform "full time" can reach 20-40 hours a week, amounting to a salary of \$ 200-750 a month. The average hourly pay is 2 euros. "Highly ranked" workers can get up to 6-8 euros per hour. As a result, stress and unpaid waiting time are the norm.

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<sup>(95)</sup> In general, the per-delivery rate is understood as a dramatic pay drop. Certain reports indicate that many crowdworkers are economically dependent on one or few platform companies they are simultaneously active on. For example, for approximately 40% of crowdworkers their work on *Amazon Mechanical Turk* is a full-time occupation. See MILLAND K. (2016), *Crowd Work: the Fury and the Fear* in FOUNDATION FOR EUROPEAN PROGRESSIVE STUDIES (FEPS), *The Digital Economy and the Single Market*, Brussels, Belgium, p. 84. See also EUROFOUND (2015), *New forms of employment*, Luxembourg, p. 115 (describing poor conditions of crowd workers: "research has, for example, shown that 25% of the tasks offered at Amazon Mechanical Turk are valued at €0.007, 70% offer €0.04 or less, and 90% pay less than €0.07. This is equals an hourly rate of around €1.44").

<sup>(96)</sup> In a most unusual way, the global free-lancing platform *Upwork* imposed a sort of "minimum rate" of 3 dollars per hour for all jobs, irrespective of the location of the performance. *Adtriboo*, a Spanish platform, applies a minimum or even fixed price for specific tasks on the basis of market prices and assumed number of hours spent for completing such a task. See FINCK M. (2017), *Digital Regulation: Designing a Supranational Legal Framework for the Platform Economy*, LSE Legal Studies Working Paper No. 15 (exhibiting a set of examples of self-regulation).

<sup>(97)</sup> DÄUBLER W. (2017), *Challenges to Labour Law* in PERULLI A. (Ed.), *L'idea di diritto del lavoro, oggi: In ricordo di Giorgio Ghezzi*, Padova, p. 485. In a different work, the author uses the expression "greyhound", see DÄUBLER W. and KLEBE, T. (2016), *Crowdwork: datore di lavoro in fuga?* in *Giorn. dir. lav. rel. ind.*, 3, p. 479 ff. (arguing that crowdwork represents the dawn of an unprecedented form of compensating subordinate work: contest with prizes).

<sup>(98)</sup> See WEINBERGER M. (2017, June 20), *Uber will finally let its drivers accept tips*, retrieved from <https://read.bi/2rRAaQU>.

Notwithstanding the above considerations, the levels of remuneration for virtual unskilled tasks appear particularly low when converted into hourly rates and compared with national averages for standard employment involving similar tasks. They also appear insufficient to serve as a primary source of income. The scale of employment associated with this type of work is currently limited. Apart from the risk of rejection, one of the main causes of complaint is delays in receiving payments. Other grievances underlying dissatisfaction mention the fact that payments are often lower than expected. Although the final fee is calculated according to the estimated average processing time as well as to the level of difficulty, or – for creative tasks – to the special skills required to fulfil the job, hidden extras may cause a significant reduction in the amount due. So, just in conclusion, several negative aspects need to be stressed: firstly, the total lack of transparency of criteria applied to payments, secondly, the absence of the minimum levels of payment (either hourly or per task) and, thirdly, the worrisome unpredictability of how much a worker may earn using a given platform.

### 3 Overview of the legal frameworks applying to labour platforms.

From a regulatory perspective, platform labour represents a “moving target”<sup>(99)</sup>. Building on the results of the wide-ranging investigation into concrete working conditions in three selected subsectors (passenger transport services, professional crowdsourcing, on-demand work at the client’s premises), the crucial question that now needs answering is whether the existing legal frameworks provide adequate responses to the current (digital) challenges. This dilemma encapsulates very well tensions underlying any discussion on working in the platform economy: is it sufficient that common statutory rules and standards are correctly applied or is there a need for new legislation? On this matter, boosters and naysayers have re-ignited a heated debate on the relationship between law and technological progress or, even better, on the ability of regulations to keep pace with various forms of innovation. Yet until very recently “*little systematic effort has been made to establish how existing regulations should apply*”<sup>(100)</sup>. Without taking position on the unnecessary dispute, the following paragraphs will map and highlight national requirements to comply with. One thing is sure: the claim that existing laws should be disapplied and new ones adopted to better support digital matching firms interests is weak<sup>(101)</sup>.

To begin with, in the fragmented European landscape, several indicators help to define the dimension of work associated with the platform economy. The stable proportion of self-employment in the EU (14.9% in 2015<sup>(102)</sup>) may serve as a proxy to determine the potential size of a contingent of workers ready to engage in this economic segment (a possible “*surplus population’ of workers*”). At the same time, both temporary contracts and self-employment grew, quite strongly in some Member States, between the mid-1990s and 2007. There is more. Despite the relatively tiny proportion of this class of workers, there was an increase in the share of self-employed people without employees (solo self-employed workers) between 2002 and 2015, while the composition of this group is changing – service sectors account for the largest portion of self-employed labour force<sup>(103)</sup>. Moreover, the percentage of workers taking up second jobs has augmented gradually thus expanding the same pool of workers: the majority of freelancers in OECD countries are “*slashers*” (workers with a portfolio of multiple activities to earn a living), as their contract work supplements another part-time or full-time position<sup>(104)</sup>. In spite of the differences among States, all these trends appear to pre-date slightly the advent of the collaborative economy; it is indeed a well-known fact that most digitally enabled companies were founded only in the last five to ten years.

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<sup>(99)</sup> GARBEN S. (2017), *Protecting Workers in the Online Platform Economy: An overview of regulatory and policy developments in the EU*, European Risk Observatory Discussion paper, p. 14.

<sup>(100)</sup> HUWS U. and JOYCE S. (2016), *The economic and social situation of crowd workers and their legal status in Europe*, op. cit., p. 4.

<sup>(101)</sup> DEAKIN S. and MARKOU C. (2017, September 25), *London Uber ban: regulators are finally catching up with technology*, retrieved from <https://goo.gl/fpgTMM>.

<sup>(102)</sup> Defined as “*the employment of employers, workers who work for themselves, members of producers’ co-operatives, and unpaid family workers. Employed people are those aged 15 or over who report that they have worked in gainful employment for at least one hour in the previous week or who had a job but were absent from work during the reference week*”. See <https://data.oecd.org/emp/self-employment-rate.htm#indicator-chart>. According to Eurostat, in 2016, 30.6 million people aged between 15 and 64 were self-employed in the EU. They accounted for 14% of total employment, see <https://goo.gl/yc7iCK>. See also EUROFOUND (2017), *Exploring self-employment in the European Union*, Publications Office of the European Union, Luxembourg (warning that the figure may seem “*to be in contrast with the current discourse on the rise of non-standard employment and selfemployment*”).

<sup>(103)</sup> Own-account workers (self-employed people without employees) amount to 10% of all employed, while employers (self-employed persons with at least one employee) take a share of 4.5% of total employment in Europe. Among the self-employed, one out of five could be classified as “dependent” in the light of their self-perceived and objective economic situation. For a complete picture, see EUROFOUND (2017), *Non-standard forms of employment: Recent trends and future prospects*, Dublin, p. 1.

<sup>(104)</sup> HUSSENOT A. (2017, August 21), *Why the future of work could lie in freelancing*, retrieved from <http://wef.ch/2vWWHPR>. In addition to this, it is important to note that most of these self-employed workers have no employees.

To put it bluntly, the very questions to be answered are: does an authentic loophole exist? How can this space of uncertainty be reduced to the benefit of the parties involved? Solving this dilemma is no minor matter. More recently, the European Parliament has called on the Commission “to publish guidelines on how Union law applies to the various types of platform business models in order, where necessary, to fill regulatory gaps in the area of employment and social security”. At first glance, it might seem that policymakers seem to have adopted a “wait-and-see” attitude so far, at least from a labour law perspective: this approach is to be welcomed as a wise choice, given the embryonic phase of this sector. Nevertheless, a number of episodic initiatives may be traced mostly concerning work on demand and transport services <sup>(105)</sup>. Conversely, much more has been said (and done) in the field of competition, tax and administrative law, particularly as regarding ride-hailing services such as *Uber* or, more in general, occasional services exchanged directly or through various intermediaries, including digital platforms <sup>(106)</sup>.

The truth is that some old issues gain new attention and conceivably importance in the age of digital transformation of work. It can be said that, from a legal point of view, “digital platform work” does not even exist. First of all, as explained in the previous sections, the modalities in which digitally enabled work is performed differ much from one another. While focusing on the “distribution channel” is convenient for academic purposes (even though it is not a legal criterion for distinction), regulating app-mediated work as an entirely unique category deserving “new notions, new concepts, new regulations” should be avoided: the design of specific legislation only targeting platforms makes little sense, at least in the area of labour law. Before going into the content of the third section of the report, it is important to clarify that there has been a little number of court cases around Europe providing insights on different topics yet. Thus this section will highlight national requirements and legal frameworks that may be adapted, using the already defined tripartite scheme to present collaborative economy services (peer-to-peer transport services, crowdsourcing, manual on-demand work via platform). Afterwards, the second paragraph will investigate the issues at hand in pending and potential lawsuits and their possible outcomes, largely looking into the vexed question of worker classification.

### **3.1 (European and) national requirements to comply with.**

It should be made clear that, from a purely legal point of view, “digital platform-enabled labour” does not even exist, in the sense that it is not “a sort of watertight dimension of the economy and the labour market” <sup>(107)</sup>. First of all, as explained in the previous sections, digitally enabled work patterns differ much from one another. What is more, the fact is that this intrinsic heterogeneity makes generalisation hazardous. While the wide-ranging description of working conditions in the “app economy” is becoming consistent and unambiguous – at least in academic research, there is no consensus on the legal

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<sup>(105)</sup> LENAERTS K., BEBLAVÝ M. and KILHOFFER Z. (2017), *Government Responses to the Platform Economy: Where do we stand?*, CEPS Policy Insights No. 30, p. 5 (claiming that “[i]n Europe, the most common approach taken by governments involves applying the legal, regulatory and policy frameworks that are already in place to the platform economy. In none of the countries studied is there a specific framework or guidelines covering the platform economy as such”).

<sup>(106)</sup> Some countries such as Finland have published guidance on the application of the national tax regime to the collaborative economy. Moreover, the Italian “Sharing Economy (Tax) Act” – which was simply brushed aside when it came to the actual discussion – introduced a “discounted” tax rate, with lower or no tax charged on income up to €10,000. See VAUGHAN R. and DAVERIO R. (2016), *Assessing the size and presence of the collaborative economy in Europe*. PwC UK, impulse paper for the European Commission. Two other significant experiences can be mentioned. For instance, in Belgium an act adds a new type of income related labour activities delivered via “registered platforms” (i.e. recognised by the Belgian federal government) below € 5,000 of annual income. A beneficial fiscal regime of 10% applies. Below this cut-off, no VAT or social contributions are charged. For income gained through accommodation, there are different rules (and then generally municipal taxes apply). In France, instead, in its 2014 annual digital report, the *Conseil d’Etat* proposed the creation of a platform-specific status requiring the renegotiation of Directive 2000/31/EC.

<sup>(107)</sup> DE STEFANO V. (2016), *The rise of the “just-in-time workforce”: On-demand work, crowdwork, and labor protection in the “gig economy”* in *Comp. Lab. L. & Pol’y J.*, 37(3), p. 472.

recipe for dealing with these issues. Scholars, commentators and lawmakers have conflicting views on the applicability of existing legal frameworks to digitally enabled platforms<sup>(108)</sup>. On the one hand, those who think that new realities of work have outgrown old-fashioned legal concepts, on the other, those who insist in making clear that the newness of platforms does not deserve or justify a special treatment. Boosters and naysayers have re-ignited a heated debate on the relationship between law and technological progress or, even better, on the ability of regulations to keep pace with transformational new realities. In the meantime, platforms have grown pretending not to be covered by already existing regulations<sup>(109)</sup>, "*their preferred tactic being that of the fait accompli*"<sup>(110)</sup>.

Only few European States have adopted explicit regulations to address the numerous issues stemming from the advent of the collaborative economy: the model is mercurial in nature and a hefty intervention may provoke its premature asphyxiation. Accordingly, before proposing universal or rather horizontal regulatory schemes, it would be useful to validate the appropriateness of existing labour legislations. According to the European Parliament, in fact, "*certain parts of the collaborative economy are covered by regulation at local and national level*"<sup>(111)</sup>, therefore member States are encouraged to "*step up enforcement of existing legislation*" by recurring to all available tools<sup>(112)</sup>. In the view of many scholars, "*[m]ethods need to be found of applying existing European directives and national legislation to work of this kind*"<sup>(113)</sup>. Taking note of the current state of play, which kind of rule could be applied to digital labour platforms? As already mentioned, it might be acknowledged that these arrangements often fall within the "extended family" of "non-standard forms of employment" which are even more frequently used to "*enable a firm to adjust to fluctuations in demand*" as well as for cost-saving reasons<sup>(114)</sup>. Typically, these forms imply a discontinuous and multilateral nature of the relationship and the concrete risk of work intensification. Conceived as a balanced instrument combining flexibility and security, they have largely been employed for unintended purposes, thus resulting in an escalation of precariousness leading to a detrimental race to the bottom.

If, for instance, platform-based labour is understood as a peculiar form of vulnerable (yet subordinate) work, then the feasibility of the application of the three directives regulating "atypical employment" to platform workers (namely, Part-Time Work<sup>(115)</sup>, Fixed-Term

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<sup>(108)</sup> SUNDARARAJAN A. (2017), *The Collaborative Economy: Socioeconomic, Regulatory and Policy Issues*, Directorate General for Internal Policies Policy Department, Economic And Scientific Policy, p. 7 (arguing that "*it is important to think beyond simply trying to retrofit old regulatory regimes onto the new models*").

<sup>(109)</sup> A Uber manager once admitted that the company, today in the seventh year of operation, didn't "*have the time to marinate on some of the basics as the focus has been on launching in more cities*". See *Uber drivers confront challenges working for a 'faceless boss'* (2017, June 9), retrieved from <https://goo.gl/WUFiK4>.

<sup>(110)</sup> DEGRYSE C. (2016), *Digitalisation of the economy and its impact on labour markets*, WP ETUI, No 2, pp. 15 and 35 (claiming that "*these [...] strategies are likely to have a major impact on the traditional payment and regulation models directly affecting workers*"). See also GRAHAM M., HJORTH I. and LEHDONVIRTA V. (2017), *Digital labour and development: impacts of global digital labour platforms and the gig economy on worker livelihoods* in *Transfer, European Review of Labour and Research*, 23(2), p. 153 (arguing that "*work tends to be performed outside of the purview of national governments: minimum wages, worker protections, and even taxes, seem to be optional rather than required for both the platforms and the clients that source work through them*").

<sup>(111)</sup> European Parliament resolution of 15 June 2017 on a European Agenda for the collaborative economy (2017/2003(INI)). Para. 14. Yet, it must be acknowledged that, in the section "Impact on labour market and workers' right", the Parliament demands, "*in a proactive way*", the modernisation of existing legislation and the reduction in regulatory gaps.

<sup>(112)</sup> European Parliament resolution of 15 June 2017 on a European Agenda for the collaborative economy (2017/2003(INI)). Para. 15.

<sup>(113)</sup> VALENDUC G. and VENDRAMIN P. (2016), *Work in the digital economy: sorting the old from the new*, WP ETUI, No. 3, p. 42.

<sup>(114)</sup> INTERNATIONAL LABOUR OFFICE – ILO (2016), *Non-standard employment around the world: Understanding challenges, shaping prospects*, Geneva, p. 159.

<sup>(115)</sup> Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on Part-time work concluded by UNICE, CEEP and the ETUC, OJ [1999] L14/9 (pursuing equality alongside the non-discrimination aims, the directive imposes comparable working conditions for full-time and part-time workers unless there is an objective justification for dissimilar treatment). For a comprehensive

Contract<sup>(116)</sup>, Temporary Agency Work<sup>(117)</sup>) should be assessed<sup>(118)</sup>. Broadly speaking, "each Directive reflects a trade-off between flexibility for employers to have recourse to these forms of contract, coupled with standards on the treatment of such workers"<sup>(119)</sup>. They were underpinned by the assumption workers engaged in non-standard employment should not see their working conditions limited by barriers erected on the basis of the form of employment. Interestingly enough, the aforementioned directives impose a prohibition of discrimination but also contain limits and provisions aimed at preventing the abuse of such forms<sup>(120)</sup>. Furthermore, one could claim the significance of standards regarding Undeclared Work<sup>(121)</sup>, Equal Pay<sup>(122)</sup> and Equal Treatment<sup>(123)</sup>. It can be said that the rationales behind these guidelines are now challenged by the increasing prevalence of ITC-enabled arrangements, thus needing to be updated and reviewed.

Another question to be addressed is whether, and to what extent, the Directive on Working Time<sup>(124)</sup> – offering a lot of flexibility in exchange for certain limits – may be used as regards the workers concerned. However, it has to be noted that workers who can determine the organisation of their own working time are not necessarily excluded from being in an employed relationship. Against this background, it has to be pointed out that the notion of working time is defined as an interval "during which the person gives

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assessment, see BELL M. (2011), *Achieving the Objectives of the Part-Time Work Directive? Revisiting the Part-Time Workers Regulations in Industrial Law Journal*, 40(3), pp. 254-279.

- <sup>(116)</sup> Council Directive 1999/70/EC of 28 June 1999 concerning the Framework Agreement on Fixed-term work concluded by ETUC, UNICE and CEEP, OJ [1999] L175/43 (the directive establishes a framework for the prevention of both abuse arising from the use of successive fixed-term contracts and discrimination against those working under fixed-term contracts). For a comparative analysis of the origins and evolution of legal regulations on fixed-term employment contract, see LUDERA-RUSZEL A. (2015), *Typical or Atypical: Reflections on the Atypical Forms of Employment Illustrated with the Example of a Fixed-Term Employment Contract-A Comparative Study of Selected European Countries in Comp. Lab. L. & Pol'y J.*, 37, pp. 407-445.
- <sup>(117)</sup> Directive 2008/14/EC of the European Parliament and the Council of 19 November 2008 on temporary agency work OJ [2008] L327/9 (allowing workers to fall under the scope of domestic definitions of "employees" or "workers" and qualify for stronger employment rights). See also EUROPEAN COMMISSION (2014), Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of directive 2008/104/EC on temporary agency work. COM(2014) 176 final, p. 19 (stating that the use of derogations to the principle of equal treatment could, in specific cases, "have led to a situation where the application of the Directive has no real effects upon the improvement of the protection of temporary agency workers").
- <sup>(118)</sup> The resolution of European Parliament urges the Commission to reinforce the implementation of already existing directives devoted to precarious employment in order to "the spread of socio-economic uncertainty and the deterioration of working conditions for many workers".
- <sup>(119)</sup> BELL M. (2012), *Between flexicurity and fundamental social rights: the EU directives on atypical work in European Law Review*, 37, p. 36 (wondering whether there is a fundamental social right to equal treatment for atypical workers). The principle of equal treatment contained in directive on Part-Time Work, Fixed-Term Contract, and Temporary Agency Work.
- <sup>(120)</sup> See Paragraph 5 of the Framework Agreement on Fixed-Term Work; art. 4(1) of Directive 2008/104/EC.
- <sup>(121)</sup> A type of undeclared work is "own account" or "self-employed work", where self-employed persons provide services either to a formal enterprise or to other clients, such as households.
- <sup>(122)</sup> Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women.
- <sup>(123)</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.
- <sup>(124)</sup> See RISAK M. (2017), *The scope of working time directive: perspective and challenges, A Thematic Working Paper for The Annual Conference of the European Centre of Expertise (ECE) in the field of labour law, employment and labour market policies: The Personal Scope of Labour Law in Times of Atypical Employment and Digitalisation* (arguing that "[those persons active in the virtual realms of the gig economy] are formally free to work what and when they choose – but this freedom may often be no more than formal 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"). It has been claimed that the WTD has been written "from the perspective of a standard worker is expected to work excessively long hours". For a comprehensive analysis, see DAVIES A. (2013), *Regulating Atypical Work: Beyond Equality* in COUNTOURIS N. and FREEDLAND M. (Eds.), *Resocialising Europe in a Time of Crisis*, Cambridge, UK, pp. 230-249. Interestingly enough, AMT warns its providers to "comply with all applicable laws and registration requirements, including those applicable to independent contractors and maximum working hours regulations".

up autonomy and is not free to determine its behaviour" <sup>(125)</sup>, a concept that somehow diverges from the basic structure of some of these alternative arrangements. At the same time, one could argue that, in most of the cases, the substantial conduct and the concrete situation of this group of workers approximates the one of employees, therefore the provisions of the directive shall apply by analogy. Nevertheless, the extension of the scope of the abovementioned regulation may be considered questionable, since "working time restrictions in the sense to forbid [workers] to work beyond a certain number of hours" <sup>(126)</sup> may prove to be to the detriment of this group, infringing the possibility to earn a decent wage, stay above the ranking thresholds, then be paid enough or be appointed in the future. Indeed, tracking all activities in order to enforce a regulation as such "would lead to a complete supervision of the individual and it would be incomplete because the time spent, e.g., in preparing work with electronic media, will be not included" <sup>(127)</sup>. As shown above, an extensive interpretation of the Directive may cause difficulties. In nearly all scenarios, its application is not entirely satisfactory, unless prompt action is taken to ensure scrupulous revision and reasonable enforcement.

### **Box 1. The Communication on the European agenda for the collaborative economy**

Rebutting the charge of ill-adapting pre-existing or out-dated legal arsenal and national regulations to this new mode of doing business <sup>(128)</sup>, starting from 2015, the European institutions have developed a framework for (collaborative) online platforms. This journey's milestones are several: after the adoption of the Single Market Strategy in October 2015, the Commission focused its attention on carrying out a public consultation, with the aim to gather the observations of various stakeholders including public authorities, scholars, entrepreneurs and individuals, and a valuable Eurobarometer survey <sup>(129)</sup>. Finally, two Communications on Online Platforms and on the Collaborative Economy were released between May and June 2016. Since the first is rather wide-ranging (it contains principles such as a level playing field for comparable digital services, responsible behaviour of online platforms, transparency, openness and non-discrimination) <sup>(130)</sup>, a hands-on analysis of the Agenda for the Collaborative Economy will be provided <sup>(131)</sup>.

<sup>(125)</sup> VERHULP E. (2017), *The Notion of 'Employee' in EU-Law and National Laws, A Thematic Working Paper for The Annual Conference of the European Centre of Expertise (ECE) in the field of labour law, employment and labour market policies: The Personal Scope of Labour Law in Times of Atypical Employment and Digitalisation*.

<sup>(126)</sup> RISAK, *ibidem*.

<sup>(127)</sup> DÄUBLER W., *Challenges To Labour Law* in PERULLI A. (Ed.), *L'idea di diritto del lavoro, oggi: In ricordo di Giorgio Ghezzi*, Padova, p. 497.

<sup>(128)</sup> HATZOPOULOS V. and ROMA S. (2017), *Caring for Sharing? The Collaborative Economy under EU Law in Common Market Law Review*, 54(1), p. 26.

<sup>(129)</sup> Flash Eurobarometer 438: *The use of collaborative platforms*, retrieved from [https://data.europa.eu/euodp/en/data/dataset/S2112\\_438\\_ENG](https://data.europa.eu/euodp/en/data/dataset/S2112_438_ENG)

<sup>(130)</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "A Digital Single Market Strategy for Europe" {SWD(2015) 100 final}. Brussels, 6.5.2015. COM(2015) 192 final. See BUSCH C., SCHULTE-NÖLKE H., WIEWIÓROWSKA-DOMAGALSKA A. and ZOLL F. (2016), *The Rise of the Platform Economy: A New Challenge for EU Consumer Law?* in *Journal of European Consumer and Market Law*, 1(6), p. 4 (soliciting the drafting of a Platform Directive since "EU consumer law does not adequately cover the growing number of three-party situations").

<sup>(131)</sup> This paragraph draws from ALOISI A. (forthcoming), *The role of European institutions in promoting decent work in the collaborative economy* in BRUGLIERI M. (Ed.), *Multi-disciplinary design of sharing services*, Milano.

A cornerstone of the Communication resides in the classification of activities. If the distinction between true and commercial sharing can easily be rooted in the switch between “compensation costs vs. *remuneration*”, regulators are constantly asked to distinguish between professionals and individuals who turn to the collaborative economy platforms on an occasional basis, when services are provided for free or at a price that barely covers costs. Experts suggest establishing a narrow set of criteria such as the frequency with which a service is rendered, the provider’s profit-seeking motive and the relevant payment <sup>(132)</sup>. Yet, the issue is far from being unravelled. Lines between categories are now increasingly tangled, and sometimes this uncertainty seems to be sought deliberately in order to avoid due legal compliance.

In the Communication, the supply of the “*underlying service*” is considered the criterion to establish which regulatory *corpus* should be applied to a given platform. In particular, this paragraph focuses on the multilayer analysis designed by the Commission and aimed at establishing whether a platform is operating in a “real world” sector, rather than as an ICT matchmaker. According to the document, if the platform provides the “underlying” service, in addition to the information society service one <sup>(133)</sup>, it should be subject to “*relevant sector-specific regulation, including business authorization and licensing requirements generally applied to service providers*”. To this extent, the provision of the “underlying service” has to be assessed in concrete by considering three key concurring elements: (i) the price-fixing activity; (ii) the setting of other contractual terms; (iii) the ownership of assets used to supply the service itself. Other criteria may be taken into account: for example, the fact that the platform incurs in the cost and assumes all the risk related to the service or whether an employment relationship exists with the worker. The conditions are not extremely stringent as, for instance, merely assisting the “ultimate” provider of the underlying service or arranging a ranking mechanism does not “*constitute proof of influence and control*”. When most criteria are met, there are vigorous indicators that the collaborative platform exercises a notable influence or control over the ultimate provider. As a consequence, the platform cannot be merely considered as the facilitator of the mere “intermediation service” <sup>(134)</sup>, absolved of its sectorial responsibilities. In Smorto’s words, as a first rule of thumb, when platforms exert a high level of control and influence over workers, “*they should be regarded as service providers; conversely, when platforms limit their activity to the matching of demand and supply, enabling peers to deliver the underlying services, they should be deemed as intermediaries*” <sup>(135)</sup>.

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<sup>(132)</sup> PETROPOULOS G. (2017), *An economic review of the collaborative economy*, Bruegel Policy Contribution, No 5.

<sup>(133)</sup> See Article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC.

<sup>(134)</sup> Moreover, if the platform does not just act as a broker (even as a “notice board” or a “virtual display”), but offers ancillary services, this cannot be read as a decisive index of influence or control over the underlying service.

<sup>(135)</sup> SMORTO G. (forthcoming), *Regulating (and self-regulating) the sharing economy in Europe: an overview* in BRUGLIERI M. (Ed.), *Multi-disciplinary design of sharing services*, Milano.



To move on to a different subject, it is crucial to scrutinise the analysis developed by the Commission and aimed at establishing whether a worker is employed by the platform. Equally noteworthy, the Communication refers to the notion of worker settled by the Court of Justice ("*...a person [who] for a certain period of time performs services for and under the direction of another person in return for which he receives remuneration*"). Three criteria need to be met in order to detect the existence of an employment relationship: (i) the existence of the subordination link; (ii) the performance of effective duties; (iii) the presence of remuneration. The clarification of the Commission is relevant to the extent of this analysis: the link of subordination can be described as the provision of the directive power by the platform, which determines the content of the activity (*i.e.* the scope of work), how the performance has to be accomplished and the form and level of the remuneration. It has to be underlined that management and control on a continuous basis is not decisive, as well as limited working hours or low rate of productivity are not enough to exclude the existence of an employment relationship. What is relevant is that an employment relationship can be identified, according to the OECD's assessment (<sup>136</sup>), when platform workers have no choice but to follow detailed instructions given by the operator, or when the latter utilises customer ratings to control or even "dismiss" providers. Taking a closer look, it is possible to connect this examination with the previous one on the provision of the underlying service. If so, the existence of an employment relationship would be sufficient to label the platform as a provider of the off-line equivalent service, thus enforcing compliance with sector specific requirements, in a circular way.

As for the nature of work and the presence of remuneration, the debate on how to set a threshold for distinguishing between peers (or amateur/occasional providers) and professional services providers is still intense. The European Commission support analysis (<sup>137</sup>) mentions different elements: annual turnover for transport services, the frequency of the activity (*i.e.* the services are offered regularly or marginally). The Parliamentary resolution corroborates this view invoking "*further guidelines on laying down effective criteria for distinguishing between peers and professionals*" (<sup>138</sup>). Taking a step backwards, in France, for instance, an act was passed defining a "social liability" of platforms towards (professional) self-employed workers. Due to this regulation, platforms are obliged to pay insurance against industrial accidents at the workplace and contributions to vocational training. In particular, a worker working for a certain amount of time acquires rights in the field of lifelong training and the platform must pay the contributions provided for by the legislation. Moreover, prior experience has to be validated in order to be portable. Since August 2016, unprecedented provisions have been introduced by the new Labour Code regarding "*workers obtaining work through digital platforms*". The Code extends to this group of freelancers individual and collective rights, including to strike and form or join a union. In Ireland, last year, a bill was passed allowing for self-employed people to collectively bargain (<sup>139</sup>).

The Communication concludes by advocating an intervention of Member States aimed at "*assessing the adequacy of national employment legislation*" in relation "*to the different needs of workers and self-employed individuals in the digital world as the innovative nature of collaborative business model*" and to "*provide guidance on the applicability of their national employment rules in light of labor patterns in the collaborative economy*" (<sup>140</sup>).

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(<sup>136</sup>) Other arguments rely on the "economic dependence" criterion, applicable to some providers.

(<sup>137</sup>) *Commission Staff Working Document, 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.*

(<sup>138</sup>) Paragraph 18. Paragraph 19, instead, demands "*appropriate dividing lines*".

(<sup>139</sup>) O'REGAN M. (2016, November 10), *Seanad passes Bill providing collective pay bargaining for self-employed*, retrieved from <https://goo.gl/whJaHP>.

(<sup>140</sup>) CAUFFMAN C. and SMITS J. (2016), *The sharing economy and the law: food for European lawyers in Maastricht Journal of European and Comparative Law*, 23(6), pp. 903-907.

### 3.1.1 Legal frameworks for casual work: on-call work, voucher-based, and zero-hours contracts.

Platform-based working templates can be labelled under the umbrella definition of app-driven casual arrangements, a subgroup of non-standard forms of work<sup>(141)</sup>, rather than under the self-employment category. In such arrangements "*the relationships is not stable and continuous, and the employer is not obliged to regularly provide the worker with work, but has the flexibility of calling them in on demand*", in the words of Eurofound<sup>(142)</sup>. It has to be noted that the concrete performances rendered in the context of crowdsourcing and work on demand via platform are collocated in a problematic area of business where informality (implying recruitment by word of mouth and cash payments), low wages and abuses are becoming increasingly frequent.

The "precarity" that originates from these arrangements is manifold. First, the very low guaranteed hours mean that the worker can hardly earn sufficient income under the contract. Second, while the intermittent (and unpredictable) nature of the hours provides a flexible tool to the employer/client<sup>(143)</sup>, the worker suffers from insecurity and instability. Since the employer only agrees to pay for work completed, not to make work available, the workers may have to wait for the next work order to materialise (what is called "spot labour market"), and are therefore prevented from organising their schedule ahead. Third, the fact that the employer can "adjust" the hours to the contractual minimum, according to her needs, without any constrain, closely resembles "*a situation where the worker can be dismissed without notice*"<sup>(144)</sup>. The combination of these vulnerabilities makes it "*exceedingly difficult for workers to enforce the few rights that do apply to them, as any challenge or inconvenience to the employer may lead to ad hoc termination*"<sup>(145)</sup>.

Non-standard working arrangements could be seen as part of the broader trend of "over-flexibilisation" of the labour market to the disadvantage of workers. This brief paragraph will try to present work on demand as a *species* of the *genus* of casual work which has been regulated in different ways throughout Europe. The common feature is the fact that in this arrangement employer can determine "*location and allocation of working time*" and the scope of the work to be done. In many cases, the performance is characterised by "*continuous employment relationship without continuous work*"<sup>(146)</sup>. Another shared characteristic is that employers, who are supposed to bear the economic risk, end up in shifting business risk on the workers. Despite the widespread factual complexity, work in the on-demand economy can be characterised as a set of digitally intermediated voucher-based contracts<sup>(147)</sup>. Far from being monolithic, this tool represents rather an "*organising principle of precarious work*", kind of a wide and various arrangement where

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<sup>(141)</sup> There is no universally accepted definition of NSFE. Note that Eurofound's list contains only "new forms of work" which is a narrower definition. EUROFOUND (2015), *New forms of employment*, Publications Office of the European Union, Luxembourg (conducting a "mapping exercise" resulting in the identification of nine distinct forms of employment as new – or of increasing importance – since 2000). See also EUROPEAN COMMISSION (2015), *Employment and Social Developments in Europe 2014*, Luxembourg; INTERNATIONAL LABOUR OFFICE (2016), *Non-standard employment around the world: Understanding challenges, shaping prospects*, p. 2; OECD (2016), *New forms of work in the digital economy*, Digital Economy Papers No. 260, p. 17.

<sup>(142)</sup> The pattern is the same as for so-called "zero-hours contracts" that imply no minimum number of working hours. It has to be admitted that the same report classifies a portion of digital labour platforms under the label of ICT-enabled work. See EUROFOUND (2015), *New forms of employment*, Publications Office of the European Union, Luxembourg, p. 46.

<sup>(143)</sup> EICHHORST W. and MARX P. (2015). *Introduction: an occupational perspective on non-standard employment* in ID. (Eds.), *Non-standard employment in post-industrial labour markets: an occupational perspective*, Cheltenham, UK and Northampton, MA, p. 5.

<sup>(144)</sup> GARBEN S., KILPATRICK C. and MUIR E. (2017), *Towards a European Pillar of Social Rights: upgrading the EU social acquis*, College of Europe Policy Brief, 1, pp. 4-5.

<sup>(145)</sup> *Ibid.*

<sup>(146)</sup> As explained in VALENDUC G. and VENDRAMIN P. (2016), *Work in the digital economy: sorting the old from the new*, WP ETUI, No. 3, p. 34.

<sup>(147)</sup> FREEDLAND M. R. and PRASSL J. (2017), *Employees, Workers, and the 'Sharing Economy': Changing Practices and Changing Concepts in the United Kingdom*, University of Oxford, Legal Research Paper Series, No 19.

workers are not guaranteed a fixed (or even any) number of hours in a given period and where, at least in theory, they are not obliged to accept any offers of work made by their employer/principal/client<sup>(148)</sup>. This controversial area needs to be addressed by European authorities in order to improve the situation of these workers.

Member states have inconsistent regulations for casual work, the Dutch model<sup>(149)</sup> and the British scheme<sup>(150)</sup>, being on two opposite ends of a spectrum. This legal format can be used to regulate arrangement in the work on demand via platform (at the household's premises) segment, but it may fail to regulate different activities. In The Netherlands, no minimum hours are assigned and voucher-based workers are paid only if actually worked. A minimum wage is guaranteed for on-call workers employed for less than 15 hours per week. Nevertheless, after three months, the worker (who has worked for a certain amount of time) must be guaranteed a minimum working hours on the basis of the average hours worked in the previous quarter; social partners may adapt, and in some cases alter, certain modules for a specific sector in a collective agreement. The aim of the law was to discourage the use of the on-call contract as a sham for what should be a SER. According to commentators, the Dutch experiment was successful.

Conversely, in the UK, zero-hours contract (ZHC) workers are not entitled to any pay if the employer cannot provide them with work. In this system, workers are not paid for their inactive time away from the workplace, while they receive remuneration for the time spent working or waiting at the employer's premises. In the UK, ZHC are considered as employment contracts only when: (i) an obligation to provide work personally is applied; (ii) employer and employee share a "mutuality of obligation"; (iii) the worker agrees to be under the "sufficient" control of the employer, either expressly or implicitly<sup>(151)</sup>. Nevertheless, it is very difficult "for an individual to acquire sufficient continuity of employment to qualify for significant employment rights, including unfair dismissal and redundancy protection which require two years of service"<sup>(152)</sup>. Dissimilarly, the Irish model can guarantee a certain degree of protection to workers, but such approach is not very widespread<sup>(153)</sup>. If a worker is not called at all in a given week, she is entitled to a compensation for the availability to be engaged amounting to a fraction of the contract hours (25% of the available hours, with a cap). Just like the platform labour arrangements, ZHCs have no specific legal status.

In France, a voucher-based scheme (the so-called "*chèque emploi service universel*") has existed since 1994, then modified in 2006 as for domestic work childcare. A very similar instrument was available in Italy until the beginning of 2017<sup>(154)</sup>: each "voucher" – easily purchasable – had a nominal value of 10 euros (7.50 for the worker and the remaining part allocated to the national system of social security and for health and

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<sup>(148)</sup> ADAMS A., FREEDLAND M. R. and PRASSL J. (2015), *The 'Zero-Hours Contract': Regulating Casual Work, or Legitimizing Precarity?*, in *Giornale di diritto del lavoro e di relazioni industriali*, 147, p. 529

<sup>(149)</sup> Introduced by the Flexibility and Security Act (FSA) in 1999.

<sup>(150)</sup> ADAMS Z. and DEAKIN S. (2014), *Re-regulating zero hours contracts*. Institute for Employment Rights, Liverpool.

<sup>(151)</sup> For a complete review of various tests, see BURCHELL B., DEAKIN S. and HONEY S. (1999), *The employment status of individuals in non-standard employment*, Department of Trade and Industry, London, p. 5 ff. and also p. 11 for other factors taken into account by courts.

<sup>(152)</sup> DEAKIN S. (2016), *New forms of employment: Implications for EU-law – The law as it stands* in WAAS B. (Ed.) *New forms of employment in Europe*, *Bulletin of comparative labour relations*, 94, Alphen aan den Rijn, The Netherlands, p. 49.

<sup>(153)</sup> For a complete overview, see O'SULLIVAN M., TURNER T., LAVELLE J., MACMAHON J., MURPHY C., RYAN L., GUNNIGLE P. and O'BRIEN M. (2017), *The role of the state in shaping zero hours work in an atypical liberal market economy* in *Economic and Industrial Democracy*, pp. 6-7 (arguing that "zero hours work is operationalised through an alternative type of contract – an 'If and When' contract").

<sup>(154)</sup> Moreover, according to Decreto Legislativo, 15 June 2015, no. 81, Arts. 13-18, two types of *contratto di lavoro intermittente* exist. Under the first type, the worker is not bound to accept calls, and the employer, to offer a minimum amount of work. In the second type, the worker undertakes to accept the calls. The employer still does not guarantee a minimum amount of hours but has to pay a monthly 'availability indemnity' for periods in which the worker is not called in. In case of a call, a minimum notice of one working day is required. See DE STEFANO V. (2016), *Casual Work beyond Casual Work in the EU: The Underground Casualisation of the European Workforce—And What to Do about it* in *European Labour Law Journal*, 7(3), p. 439.

safety and administrative purposes). The government had firstly liberalised their use in 2012 but, due to a worrisome increase in their usage, it had to set up limitations (400 working days for each employee over three years) and the duty to notify the local directorates of the Ministry of Labour via text message the precise time period of usage. Under the concrete threat of a referendum promoted by the central union organisation CGIL, the legislator repealed that provision. A new form of occasional jobs <sup>(155)</sup> has recently been introduced limiting the scope of application to certain clients and sectors. The Swedish homologous contract can be permanent or fixed term, with no guaranteed income. Similarly to the other national experiences, the employer is not obliged to pay for the inactive periods. Access to training and other benefits are regulated by each individual contract.

In Belgium, a similar template can be found under the label of “intermittent work” (so-called “*travail occasionnel*”). Designed in 2007 and revitalised in 2013, such short-term contracts of two consecutive days can be signed in order to deal with peak periods – with a cap of 50 days per year per single worker. An employer may take flexible measures for up to 100 days per year, contributing with a lump sum of €7.50 per hour in social security (up to €45 per day) <sup>(156)</sup>. The workers enjoy full social security rights as well as benefits afforded to standard employees in the same sector, and so have the same working conditions <sup>(157)</sup>. A new scheme devoted to domestic services (*titre-services*) has been launched at the beginning of 2004. At the same time, the Belgian legislator has somehow merged voucher-based work and temporary-work agency into a hybrid triangular formula tying a worker, an employer and a final user. Service voucher organisations need to be recognised by the Ministry of Labour in order to employ workers on a permanent or fixed-term, full-time or part-time basis. At least a quota of 13 hours with a unit price of 9 euros per week has to be mandatorily offered after the three initial months, and the contract has to be converted into a permanent one. The voucher organisation (public institutions, commercial businesses, temporary work agencies, private non-profit organisation) employs voucher workers for a maximum 500 hours per calendar year per client.

In Germany, “on-call worker” regulations curb the incidence of ZHC-style arrangements. Yet the so-called “mini-jobs” serve the same purpose, by “*provid[ing] work incentives for individuals with supposedly low earning potential*” <sup>(158)</sup>. Introduced as a form aimed at supporting marginal employment and formalising undeclared work, they are part-time forms of employment mainly used for domestic household workers whose monthly salary cannot exceed €450. Although employers belonging to all German industries are allowed to offer these contracts, the form is typical in fields such as catering and retail. “Mini-jobbers” are entitled to sick pay and annual leave and exempted from income tax payments, while employers’ social insurance contributions are considerably below those for equivalent regular jobs (the rate is around 14%). The number of daily and weekly working hours has to be specified. If not agreed otherwise, at least ten working hours per week or three hours per shift must be paid, regardless the number of hours worked <sup>(159)</sup>. Their classification is alternative to the employer-employee relationship, as long as the service provision does not exceed four working days per week – in most cases, falling within the scope of marginal part-time employment. A minimum wage is set, as well as benefits such as holiday allowances and paid sick leave are granted.

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<sup>(155)</sup> Act 24 April 2017, n. 50, transformed into Act 21 June 2017, n. 96.

<sup>(156)</sup> EUROFOUND (2017), *Non-standard forms of employment: Recent trends and future prospects*, op. cit., p. 49.

<sup>(157)</sup> See also EUROFOUND (2017), *Non-standard forms of employment: Recent trends and future prospects*, Dublin, p. 30 (explaining how this contractual form has been subsidised by the government and benefits from the standard labour regulations for the sector).

<sup>(158)</sup> On this point, see DEAKIN S. (2016), *New forms of employment: Implications for EU-law – The law as it stands* in WAAS B. (Ed.) *New forms of employment in Europe, Bulletin of comparative labour relations*, 94, Alphen aan den Rijn, The Netherlands, p. 52.

<sup>(159)</sup> Moreover, in the Netherlands, where zero hours clauses can only be concluded for the first 6 months of employment with the same employer, a special status for workers in the housework service sector has been introduced. See *Dienstverlening aan huis*; Service provision at home.

### 3.1.2 Sectorial analysis. Passenger transport service.

At first glance, this sector seems to have been caught up in the eye of the storm raging on the platform economy. Although outside of the scope of this report, issues related to competition law will be analysed briefly. There are substantially three reasons for such interest. First and foremost, peer to peer transport service companies – especially *Uber* – are considered the flagships of the whole “at-the-touch-of-a-button economy”, therefore regulations and decisions regarding this segment attract more attention and gain a bigger media impact. Secondly, this economic sector is (“heavily”) regulated at the national level – basically through a system of prior authorisations and licenses<sup>(160)</sup>. All complaints by incumbents aside, when *Uber* enters a (national) market, it is confronted by a broad array of requirements to be met. Thirdly, the only case ruled by the European Court of Justice (ECJ) concerns the legal regime applicable to the much-reviled ride-hailing service<sup>(161)</sup>. On Wednesday 20 December 2017, the Court took the view that the service provided by *UberPop* (the peer-to-peer service) is more than a matching activity connecting, by means of a digital app, a nonprofessional driver with riders. Rather it is a genuine transport service. Such a service must be excluded from the scope of the freedom to provide services in general as well as the directive on services in the internal market and the directive on electronic commerce<sup>(162)</sup>. As a consequence, the company must comply with rules governing traditional taxi services at the national level. It is important to review such regulations, imposing a prior authorisation<sup>(163)</sup>.

Looking at the requirements, it has to be highlighted that the current regulations for passenger transport services are rather restrictive. Barriers to market entry prevent new players from entering in several countries. For instance, in France, following the reform of the Transport Code, only taxicabs can inform users about the availability and location of cars in real time<sup>(164)</sup>, thus excluding platforms from exercising any organisational prerogative. In Spain, the Transport Code distinguishes between remunerated transport services and non-profit transport services<sup>(165)</sup>. In order not to be subject to authorisations, private transport must (i) be carried out for personal or domestic needs of the car owner and his or her relatives and (ii) not result in direct or indirect monetary remuneration. Likewise, in Germany, passenger transportation for commercial purposes is regulated but, in the event that the “*payment only covers the running costs of operating the vehicle*”, the law does not apply, as specified in the general provisions. Also in Denmark all of transportation services of persons for remuneration which goes beyond

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<sup>(160)</sup> The ILO Tripartite Sectorial Meeting on Safety and Health in the Road Transport Sector, held in Geneva in October 2015, adopted a resolution on transport network companies. The Resolution stressed “*the need for a level playing field which ensures that all transport network companies are covered by the same legal and regulatory framework as established for transport companies, in order to avoid a negative impact on job security, working conditions and road safety and to avoid an informalisation of the formal economy*” and “*the importance of decisions taken by competent authorities or judiciary in relation to self-proclaimed ‘ride-sharing’ for-reward transport platforms, to be fully implemented and enforced*”.

<sup>(161)</sup> *Asociación Profesional Élite Taxi v. Uber Systems Spain, S.L.* (Case C-434/15).

<sup>(162)</sup> Questions 3 and 4 refer to the services provided by *Uber Systems Spain*, even though *UberPop* is provided by *Uber BV*, while *Uber Systems Spain*’s activities being limited to marketing and support. Nevertheless, it is clear that the court refers to *Uber BV* (based in the Netherlands) rather than *Uber Systems Spain*. *Uber* failed in claiming that its *UberPop* service could be classified as a mere ICT service. It is worth noting that the ruling focused on the so-called peer-to-peer operations.

<sup>(163)</sup> In the ECJ’s words, “*as EU law currently stands, it is for the Member States to regulate the conditions under which intermediation services such as that at issue in the main proceedings are to be provided in conformity with the general rules of the FEU Treaty*” (§47). In a statement, the company claimed that it already operated under the transportation law of most Member States, and that the ruling might have little impact. At the same time, Member States might use this window of opportunity to update (sometimes obsolete) rules on urban public transport.

<sup>(164)</sup> *Uber*’s top management was accused of “deceptive commercial practices” and complicity in promoting an illegal taxi service. In 2016 the company had to pay a 1.2m fine on the grounds of unfair trade practices.

<sup>(165)</sup> In addition, a definition for ridesharing (“*co-voiturage*”) has been introduced referring to the use of a vehicle by a driver and one or several passengers, for non-profit (“*à titre non onéreux*”) except for cost compensation, in the context of a ride that the driver performs for its own account. The same article states that the matching of drivers and passengers (and thus intermediation services for ridesharing) may be done “*à titre onéreux*” (for remuneration) without the intermediary falling under the transport professions laid down in Article L. 1411-1 of the French Transport Code.

the direct cost coverage is to be considered a commercial activity<sup>(166)</sup>. As a consequence, many platforms would be subject to prior authorisation. It is fundamental to acknowledge that national courts in France, Belgium, Italy<sup>(167)</sup> and Germany have banned *Uber* peer-to-peer passenger transport services. In particular, several German courts stated that the technological platform (*i.e.* the software application) had to be considered "*as an integral part of an overall service which involves a transport service*". Therefore, *Uber* has been considered as an illegal provider of transport service directly affecting competition in that sector. Similarly, the Commercial Court of Brussels outlawed *UberPop*, which allowed non-licensed drivers to offer rides. Shortly after, *Uber* restricted its offer to the other versions, only relying on professional drivers, though this kind of license is very easy to obtain in the Belgian capital.

All the issues dealing with competition law implications will be not included in this report due to space constraints. Rather, what matters is the preliminary ruling that the CJEU issued in response to a request submitted by *Commercial Court No 3* of Barcelona<sup>(168)</sup>. The decision by the Luxembourg court defined the nature of the services provided by the *UberPop* application and, consequently, the applicable regulation. In brief, since *Uber* organises the service, sets rules for drivers, checks prices and fixes cars' quality standards, *UberPop* is not an information society service, but rather a transport service<sup>(169)</sup>. In May 2017 the Advocate General Szpunar released a non-binding opinion<sup>(170)</sup> stating that the service offered by *Uber* is a "composite" one since it comprises two main components: the one provided by electronic means and the other part essentially consisting in urban transport. The ECJ closely followed AG Szpunar's opinion. Two requirements are to be met for a composite service to be classified as falling within the concept of "information and society service", thus benefiting from liberalisation.

Firstly, the "material" activity has to be economically independent of the service rendered by electronic means and independently of the physical services (such as platforms for

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<sup>(166)</sup> Suffice here to observe that in Belgium, France, and Italy, *UberPop* – the service that allow private individuals without any requirements to become "drivers partners" – has been banned and therefore blocked. In these countries *Uber* can provide its *UberX* or *UberBlack* versions, by meeting a set of obligations including registration, insurance policies, training or a clean criminal background. *London: PwC UK*. In Spain, *Uber* was banned nationally in December 2014. VAUGHAN R. and DAVERIO R. (2016), *Assessing the size and presence of the collaborative economy in Europe*. PwC UK, impulse paper for the European Commission.

<sup>(167)</sup> *Tribunale di Milano* banned the *UberPop* app across Italy for unfair competition practices in May 2015. According to the court the service was a direct competitor of traditional taxi cooperatives. Although *Uber* is a private transport service, it has the same features as a taxi service. The service should not be treated as a mere car-sharing or car-pooling (since car owners do not share the costs of the drive to reach their personal destination). The app was therefore deemed comparable with an old-fashioned call centre while its pricing system is not subject to the rules governing the public taxi service, "*Uber fares are lower because its drivers do not have to bear the expenses incurred by the holders of a transport licence (such as the cost of installing meters, insurance and maintenance checks)*", the lack of authorisation and the non-regulated behaviour of *UberPop* drivers give them an unfair competitive advantage. A second decision by the Court of Milan stated that *UberBlack* service (licenced drivers) may also constitute "unfair competition" against PHV drivers who have to return to a garage in between rides. See DONINI A. (2016), *Regole della concorrenza e attività di lavoro nella on demand economy: brevi riflessioni sulla vicenda Uber, nota a Trib. Milano, sez. spec. impresa, ord. 9 luglio 2015 in RIDL, II, p. 46*. Similar observations were made in *Tribunale di Torino, Sez. spec. impresa, sentenza 24/3/2017, n. 1553 and Tribunale di Roma, S. spec. impresa, ordinanza 7/4/2017* (then reversed). For a complete review, including a focus on *Uber's* liability towards passengers and third parties, see DI AMATO A. (2016), *Uber and the Sharing Economy in Italian L.J.*, 2, p. 177.

<sup>(168)</sup> Case C 434/15 *Asociación Profesional Elite Taxi v. Uber Systems Spain SL* (Request for a preliminary ruling from the *Juzgado de lo Mercantil No 3 de Barcelona* (Commercial Court No 3 of Barcelona, Spain)). Questions 3 and 4 refer to the services provided by *Uber Systems Spain*, even though *UberPop* is provided by *Uber BV*, while *Uber Systems Spain's* activities being limited to marketing and support. Nevertheless, it is clear that the court refers to *Uber BV* (based in the Netherlands) rather than *Uber Systems Spain*. Accordingly, the question arising is "*whether restrictions in one Member State [pertaining] the freedom to provide electronic intermediary service from another Member State*".

<sup>(169)</sup> GENNA I. (2017, December 20), *The European court stops UberPop, not Uber. A new legislation for digital start-ups is needed*, retrieved from <https://goo.gl/kkNZ52> (arguing that "[t]he principles stated by the court may become far restrictive for innovative digital services rendered by such non professional workers, since it requires them to be subject to the general legislation of the sector (if any)").

<sup>(170)</sup> However, statistics show that in 80% of the cases the court substantially confirms the legal solution suggested by the Advocate General. See also SCOTT M. (2017, May 11), *Uber Suffers Bloody Nose in Its Fight to Conquer Europe*, retrieved from <https://nyti.ms/2pAaM0U>.

airline tickets or hotel reservations), secondly, the provider has to supply the service as a unique entity or to exert a significant influence over the conditions of the electronic service (the prevailing part). The observations of the Advocate General seem to follow settled case law on the intrinsic connection between the two activities. In the end, the digital infrastructure would not exist without the singular rides. Accordingly, *Uber* is not considered to be a mere matchmaking intermediary (comparable to a “broker”) between drivers and passengers, but rather “a genuine organiser and operator of urban transport”<sup>(171)</sup>.

As a direct consequence, it does not fall under the scope of the principle of the freedom to provide services in the context of the information society services, in the sense of Directive on electronic commerce. It should be noted that many scholars suggest a similar interpretation, according to which platforms like *Uber* “are directly involved in the provision of the transportation service and are unlikely to qualify as mere providers of online services”<sup>(172)</sup> since their conditions on cars, facilities, and prices, and should thereby be considered a supplier of transportation services. It is also undeniable that this allegation is sufficiently substantiated by the fact that *Uber* creates added value providing rides and exerting significant indirect control over how drivers perform their jobs<sup>(173)</sup>. *Uber* should be considered as a supplier of transportation services<sup>(174)</sup>. Accordingly, if the platform under scrutiny should offer a tangible service, demonstrating the intense command power could be even easier. Although the issue relating to workers’ classification is extraneous to the subject of the opinion, many of the arguments used could be read in the sense of considering them as employees rather than contractors before a national court. As a consequence, such conduct potentially infringes both competition and employment legislations.

Apart from this consideration, it can be said that the opinion reflects the passages used by the British Tribunal in 2016<sup>(175)</sup> and by several American courts before<sup>(176)</sup>. It sheds a light on the concrete relationship between the eponym platform and drivers using the app, or better the application programming interfaces, as their “main professional activity”. The mechanism is brilliantly presented: “*Uber informs drivers of where and when they can rely on there being a high volume of trips and/or preferential fares. Thus, without exerting any formal constraints over drivers, Uber is able to tailor its supply to fluctuations in demand*”. The Advocate couldn’t have been clearer describing the rating system: “*Uber therefore exerts control, albeit indirect, over the quality of the services provided by drivers*”. Again, it is important to stress the fact that the opinion is not aimed at investigating working conditions, and distances himself from dealing with the (mis)classification issue, denying that the intrusive control is “exercised in the context of a traditional employer-employee relationship”. Nevertheless, the same arguments – used

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<sup>(171)</sup> “The moment we shift our analytical focus to *Uber*’s exercise of employer functions, on the other hand, it becomes clear that the platform does in fact exercise all relevant employer functions usually involved in the provision of transportation or logistics services”. See PRASSL J. and RISAK M. (2016), *Uber, Taskrabbit, and Co.: Platforms as Employers – Rethinking the Legal Analysis of Crowdwork in Comp. Lab. L. & Pol’y J.*, 37(3), p. 637.

<sup>(172)</sup> HATZOPOULOS V. and ROMA S. (2017), *Caring for Sharing? The Collaborative Economy under EU Law*, Common Market Law Review, 54(1), p. 97.

<sup>(173)</sup> “Through tools such as dynamic, algorithmic pricing and a number of other elements of the *Uber* application’s design, *Uber* is empowered via information and power asymmetries to effect conditions of soft control, affective labor, and gamified patterns of worker engagement on its drivers” according to ROSENBLAT A. and STARK L. (2016), *Algorithmic Labor and Information Asymmetries: A Case Study of *Uber*’s Drivers in International Journal of Communication*, 10(27), p. 3759.

<sup>(174)</sup> “*Uber* exercises decisive influence over the conditions under which that service is provided by those drivers”, Case C-434/15, § 39.

<sup>(175)</sup> Employment Tribunal, *Mr. Y. Aslam, Mr. J. Farrar and Others v Uber*, Case Numbers: 2202551/2015 & Others, 28 October 2016. At the time of writing, the ruling is undergoing scrutiny by a higher court.

<sup>(176)</sup> United States District Court, Northern District of California, *O’Connor et al. v. Uber Technologies, Inc.*, et al., Order Denying Cross-Motion for Summary Judgement, 11 March 2015; United States District Court, Northern District of California, *Cotter et al. v. Lyft Inc.*, Order Denying Cross-Motion for Summary Judgement, 11 March 2015. As to the case, it should be noted that it was “filed in northern California – a jurisdiction with both an expansive legal definition of employee<sup>12</sup> and potentially sympathetic judges and jurors”. See DUBAL V. B. (2017), *Winning the Battle, Losing the War?: Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy in Wisconsin Law Review*, (4), p. 743.

before a Labour Court – may prove the existence of a subordination link (“*indirect control such as that exercised by Uber, based on financial incentives and decentralised passenger-led ratings, with a scale effect, makes it possible to manage in a way that is just as – if not more – effective than management based on formal orders given by an employer to his employees and direct control over the carrying out of such orders*”). This is why such comment is much more significant than the mere legal situation at hand.

### 3.1.3 Sectorial analysis. Online crowdsourcing.

As a matter of fact, online piecework and crowdsourcing are overlapping but distinguishable concepts, the difference being centred on the size of the tasks. To sum up, the contractual scheme allows the engagement of “*a large, distributed, global labor pool of remote workers*” to whom tasks can be commissioned<sup>(177)</sup>. It can be said that online crowdsourcing is the most elusive segment of collaborative economy. To date, perhaps not surprisingly, there are no tailored regulations governing these workers. Being perhaps the most genuinely unprecedented segment of this phenomenon, it has not been captured by the legislator yet. The online labour market for professional activities is more sensitive to the intervention of the lawmaker – particularly in those areas where specific restrictions and charges set by professional bodies and associations apply.

More in general, and in addition to those enumerated in the previous sections, one can list several concerns regarding remotely provided services including the need to safely use ergonomics office tools and display screens or taking a break during long shifts<sup>(178)</sup>, in order to avoid stress and postural disorders. As is well known, prolonged use of laptops or smartphones or the fact that a worker has to work at an unconformable, overcrowded or dangerous workplace, whether domestic or “shared” in co-working spaces, may determine severe consequences. Yet, the European Framework Agreement on Telework, signed by the social partners in July 2002, cannot be applied to these performances, at least in theory, as it has been designed “*in the context of an employment contract/relationship*” (Art. 2)<sup>(179)</sup>. Much the same goes for the Directive on Health and Safety in Fixed-Term and Temporary Employment (91/383/EEC)<sup>(180)</sup>. A point of contention with respect to including platform workers under the scope of the aforementioned regulations is likely to revolve around the interpretation of legal status of the worker, since these relationships do not qualify as either an employment contract or a contract that creates an employment relationship. In Spain, the Netherlands and the United Kingdom collaborative workers need to register with the tax authorities/social security funds. Also, workers need to keep records of their earnings made through platforms and track their expenses. In France, the same registration is compulsory and expenses are deductible. In other countries, such as Germany and Italy, workers are not required to register when providing services through collaborative platforms.

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<sup>(177)</sup> According to Wexler, quoted by Eurofound, The process can be divided into different main stages: the client (i) identifies a challenge or an opportunity, (ii) launches a call specifying instructions, rules and expectations, (iii) collects proposals from the crowd, (iv) selects the proposal deemed most suitable for the intended purpose, (v) understands “*how to best to use the loyalty of those drawn to a competition once it is over*”. See WEXLER M. N. (2011), *Reconfiguring the sociology of the crowd: Exploring crowdsourcing in International Journal of Sociology and Social Policy*, 31(1/2), pp. 6-20.

<sup>(178)</sup> EC Directive 90/270/EEC refers, among others, to “*computer systems on board a means of transport*”, “*portable systems [...] at a workstation, typewriters*”. In this case, the Directive states that employers (emphasis added) are obliged “*to perform an analysis of workstations in order to evaluate the safety and health conditions to which they give rise for their workers, particularly as regards possible risks to eyesight, physical problems and problems of mental stress*”. As a consequence, they are obliged to “*take appropriate measures to remedy the risks found*”.

<sup>(179)</sup> See <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:c10131&from=EN>

<sup>(180)</sup> The directive ensures the same level of protection to fixed-term and agency workers as to other employees, moreover it imposes an adequate procedure of information and training as well as appropriate medical surveillance to protect workers’ safety and health. See <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:01991L0383-20070628>



### 3.1.3.1 Platforms as temporary work agencies, an "indirect" approach.

The Parliamentary Resolution has recommended "to examine how far the Directive on Temporary Agency Work (2008/104/EC) is applicable to specific online platforms" <sup>(181)</sup>. It is not crystal clear whether the document refers to the whole collaborative ecosystem, as the expression "online platform" can be interpreted in different ways. The Parliament explains that "many intermediating online platforms [as] structurally similar to temporary work agencies (triangular contractual relationship between: temporary agency worker/platform worker; temporary work agency/online platform; user undertaking/client)". Other scholars have proposed an analogous intervention, mostly focusing on knowledge based work exchanged via digital platforms <sup>(182)</sup>. If it is undeniable, as rightly pointed out, that the relationship between players can be described as tripartite – and the role of the platform can be likened to that played by a "broker" – the fully-fledged or automatic application of the European Directive raises more problems. As a matter of fact, it has to be noted that the power to supervise and control the individuals' performance execution is sometimes shared between the final user (private citizens, families or firms) and the platforms matching professional or amateur freelancers with clients. However, it is recalled that this arrangement postulates the existence of two different contracts: a commercial one binding the agency and the final user and an employment one between the agency and the worker.

Nevertheless, the concept of "temporary agency worker" can be "applied not only to workers who have concluded a contract of employment with a temporary-work agency, but also to those who have an 'employment relationship' with such an undertaking" <sup>(183)</sup>. Such employment relationship is characterised by the fact that a person performs services for, and under the direction of, another person for a certain period of time in exchange for remuneration. In particular, the ECJ has somewhat enlarged the scope of the Directive by establishing that, while member states have the competence to define the notion of "worker" under national law <sup>(184)</sup>, the same cannot be said of that concept for the purposes of the Directive that would be otherwise undermined. Building on this interpretation, other scholars have proposed the application of the temporary work agency scheme also to platform-mediated labour, when the requester (i.e. the client) is a

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<sup>(181)</sup> OJ L 327, 5.12.2008, p. 9.

<sup>(182)</sup> A Discussion Draft of a Directive on Online Intermediary Platforms has been proposed by a European network of scholars and published in April 2016 taking the triangle-relation as the qualifying element to distinguish a platform. See BUSCH C., DANNEMANN G., SCHULTE-NÖLKE H., WIEWIÓROWSKA-DOMAGALSKA A. and ZOLL F. (2016), *Discussion Draft of a Directive on Online Intermediary Platforms in Journal of European Consumer and Market Law*, 5, p. 164-169. The text of the Discussion Draft is available at: <https://goo.gl/Tsxke9>. See also KINGSLEY S. C., GRAY M. L. and SURI S. (2014), *Monopsony and the crowd: Labor for lemons in Internet, Politics, & Policy 2014 Conference*, Oxford, UK, pp. 18-19. According to Kezuka, the online freelancing platform Upwork represents "a prototype of a platform that competes with the traditional staffing agency (or direct employment) model by matching individuals with contingent or freelance projects". See KEZUKA K. (2017), *Crowdwork and the Law in Japan* in WAAS B., LIEBMAN W. B., LYUBARSKY A. and KEZUKA K. (Eds.), *Crowdwork—A Comparative Law Perspective*, Frankfurt. In order to ensure the protection of crowdworkers and to improve the quality of crowdwork, Temporary Agency Work Directive 2008/104/ EC and its transposition have been used as a model for the creation of a special legislative act dealing with platform labour: "a core provision might thus be – as in the case of artwork (Art. 5 of Directive 2008/104/EC) – a principle of equal treatment with a corporate customers' existing workforce, to ensure that jobs are not crowdsourced just for the sake of contravening minimum wage and other employment provisions. The basic working and employment conditions of crowdworkers shall therefore be for the duration of working on tasks or—if the general availability is part of the business model like in the case of Uber in the United Kingdom—at least those that would apply if they had been recruited directly by the crowdsourcer to occupy the same job. This would also establish the equal treatment of temporary agency workers and avoid the circumvention of the laws protecting them by switching over to crowdsourcing. It should be noted, however, that this equal-treatment-approach very likely only works in cases where the crowdworker is actually working for a business that would otherwise employ an employee and that actually crowdsourced labor". See PRASSL J. and RISAK M. (2017), *The Legal Protection of Crowdworkers: Four Avenues for Workers' Rights in the Virtual Realm* in MEIL P. and KIROV V. (Eds.), *Policy Implications of Virtual Work*, London, pp. 290-291.

<sup>(183)</sup> *Betriebsrat de Ruhrländklinik gGmbH v Ruhrländklinik gGmbH* (C-216/15) <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62015CJ0216&from=EN>

<sup>(184)</sup> In general, European social policy has been limited, due to the "unanimity requirement" for adopting legislative acts.

commercial business. Although this working hypothesis does not reflect current market conditions, it should be taken into consideration despite its difficult and controversial feasibility <sup>(185)</sup>.

### **3.1.4 Sectorial analysis. Work on demand via platform (at the household's premises).**

To begin with, it is worth emphasising that the vast majority of tasks exchanged through platform or app has nothing "disruptive" in their concrete execution (one needs to think only of, for example, assembling furniture, cleaning an apartment or caring for the elders) <sup>(186)</sup>. Such platforms represent an "outlet for pre-existing abilities" and specified tasks which are carried out locally, with the service purchaser and provider based in the same physical area. Much of the work in the sectors of household chores (such as nannies, cleaners and caregivers) has changed little over decades <sup>(187)</sup>. Paradoxically, ITC-enabled arrangements are suspiciously reminiscent of what the labour market has experimented in bygone times <sup>(188)</sup>. Consequently, on-demand household services (as defined in the first paragraph of this research) can be simply considered as "*twenty-first century casual work rebranded*".

The good thing is that platforms have the potential to reduce the informal sector by offering formal schemes for low-productivity jobs in sectors particularly prone to undeclared work (often been paid in cash, off the books) such as domestic housework services, personal services, private security, industrial cleaning, agriculture and hotel or food industry. Legal implications of this model should not be treated lightly since the combination between the displacement of work in many sectors of the economy and the increase in the need for home-based care and services <sup>(189)</sup> due to demographic reasons could make jobs such as home help "*the single largest occupation in the economy by 2030*" <sup>(190)</sup>.

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<sup>(185)</sup> For an updated comparative analysis of the regulation of temporary agency work at a supranational European level, see COUNTOURIS N., DEAKIN S., FREEDLAND M., KOUKIADAKI A. and PRASSL J. (2016), *Report on temporary employment agencies and temporary agency work: A comparative analysis of the law on temporary work agencies and the social and economic implications of temporary work in 13 European countries*, Geneva (clarifying how "temporary agency work can constitute a potential stepping stone for so-called labour market entrants, as well as [...] a 'trap' in the sense of leading to an overall downgrading of working conditions").

<sup>(186)</sup> A dissonance between narratives and reality is worth mentioning. And, while cell phone apps and online markets for work may be new, the roles of driver, cleaner, and errand runner are well-established. The tasks that these workers perform are by no means new jobs, even if these jobs are enabled, enhanced, or made more efficient by technology. See CHERRY M. A. (2016), *Beyond Misclassification: The Digital Transformation of Work in Comp. Lab. L. & Pol'y J.*, 37(3), p. 587.

<sup>(187)</sup> FARVAQUE N. (2015), *Thematic review on personal and household services*, EEPO, European Commission, p. 9 (mapping the variety of employment models). See also Commission Staff Working Document on exploiting the employment potential of the personal and household services, SWD (2012) 95 final.

<sup>(188)</sup> See also TOMASSETTI J. (2016), *Does Uber redefine the firm? The postindustrial corporation and advanced information technology in Hofstra Lab. & Emp. L. J.*, 34, p. 31 (explaining how, "despite their seductiveness, the self-definition as a mere tech firm is correct if referred to the "mechanics" of the operation rather than on the substance".)

<sup>(189)</sup> According to many commentators, "*the existing evidence base suggests growth in these services has been exponential within and across countries*". For a comprehensive analysis of how on-demand domestic work platforms operate in different developing country contexts, and the experiences of domestic workers and services purchasers who have engaged with them, see HUNT A. and MACHINGURA F. (2016), *A good gig? The rise of on-demand domestic work*, Overseas Development Institute Working Paper No. 7, p. 20 (suggesting that "*the engagement of domestic workers as independent contractors could undo progress in the formalisation of domestic work by diminishing legal rights and protections where they currently exist*").

<sup>(190)</sup> POO A. (2017), *Out from the shadows: domestic workers speak in the United States* in GAROFALO GEYMONAT G., MARCHETTI S. and KYRITSIS P. (Eds.), *Domestic workers speak a global fight for rights and recognition*, p. 21.

## 4 Issues at stake and potential outcomes from key litigation cases.

The employment status issue is fundamental in order to solve the other ones. In brief, it has been claimed that current labour law framework is not aptly suited to govern new working patterns and should be revised, either on legislative <sup>(191)</sup> or interpretative level. Against this background, the vast majority of labour lawyers have concentrated their research on the issue of platform workers' classification into either of the existing categories of employees or self-employed workers <sup>(192)</sup>. Since the dawn of the platform economy, scholars and lawmakers have been striving to find a viable solution to numerous complex challenges that this new organisational model poses to the legal system: the classification of platform workers, the demarcation of the relevant market, and the nature of the service provided by online intermediaries, to name but a few.

Accordingly, this section will investigate the issues at hand in pending and potential lawsuits and their possible outcomes, largely looking into the vexed question of worker classification. Indeed, *"the status of the crowd is, perhaps, the thorniest issue of all"* <sup>(193)</sup> affecting individuals but also employers seeking to implement new working practices. Europe can be considered a relatively uncharted territory in particular when it comes to litigation cases in the field of labour law. However, this does not mean that workers' classification is not an issue of genuine relevance. A number of different dynamics may have led to this situation. First and foremost, despite the current ascent phase in the development of collaborative economy, the diffusion of these digital infrastructures is still relatively limited. Unfortunately, many workers – especially those in a vulnerable or isolated situation – are unaware of the lack of compliance with labour law provisions that could be invoked in their favour and, additionally, they are not really in a position to join forces due to the competitive nature of their relations (also with one another) or to the subjection to the employer's volatile will. Moreover, in certain cases, the delimitation of the areas of "contract for service" and "contract of service" has regularly posed practical difficulties and still represents a subject under constant debate. One could comment that the platform economy has ossified a relatively old policy and judicial concern. As observed, already existing problems gain new attention and visibility – it is glaringly obvious the reference to the role of new media in denouncing indecent conditions, now more than ever. While it is true that a whole different level of exposure has recently been reached, there is no denying that labour platforms have added new dimensions to stratified issues, and it would be erroneous to consider this entire phenomenon as an astonishing *"déjà vu"*.

Whilst dealing with antitrust issues, the ECJ ruling in C-434/15 <sup>(194)</sup> is one of the most important contributions one may refer to when analysing the judicial interventions

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<sup>(191)</sup> It has been proposed to create an intermediary, third category of workers, that would be specifically suited for crowdworkers. HARRIS S. D. and KRUEGER A. B. (2015), *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker", Hamilton Project, Brookings* (according to the proposal cornering the U.S.A. system, such "independent workers" would gain rights to organise and bargain collectively under the NLRA and would also gain anti-discrimination protections. However, the Hamilton project proposal excludes payment for overtime and minimum wage arrangements). See also KENNEDY J. V. (2016), *Three Paths to Update Labor Law for the Gig Economy, Information Technology & Innovation Foundation*.

<sup>(192)</sup> See CHERRY M. A. (2016), *Beyond Misclassification: The Digital Transformation of Work in Comp. Lab. L. & Pol'y J.*, 37(3), p. 579 ff. (providing a "temporal snapshot" of current on-demand worker litigation in the United States).

<sup>(193)</sup> HUWS U. (2016), *New forms of platform employment* in FOUNDATION FOR EUROPEAN PROGRESSIVE STUDIES (FEPS), *The Digital Economy and the Single Market*, Brussels, p. 65.

<sup>(194)</sup> In general, it could be said that, if a platform exercises a significant organisational power over the underlying service, it has to be considered a provider of the concrete service, rather than a mere matchmaking system. As a result, the principles stated by the ECJ in C-434/15 can be considered restrictive for services rendered by non-professional workers, since it requires them to be subject to the general legislation of the relevant sector (if any). The AG Szpunar has reiterated this point in the Opinion in Case C-320/16, confirming that *"the UberPop service falls within the field of transport and, consequently, does not constitute an information society service within the meaning of the directive"*. See <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-07/cp170072en.pdf>.

regarding the collaborative economy at the European level. In UK grassroots organisations such as *IGWB* (which stands for “Independent Workers Union of Great Britain”) have started promoting lawsuits claiming the improper classification of gig-workers and achieving remarkable victories <sup>(195)</sup>. The same is with a landmark case before the Employment Tribunal that has stated that drivers working for *Uber* in London had to be considered workers and not self-employed within the meaning of the Employment Rights Act <sup>(196)</sup>. The first *caveat* is not a legal, but a more significant one. Besides uncertainty, these lawsuits require hefty investments in time and money, thus discouraging any initiative. As a consequence, they cannot be considered the only tactic aimed at restoring workers’ rights unilaterally denied. Literature has nonetheless casted doubt on the potential of these very preliminary decisions. The second warning is that every litigation is made on a case-by-case basis, therefore the solution depends on the concrete facts and cannot be used but between the parties. There is no general application, although it could be said that consistent case law may impose a particular view on this issue. As a result, what applies to one situation does not necessarily have any implications for those workers working for other platform with, paradoxically, very similar business model.

The case *Aaslam Y. & Farrar J. against Uber* is insightful in this regard. Although it was called a major victory determining a profound advance of employment rights into the realm of the platform economy, the decision *only* concerns unmeasured work <sup>(197)</sup>. Accordingly, working time is to be calculated in accordance with Work Time Regulation <sup>(198)</sup> and the working hours are to be reckoned in accordance with the National Minimum Wage Regulations. In France <sup>(199)</sup>, a judgement of the *Conseil des Prud’hommes de Paris* on December 20, 2016 has qualified the relation between a private-hire driver (“*voiture de transport avec chauffeur*”) and a digital platform (*Le Cab* <sup>(200)</sup>) as that of an employment contract in the light of the exclusivity clause which prevented the driver from using other platforms or to serve a customer on his own <sup>(201)</sup>. In particular, “*les contraintes excessives qui lui étaient imposées*” compromise the autonomy commonly enjoyed by a contractor thus leading to the reclassification <sup>(202)</sup>. The judgement gives rise to unnecessary ambiguity because it could be interpreted in two opposing ways. In particular, what if a platform exercises substantial control power but does not impose an exclusivity clause? For the sake of completeness, the tribunal asserted that “*the status of*

<sup>(195)</sup> *First gig-economy company to admit to unlawfully classifying its couriers as independent contractors* (2017, May 12), retrieved from <https://goo.gl/A8VFDk>; *NHS blood service admits couriers are “workers”* (2017, June 30), retrieved from <https://goo.gl/g9yGDZ>.

<sup>(196)</sup> Employment Tribunal, *Mr Y Aslam, Mr J Farrar and Others v Uber*, Case Numbers: 2202551/2015 & Others, 28 October 2016.

<sup>(197)</sup> Although the Tribunal judgment only applies to the two drivers who brought the case, the doctrine of precedent in common law may reinforce this outcome.

<sup>(198)</sup> Employment Rights Act 1996, s 230(3) (b), the Working Time Regulations 1998, reg 36 (1) and the National Minimum Wage Act, s 54(3). The Working Time Regulations 1998, reg 2 (1).

<sup>(199)</sup> The scope of a new legal framework should be broad enough to cope with issues such as protection of fair competition, clients and workers. A first step in this direction has been taken by the Law Macron in France, which has reinforced the information obligations between the platforms and the clients. According to this law, both the service providers and the owners of the platform must supply clear and transparent information (art. 134). The law requires the platforms to provide detailed information on the service, the different offers on line, civil and fiscal rights, obligations of the different parties involved and information about the professionals, service providers and consumers who use the platform. L121-17 *Code de la consommation. Commentaires at Economie de partage et loi Macron: nouvelles obligations pour les plateformes collaboratives*

<sup>(200)</sup> *LeCab* is a service provided by the company “*Voxtur*”. See <https://www.lecab.fr/>.

<sup>(201)</sup> VAN DE CASTEELE M. (2017, January 5), *Un chauffeur VTC (LeCab) requalifié en salarié: quel impact pour le modèle Uber?*, retrieved from <https://goo.gl/SAj3xw>. More recently, the Court of Appeal reclassified a driver as an employee. See LERNOULD S. and PELLOLI M. (2017, December 15), *Un ex-chauffeur VTC LeCab requalifié en salarié*, retrieved from <https://t.co/P0DpUyIzT1>.

<sup>(202)</sup> The other elements that had been raised were not taken into account by the employment tribunal. It has to be recalled that article 60 of the *Loi n° 2016-1088 relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels* affords individual and collective rights to “*les travailleurs utilisant une plateforme de mise en relation par voie électronique*” (independent contractors using an electronic matchmaking platform). The law entered into force starting from January 1, 2018. See Décret No. 2017-774 4/5/2017, available at <https://www.legifrance.gouv.fr/eli/decret/2017/5/4/ETST1710240D/jo>.

*self-employed worker has been chosen by the company in order to 'escape' the constraints of the Labour Code while imposing obligations that can be considered proper of an employer-employee relationship"* <sup>(203)</sup>. Moreover, the French social security institution has claimed contributions due by Uber, as a worker should be qualified as employees and not self-employed. The Special Court has been seized and the request rejected on the grounds of infringement of an essential procedural requirement.

As rightly pointed out, the inclusion of clauses denying the employee status demonstrates the fact that platform companies are aware of the legally ambiguous nature of the relationship. After all, gig-workers may display some characteristics that are proper to independent contractors and others that are reminiscent of employees. In an increasingly relevant number of industries, the blurring of employment status is a topical question issue. Originally confined to the lower-end of the pay spectrum, this issue has come up repeatedly as regarding, for instance, freelance consultants labelled as self-employed "*with working arrangements very similar to those of the employees they work alongside*". As such, predictions are inherently uncertain.

Moreover, of notable concern is the fact that the "Terms of Conditions" often try to obfuscate the actual relationship between the worker and the platform, since the latter unilaterally states that providers use the relevant service on their own term. Examples can be found in every adhesion-styled contract. Such clauses are unlikely to be legally enforceable <sup>(204)</sup> and the "coerced" labelling in a participation agreement may be easily disregarded as reality casts doubt on such naïve statements <sup>(205)</sup>. As rightly pointed out, the inclusion of clauses denying the employee status demonstrates the fact that platforms are aware of the legally ambiguous nature of the relationship. A contract is usually drafted purporting to create a contract for self-employment <sup>(206)</sup>.

After all, gig-workers may display some characteristics that are proper to independent contractors and others that are reminiscent of employees. In an increasingly relevant number of industries, the blurring of employment status is a topical question issue <sup>(207)</sup>. Using the "traditional" multifactorial test may lead to different conclusions as regards the question whether a platform worker is an employee or an independent contractor. This entails a larger question of who takes the responsibility. As is well known, an analysis of concrete circumstances is essential. None of the factors is considered dispositive; rather, the court has to ponder the full range of relevant factors in interpreting the relationship in question. The qualification of the legal relationship does not necessarily follow the designation chosen by the participant. Rather, the formal agreement and the intention of the parties may be overturned in order to give value to the actual day-by-day contract implementation. Anyway, the tests, consisting of a multifactorial test that courts apply in a flexible manner, are notoriously malleable, maybe quite byzantine, and fact-dependent. As such, predictions are inherently uncertain. Conceivably, the one thing that is certain is that, in future, many claims will hang on workers status also in other European countries.

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<sup>(203)</sup> See ESCANDE VARNIOL M.-C. (2017), *What protections for workers acting via digital platforms in a market economy? Presentation, methodology and a French case*.

<sup>(204)</sup> Platform firms seem to have taken advantage of the fact that, in a broad array of situations, "*courts have become more and more willing to require enforcement of boilerplate clauses requiring arbitration of disputes and waiver of the right to bring class claims*". See COHEN J. E. (2017), *Law for the Platform Economy in U.C. Davis Law Review*, 51(1), p. 165 (explaining how "*platform firms enjoy an especially privileged position from which to exploit the relational turn in litigation avoidance*").

<sup>(205)</sup> More strikingly, workers tend not to read such increasingly complex documents. As a consequence, it could be said that they do not "*consent in the sense of understanding that to which they are consenting*". See MACNEIL I. R. (1984), *Bureaucracy and Contracts of Adhesion in Osgoode Hall L.J.*, 22(1), pp. 5-28. See also CALO R. and ROSENBLAT A. (2017), *The Taking Economy: Uber, Information, and Power in Columbia Law Review*, 117, p. 35 (arguing that terms of service may "*vary frequently, such as on a weekly basis*").

<sup>(206)</sup> Moreover, companies may choose to blatantly misclassify workers as a result of arbitration agreements containing class action waivers, which cut off their liability for aggregate claims.

<sup>(207)</sup> Originally confined to the lower-end of the pay spectrum, this issue has come up repeatedly as regarding, for instance, freelance consultants labelled as self-employed "*with working arrangements very similar to those of the employees they work alongside*". See HOUSE OF COMMONS – WORK AND PENSIONS COMMITTEE (2017), *Self-employment and the gig economy*, London, p. 10.

## 4.1 Classification of workers: a gateway to protections.

Being one of the most crucial and controversial issues when it comes to put the collaborative economy in the legal context, an analysis of the status of “crowdworkers” and “workers on demand via platform” should be handled with care. Indeed, resolving this thorny question is of the utmost importance also in order to address other areas of concern.

The five-factor analysis carried out in the second section of this report, dealing with the main phases of the relationship between the platform and the worker (and the final client, too), was not accidental. Despite the varying nature of these tasks and the relevant subsector, several aspects have been emphasised by taking into account the realities commonly assessed to solve the classification issue also in court. Oversimplifying, it can be said that labour laws only regulate the employer-employee relationship and the complete range of protective norms can be enjoyed only entering the realm of employment. In most of the cases, they are therefore excluded from fundamental principles and rights at work such as freedom of association and collective bargaining or protection against discrimination or unlawful dismissal. Moreover, many self-employed workers have no pension rights and they have no insurance rights. If gig-work is their main activity, “*the coverage and capacity to contribute to pension insurances and other types of social security is limited*”<sup>(208)</sup>.

The *corpus* of European social law fails to define uniformly who is a worker. Article 45 of the Treaty on the Functioning of the European Union (TFEU) lays down a definition of worker within the meaning of freedom of movement, which –according to the case-law goes beyond a “classical” definition of a person involved in an employment contract<sup>(209)</sup>. At present, there is too much confusion regarding the term “worker”, as the definition varies according to the area in which it is to be applied. In the Communication, the Commission emphasises that the CJEU has explained that this definition shall also be used to determine who is to be considered a worker when applying certain EU directives in the social field. The first thing one should have clear in mind is that there is no such a provision whatsoever in the Treaties defining the legal determinants in order to be classified as a worker. To get a sense of this situation, in many jurisdictions the definition of employee varies according to the field (tax, social security, health and safety) where it has to be applied<sup>(210)</sup>. The normative chaos is evident. The CJEU came up with a unitary definition, to be used in the entirety of the membership of the Union. Settled case law has established, as a key factor, that the employment relationship is when “*for a certain period of time a person performs a service for and under the direction of another person in return for which he receives remuneration*”<sup>(211)</sup>. The Court of Justice has stated that the essential feature of an employment relationship is the power of command (understood as determining the activities carried out by the worker, the working conditions and conditions of remuneration) stemming from the internal structure of the

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<sup>(208)</sup> EICHHORST W. and RINNE U. (2017), *Digital Challenges for the Welfare State*, IZA Policy Paper, No. 134, p. 2.

<sup>(209)</sup> For instance, a person seeking work could also be considered a worker. Moreover, Article 49 ensures the same freedom to self-employed person, while Article 56 recognizes the freedom to provide services.

<sup>(210)</sup> The Court of Justice of the European Union, CJEU, has stated that the definition provided for in article 45 TFEU and regulation No 1612/68 does not correspond with the definition used in Article 48 TFEU and regulation No 1408/71. See C—85/96, EU:C:1998:217 paragraph 31. See BORELLI S. (2011), *Lavoratore (definizione eurunitaria)* in M. PEDRAZZOLI (Ed.), *Lessico giuslavoristico. Diritto del lavoro dell'Unione europea e del mondo globalizzato*, 3, Bologna, p. 123 (arguing that European Social Law provides for “*case-by-case definitions*”). The Court of Justice has developed a “functional” approach to the notion of the worker. See GIUBBONI S. (2009), *La nozione comunitaria di lavoratore subordinato* in CARUSO B. and SCIARRA S. (Eds.), *Il lavoro subordinato, Trattato di diritto privato dell'Unione europea*, Torino, p. 35 (explaining how, under European Law, the definition of subordinate worker has not been developed for “protective purposes”, as in the Italian system, but to ensure and promote the access to the common labour market).

<sup>(211)</sup> Judgment of the Court of 31 May 1989. - I. Bettray v Staatssecretaris van Justitie. - Reference for a preliminary ruling: Raad van State - Netherlands. Case 344/87. CJEU, C-66/85, Deborah Lawrie-Blum v. Land Baden Wuerttemberg (on the primacy of facts principle). The CJEU is quite vague in defining what “under the direction” means.

contract<sup>(212)</sup>. Understandably, national legislations and courts still could state and decide what requirements to be met to ascertain the existence of an employment relationship<sup>(213)</sup>.

Settled case law has established that the employment relationship is when "for a certain period of time a person performs a service for and under the direction of another person in return for which he receives remuneration"<sup>(214)</sup>. Three main elements can be listed, namely (i) the work has to be carried out by the worker on behalf of someone else, (ii) the worker must be under that person's supervision and (iii) the existence of a remuneration<sup>(215)</sup>. The label (or "*nomen juris*") placed on to the relationship is a factor in the outcome, but it is certainly not dispositive<sup>(216)</sup>. According to the so-called typological method (i.e. rule of thumbs), other subsidiary factors for detecting employee status are: the continuous nature of the work<sup>(217)</sup>, the compliance with working hours<sup>(218)</sup>, and the provision of even non-specific guidance. The slight cautionary note is that no one of the factors represents a definitive test, while an appraisal of the overall picture is pivotal (this approach has been considered as a kind of approximation or "sufficient conformity")<sup>(219)</sup>.

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<sup>(212)</sup> See VENEZIANI B. (2009), *The Employment Relationship* in HEPPLER B. and VENEZIANI B. (Eds.), *The Transformation of Labour Law in Europe. A Comparative Study of 15, 1945-2004*, Oxford and Portland, Or., p. 109.

<sup>(213)</sup> CJEU, C-94/07, *Raccanelli v. Max-Planck Gesellschaft*.

<sup>(214)</sup> Judgment of the Court of 31 May 1989. - I. *Betray v Staatssecretaris van Justitie*. - Reference for a preliminary ruling: *Raad van State - Netherlands*. Case 344/87.

<sup>(215)</sup> These objective criteria are aimed at assessing whether the activities are effective and authentic, rather than marginal or ancillary. ECJ, *Betray*, para. 17.

<sup>(216)</sup> The interpretation of the actual terms of the contract is a matter for the court. See BURCHELL B., DEAKIN S. and HONEY S. (1999), *The employment status of individuals in non-standard employment*, Department of Trade and Industry, London (arguing that "the courts have consistently taken the view that the parties to the employment relationship cannot decide to 'opt in' or 'opt out' of the coverage of legislation, simply by choosing to describe their relationship in a particular way").

<sup>(217)</sup> See Cass. No. 8260 July 28, 1995.

<sup>(218)</sup> See Cass. No. 6983 April 9, 2004.

<sup>(219)</sup> This is a peculiar method of reasoning taking into account all the circumstances of the case (as opposed to the basic analytical method based on the identity between the case and the abstract designation). Other factors to be considered are the following: (i) the functional integration into the employer's business, (ii) the organisational dependence, (iii) the obligation to provide services exclusively or personally, (iv) the ownership of work-related equipment, (v) the nature of remuneration (single fee vs. monthly salary), (vi) the existence of commercial risk, (vii) the duration of the relationship, (viii) the employer's possession of the work tools, (ix) the performance of the work at the employer's premises. The multifactorial test is "surprisingly similar" in many jurisdictions. Employment Relationship Recommendation, 2006 (No. 198) is perhaps the most relevant recommendation concerning the employment relationship. For the purposes of the national policy of protection for workers in an employment relationship, the determination of the existence of such a relationship should be "guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties". Clear methods for guiding workers and employers as to the determination of the existence of an employment relationship should be promoted. "For the purpose of facilitating the determination of the existence of an employment relationship, Members should, within the framework of the national policy referred to in this Recommendation, consider the possibility of the following: (a) allowing a broad range of means for determining the existence of an employment relationship; (b) providing for a legal presumption that an employment relationship exists where one or more relevant indicators is present; and (c) determining, following prior consultations with the most representative organizations of employers and workers, that workers with certain characteristics, in general or in a particular sector, must be deemed to be either employed or self-employed". Moreover, the Recommendation lists 14 factors to find an employment relationship: "[m]embers should consider the possibility of defining in their laws and regulations, or by other means, specific indicators of the existence of an employment relationship. Those indicators might include: (a) the fact that the work: is carried out according to the instructions and under the control of another party; involves the integration of the worker in the organization of the enterprise; is performed solely or mainly for the benefit of another person; must be carried out personally by the worker; is carried out within specific working hours or at a workplace specified or agreed by the party requesting the work; is of a particular duration and has a certain continuity; requires the worker's availability; or involves the provision of tools, materials and machinery by the party requesting the work; (b) periodic payment of remuneration to the worker; the fact that such remuneration constitutes the worker's sole or principal source of income; provision of payment in kind, such as food, lodging or transport; recognition of entitlements such as weekly rest and annual holidays; payment by the party requesting the work for travel

Coming straight to common arrangements of the platform economy, it has to be acknowledged that a critical assessment of the worker classification is rather problematic. While crowdworking platforms disclose their terms of services and relevant contracts, it is extremely hard to retrace paperwork signed by workers providing services in the passenger transport sector or on the customer's premises (whether corporate or individual) <sup>(220)</sup>. Data is drawn from empirical observations, interviews and surveys. In particular, in the light of the above-mentioned criteria, it could be said that many requirements of platform-mediated arrangements sit uneasily with self-employed worker status. Just to get a general idea, imposing to accomplish the job personally, either by forbidding subcontracting or with the assistance of software, coupled with the prohibition of working on multiple platforms, puts genuine autonomy and control remain beyond the grasp of most workers. In another section a list of conducts that may qualify as managerial prerogatives has been provided: a strict surveillance system – based on customer ratings, GPS features, bar-coding technology, time constraints, constant metrics, regular screenshots, response rates and obscure algorithms or the possibility to determine the location of the performance and the allocation of time – represents a way to "shield platform owners from having to deal directly with service providers" <sup>(221)</sup>.

Upon closer examination, these realities seem to be inconsistent with the self-employment status of workers and are more compatible, at least in theory, with the existence of an employment status, thus resulting in a "significant murkiness". Far from supposedly catering freedom and flexibility <sup>(222)</sup>, this pattern combines a strong command power, exerted through software, with the tremendous advantages of "liquid responsibilities" <sup>(223)</sup>, as shown in the table below. There is no consistency between the contractual label of "self-employed workers" and the fact that platforms dictate the terms of the job: in some cases, the mischaracterisation of subordinate workers is blatant thus making the purported independent relationship a legal sham. As already said, the current results also suggest that a case-by-case assessment is necessary, and much will depend on the relative weight attached to each factor in a concrete ruling.

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*undertaken by the worker in order to carry out the work; or absence of financial risk for the worker". See also INTERNATIONAL LABOUR OFFICE (2013), *Regulating the employment relationship in Europe: A guide to Recommendation No. 198*, Governance and Tripartism Department, Geneva.*

<sup>(220)</sup> As repeatedly stated, "the downstream party deploys authority (hierarchy) mainly by informal agreements in order not to get in conflict with legal regulations". MUEHLBERGER U. (2005), *Hierarchies, relational contracts and new forms of outsourcing* in ICER Working Paper No. 22, p. 16.

<sup>(221)</sup> VAN DOORN N. (2017), *Platform labor: on the gendered and racialized exploitation of low income service work in the 'on-demand' economy* in *Information, Communication & Society*, 20(6), p. 903 (providing a list of "strategies that enforce the immunity of both the buyer of a service").

<sup>(222)</sup> See SCHOLZ T. (2015), *Think outside the boss* in *Public Seminar* (explaining how workers "need to be glued to their computers all day long to catch higher paying tasks and respond to them immediately").

<sup>(223)</sup> DE STEFANO V. (2017), *Labour is not a technology – Reasserting the Declaration of Philadelphia in Times of Platform Work and Gig-Economy* in *IUSLabor*, 2, p. 16.



**Table 1.** Overview of a selection of concrete realities of the relationship<sup>224</sup>

	<b>Online/global services</b>		<b>Offline/local services</b>		
	<i>Online: Professional Crowdsourcing</i>		<i>At the customer's premises manual services</i>	<i>Passengers transport</i>	
	<i>Non-routine</i>	<i>Routine</i>	<i>Complex</i>	<i>Simple</i>	<i>/</i>
<b>1. Managerial and direction power</b>	Tenuous	Strong	Tenuous	Strong	Strong
<b>2. Supervision and control power</b>	Tenuous	Strong	Medium	Strong	Strong
<b>3. Coordination with the platform</b>	Episodic	Episodic	Constant	Constant	Constant
<b>4. Flexibility in the time schedule</b>	High	Medium	Medium	Low	Low
<b>5. Continuity of the performance</b>	Rare	Typical	Rare	Rare	Strong
<b>6. Ownership of equipment</b>	Yes	Yes	Yes	No	Yes
<b>7. Personal labour (irreplaceability)</b>	Yes	No	Yes	Yes	Yes

Source: Authors' own elaboration.

It is notable that there is a great temptation to "close the case" urging for a possibly generalised reclassification aimed at protecting those workers engaged in particularly flexible forms of employment. This is an easy way to resolve a political controversy quickly and definitively<sup>(225)</sup>. Nonetheless, in defence of platforms, it has to be said that the idea that all platform work is consistently bogus self-employment could prove to be wrong: "newly created jobs may only under certain conditions be conceived of as classic standard employment relationships with long-term employment prospects, collective contractual classifications and full social security"<sup>(226)</sup>. If such a trend was to be of such a direction, it must be said that all platform workers might lose the freedom they cherish to choose their work hours, while enjoying a wide range of legal entitlements and safeguards which would come at a cost. At the same time, even the lack of distinguishable control power does not provide significant arguments in favour of a self-employed status<sup>(227)</sup>. All of this is particularly significant when one considers that subordinate nature is not "a freestanding and universal characteristic of being a worker"<sup>(228)</sup>. While employment on a discontinuous basis indicates a certain degree of independence, the fact that "workers commonly paid a low rate of pay and forced to brag and beg to secure work"<sup>(229)</sup> reveals the existence of a relation of subordination.

<sup>(224)</sup> Table 1 considers significant factors when deciding whether someone is an employee in the platform economy scenario. Author's own elaboration.

<sup>(225)</sup> ARTHURS H. (forthcoming), *The false promise of the Sharing Economy*, Paper presented at the LLRN 3<sup>rd</sup> Conference, Labour Law Research Network, Toronto 25-27 June 2017.

<sup>(226)</sup> EICHHORST W., HINTE H., RINNE U. and TOBSCH, V. (2016), *How Big is the Gig? Assessing the Preliminary Evidence on the Effects of Digitalization on the Labor Market*, IZA Policy Paper, No. 117, p. 1.

<sup>(227)</sup> TIPPETT E. C. (forthcoming), *Employee Classification in the Sharing Economy* in DAVIDSON N., FINCK M., INFRANCA J. (Eds.), *Cambridge Handbook of Law and Regulation of the Sharing Economy*, Boston, MA.

<sup>(228)</sup> Bates van Winkelhof v Clyde & Co & Anor UKEAT/0568/11/RN.

<sup>(229)</sup> HUWS U., SPENCER N. H. and JOYCE S. (2016), *Crowd Work in Europe. Preliminary Results from a Survey in the UK, Sweden, Germany, Austria and The Netherlands*, Foundation for European Progressive Studies.

Understandably, even practical reality, regardless of the contractual statement, may sometimes be fuzzy and far from clear-cut.

In the landmark judgment *Aslam v Uber BV* the court focused on the “practical realities” of the relationship between *Uber* and its drivers <sup>(230)</sup>. By conceptualising the conclusions, *Uber* drivers could be reclassified as workers (eligible for minimum wage, sick leave and paid holiday provisions but not entitled to any kind of protection against unfair dismissal or the right to a notice before being fired) rather than independent contractors, as maintained by the company in the “terms of service”. In particular, by denying the fact that the company exercises a mere enabling activity between two opposite groups of users, the British court emphasises that *Uber* does not provide the opportunity for individually negotiating the content of the obligation, while tasks are performed personally, with no possibility of being replaced temporarily <sup>(231)</sup>. However, the cause for enthusiasm might be mitigated. There can be no denying of the negative aspects of this verdict. First and foremost, workers are left in an intermediate area, and the narrowed definition of their status may “reinforce *Uber’s* penalizing practices which may deactivate drivers rejecting several consecutive trips” <sup>(232)</sup>, at any time and for any or no reason. Therefore, those victories can be seen as only partial ones, or rather as a total debacle if one subscribes to the view that claiming full employee status could be even more problematic in the future <sup>(233)</sup>.

Litigations “continue to play an important deterrence role, both drawing public attention to these practices and dissuading some firms from embracing the independent contractor business model” <sup>(234)</sup>. However, it could be said that cases like the British one have by no doubt contributed to uncovering actual working conditions and the most common business model in the industry <sup>(235)</sup>. At the same time, European Union’s highest court judgement in Case C-434/15 is much more significant than the mere legal situation at issue: the litigation will lead authorities to better understand what is the reality of the work in the platform economy. To conclude, if the trend unveiled by this verdict continues <sup>(236)</sup>, and if the multifactorial analysis defined in the Communication should be applied in a strict sense, there might be a “domino effect” in Europe. While litigation might succeed in restoring protections, it should be only a “part of a comprehensive campaign that deploys multiple strategies” to promote economic and social advance <sup>(237)</sup>.

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<sup>(230)</sup> Case 2202551/2015 & others, *Aslam, Farrar & Ors v. Uber BV & Ors*, judgement of 28 Oct. 2016. More recently *Uber* failed to overturn the ruling as the Employment Appeal Tribunal fully upheld Employment Tribunal’s findings.

<sup>(231)</sup> “The notion that *Uber* in London is a mosaic of 30,000 small businesses linked by a common ‘platform’ is to our minds faintly ridiculous”.

<sup>(232)</sup> JAMIL R. (2017), *Drivers vs Uber—The limits of the Judicialization: Critical review of London’s employment tribunal verdict in the case of Aslam Y. & Farrar J. against Uber* in *Revue Interventions Économiques. Papers in Political Economy*, (58).

<sup>(233)</sup> Moreover, as a direct consequence of opportunistic practices, “the use of the intermediate category may result in encouraging leveling down”. See also BRISHEN R. (2016), *Employment Rights in the Platform Economy: Getting Back to Basics* in *Harvard Law & Policy Review*. See also GRIERSON J. and DAVIES R. (2017, February 10), *Pimlico Plumbers loses appeal against self-employed status*, retrieved from <https://qu.com/p/5qjyv/stw>.

<sup>(234)</sup> DUBAL V. B. (2017), *Winning the Battle, Losing the War?: Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy*, op. cit., p. 747.

<sup>(235)</sup> See, for instance, SACHS B. (2016, October 26), *What the UK Decision Implies for Uber Drivers in the U.S.*, retrieved from <https://goo.gl/4PqULs>.

<sup>(236)</sup> Similarly, *Deliveroo* is under investigation in UK by the central arbitration committee to determine the employment status of its couriers. See MCGOOGAN C. (2017, March 6), *Tribunal to rule on Deliveroo riders’ employment status*, retrieved from <https://goo.gl/d4whjY>.

<sup>(237)</sup> CUMMINGS S. L. and RHODE D. L. (2009), *Public interest litigation: Insights from theory and practice* in *Fordham Urb. LJ*, 36, p. 603-651.

## Box 2. Disguised employment relationship

There is considerable agreement among scholars on what a “disguised employment relationship” is. There is little to interpret differently in the expression “falsely classified”: this fraudulent situation occurs when a company manipulates employment contracts in order to misrepresent the underlying reality thus nullifying or attenuating legal responsibilities and protection afforded by the law <sup>(238)</sup>. But there is actually a more important point here. Judges in different jurisdictions have been wrestling with the task of correctly classifying workers. Part of the difficulty in defining bogus self-employment stems from how the definition of contract of employment is crafted and interpreted <sup>(239)</sup>. In the absence of a definitive answer to the characterisation question, the expression “bogus self-employment” emphasises the intention to side-step labour, tax and social security rights and regulations, with a view to reducing costs and avoiding payments and obligations <sup>(240)</sup>. In this case, a self-employment arrangements are used to hide a genuine employment relationship, thus depriving workers of the protection they are due <sup>(241)</sup>. For this reason, the most effective way to contrast this condition is to challenge the formal classification before a tribunal <sup>(242)</sup>, being the judiciary the first line of defence when a new practice of evasion comes to light <sup>(243)</sup>.

<sup>(238)</sup> According to the Employment Relationship Recommendation, 2006 (No. 198), “disguised employment relationships” is the situation occurring “when an employer treats an individual as other than an employee in a manner that hides his or her true legal status as an employee”. In all systems, the judge must normally decide on the basis of the facts, irrespective of how the parties construe or describe a given contractual relationship. See HEYES J. and HASTINGS T. (2017), *The Practices of Enforcement Bodies in Detecting and Preventing Bogus Self-Employment*. But disguised employment relationships “may also involve masking the identity of the employer, when the person designated as an employer is an intermediary, with the intention of releasing the real employer from any involvement in the employment relationship and above all from any responsibility to the workers”. See INTERNATIONAL LABOUR OFFICE (2006), *The employment relationship*, International Labour Conference, 95<sup>th</sup> Session, 2006 Report V(1).

<sup>(239)</sup> Davidov has exhorted to put in practice a purposive approach o determining the scope of employment, for rehabilitative purposes. DAVIDOV G. (2005), *Who is a Worker?* in *Industrial Law Journal*, 34(1), pp. 57-71. See also ID. (2002), *The three axes of employment relationships: A characterization of workers in need of protection* in *The University of Toronto Law Journal*, 52(4), pp. 357-418 (identifying three dimensions of what make employee vulnerable, namely democratic deficit, psychological and economic dependence, roughly overlapping with three traditional tests such as control, integration and economic realities).

<sup>(240)</sup> See ALES E. and FAIOLI M. (2010), *Self-employment and bogus self-employment in the European construction industry*, Expert Report, Self-employment and bogus self-employment in the construction industry in Italy, p. 8 (arguing that “[t]he malpractice of bogus self-employment is mainly determined by the social security contribution gap between employment relationship and self-employment”).

<sup>(241)</sup> The issue of disguised employment relationships has recently occupied a prominent place in the policy debate in this country, with the U.S. Department of Labor warning that “misclassification of employees as independent contractors is found in an increasing number of workplaces in the United States, in part reflecting larger restructuring of business organizations” and observing how, instead, under a correct interpretation of the Fair Labour Standards Act, namely the federal act governing minimum wages and working time, “most workers are employees” and should fall into the scope of the act.

<sup>(242)</sup> In 2014, the Court of Justice of the European Union stated, in a breakthrough judgment, that “false self-employed” workers, “disguised [...] in order to avoid the application of some specific legislation (for example, labour or fiscal regulations) which is considered unfavourable by the employer”, have access to the right to collective bargaining. CJEU 4 December 2014, C-413/13 (FNV KIEM) ECLI:EU:C:2014:2411 The CJEU describes false self-employment as follows: “[o]n a proper construction of EU law, it is only when self-employed service providers who are members of one of the contracting employees’ organisations and perform for an employer, under a works or service contract, the same activity as that employer’s employed workers, are ‘false self-employed’, in other words, service providers in a situation comparable to that of those workers, that a provision of a collective labour agreement, such as that at issue in the main proceedings, which sets minimum fees for those self-employed service providers, does not fall within the scope of Article 101(1) TFEU”. The case was about a collective agreement setting a minimum salary for both employees and self-employed. The provision of a minimum pay, provided for by the collective agreement, can be applied to falsely self-employed workers, regardless the national notion of worker and without prejudice to competition. As a consequence, Article 101.1 TFEU does not apply “only when self-employed service providers who are members of one of the contracting employees’ organisations and perform for an employer, under a work or service contract, the same activity as that employer’s employed workers, are ‘false self-employed’”. When the situation of self-employed workers is comparable to that of employees, a collective agreement cannot be seen as a restriction hampering competition.

<sup>(243)</sup> In a parallel trend, the Court of Justice of the European Union (CJEU) has stated ensuring that the employment law entitlements bestowed to EU Member States’ workers by European directives were actually enjoyed by their addressees, whatever the position of national jurisdiction. “Where it perceived

The rise of non-standard forms of employment (NSFE) and misclassification of employment relationships are strongly intertwined, not least because the emergence of the latter “ambiguous” forms of employment could make the disguise of “bogus self-employment” easier. This may happen usually for fiscal reasons, or in order to avoid the payment of social contributions and thereby reducing labour costs, or to circumvent labour legislation and protections. As it was pointed out above, problems concerning employment status and misclassification extend much beyond the boundaries of the gig-economy and providing for a specific category of worker in this sector would artificially segment the labour market and employment regulation and it would also add complexity, since a definition of the gig-economy that overlaps significantly therewith, would be extremely difficult to identify. This is especially the case when there is no clear organisational separation between the economically dependent worker and the client. When the economically dependent workers work on the client's premises and/or use the client's equipment, a sharp distinction between these workers and the employees is more difficult to establish, as such aspects are considered to be features of an employment relationship. This is particularly the case when self-employment is not a voluntary choice, but the outcome of forced outsourcing or contracting-out practices.

### **Box 3. Economically dependent self-employment (the grey area)**

“Economically dependent workers” might be defined as those self-employed persons situated in an intermediate area between labour law and private or commercial law. This characterisation is rather vague and controversial. It is convenient to focus on “quasi-subordination”, described as the hallmark of those working relationships in which workers are classified under a contract different from a contract of employment but perform services predominantly or exclusively for one client. In this case, workers depend on the given principal for their income and may receive direct instructions on how the work has to be completed. In several countries, “[i]nstead of an ‘all or nothing’ approach, it is acknowledged (...) that some workers present only some characteristics of “employees” but not others, and that it is justified to apply only some labor laws to them”<sup>(244)</sup>: a floor of rights specifically has been “selectively extended” to this group of vulnerable workers<sup>(245)</sup>.

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*that some national legal systems were in effect depriving some of their workers of these rights by misclassifying them as ‘self-employed’ persons, or as workers employed under sui generis work relations, [the Court] has boldly asserted that ‘the formal classification of a self-employed person under national law does not exclude the possibility that a person must be classified as a worker within the meaning of [EU law] if his independence is merely notional, thereby disguising an employment relationship’, and that ‘the sui generis legal nature of the employment relationship under national law cannot have any consequence in regard to whether or not the person is a worker for the purposes of European Union law’.* Coming now to the legal techniques, it must be said that, in these cases, “the CJEU, while refraining from labelling these domestic arrangements as ‘shams’, has superimposed an EU reclassification resulting in their falling within the protective coverage of EU employment protection laws. In some more recent judgments it went even further by suggesting that, even in those cases where it is ultimately for national referring courts to determine whether a domestic worker is also a worker for the purposes of EU law”. In addition to this, “[t]he Court may, however, mention to the referring court a number of principles and criteria which it must take into account in the course of its examination”. See FINKIN M. W. and MUNDLAK G. (Eds.) (2015), *Comparative Labor Law*, Cheltenham, UK, p. 123.

<sup>(244)</sup> DAVIDOV G., FREEDLAND M. R. and KOUNTOURIS N. (2015), *The Subjects of Labor Law: ‘Employees’ and Other Workers* in FINKIN M. W. and MUNDLAK G. (Eds.), *Comparative Labor Law. Research Handbooks in Comparative Law Series*, Cheltenham, UK – Northampton, MA, p. 128.

<sup>(245)</sup> For a detailed analysis on “the expansion of employment law”, see PERULLI A. (2017), *The Notion of ‘Employee’ in Need of Redefinition, A Thematic Working Paper for The Annual Conference of the European Centre of Expertise (ECE) in the field of labour law, employment and labour market policies: The Personal Scope of Labour Law in Times of Atypical Employment and Digitalisation* (describing the German, French, and British cases).

Understandably, the emergence of platform-based labour makes these discussions even more relevant and urgent, as many elements defining such intermediate categories (a functional link with the principal's business organisation, a coordination mainly arranged by the client, economic or organisational dependence as opposed to personal dependence) may be easily found in a common relationship between an *Uber*-like firm and its fleet of "providers". As envisioned by Sciarra, the model of economically dependent work might attract "*new forms of employment, all similarly characterised by the non-continuity of employment, the low level of earnings and the lack of precise prospects in creating career paths*"<sup>(246)</sup>, thus marking a fundamental break with the traditional notion of quasi-dependent work in the pre-digital age. As far as working conditions of dependent self-employed are concerned, it can be said that the actual situation varies enormously. Despite dependent self-employed workers being more easy targets of abuses in working hours and facing greater difficulties in organising their task schedule, this is not necessarily the case. Dependent self-employment is often used to lower social insurance contributions, although this must not automatically lead to an undermining of labour law<sup>(247)</sup>.

Furthermore, an intermediate category of "quasi-subordinate" workers already exists in a legal sense in some jurisdictions and its acceptance, or tolerance, whatever it may be called, is increasing. More importantly, some authors have claimed that "[t]he description or definition of economically dependent workers starts from the premise that (1) such workers are not employees, and (2) economically dependent work must not be used to hide the true nature of the employment relationship" (in a disguised employment relationship situation)<sup>(248)</sup>. From a social policy point of view, "[s]urely when an intermediate category is considered, it should not be seen as a solution to misclassification (sham self-employment); rather, the goal should be to add some (partial) protection to people who are not (even without any sham) within the group of 'employees'"<sup>(249)</sup>. Depending on the specific national rules, these workers are commonly outside the scope of labour law protection (such as the rules on dismissals) and collective bargaining coverage and are subject to "promotional" fiscal and tax regulations. Whether it is called "employee-like person" (as in Germany), "para-subordinate" (as in Italy), "economically dependent autonomous worker" (as in Spain), simply "worker" (as in the United Kingdom) or "semi-dependent workers"<sup>(250)</sup>, the goal of such class remains more or less the same: allowing for better refinement in the application of labour laws.

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<sup>(246)</sup> SCIARRA S. (2004), *The Evolution of Labour Law (1992-2004)*, General Report. Project for the European Commission, p. 22.

<sup>(247)</sup> With regard to working conditions, the actual situation of dependent self-employed workers varies enormously. See EICHHORST W., BRAGA M., FAMIRA-MÜHLBERGER U., GERARD M. et al. (2013), *Social protection rights of economically dependent self-employed workers*, European Parliament Directorate General for Internal Policies.

<sup>(248)</sup> ROSIORU F. (2014), *Legal Acknowledgement of the Category of Economically Dependent Workers in European Labour Law Journal*, 5(3-4), p. 296.

<sup>(249)</sup> DAVIDOV G., FREEDLAND M. R. and KOUNTOURIS N. (2015), *The Subjects of Labor Law: 'Employees' and Other Workers* in FINKIN M. W. and MUNDLAK G. (Eds.), *Comparative Labor Law. Research Handbooks in Comparative Law Series*, Cheltenham, UK – Northampton, MA, p. 129.

<sup>(250)</sup> As proposed by FREEDLAND M. R. (2003), *The Personal Employment Contract*, Oxford, UK. For a first reaction to this proposal, see DEAKIN S. (2007), *Does the 'Personal Employment Contract' Provide a Basis for the Reunification of Employment Law?* in *Industrial Law Journal*, 36(1), pp. 68-83 (explaining that Freedland's proposal places the boundary between categories "at the point where personal service gives way to a contract of sale or other commercial relationship, and where economic dependence – that is to say, the dependence of the worker on a particular enterprise – is displaced by the presence of a professional relationship or independence business entity").

If employee status is the “gateway” to full employment coverage, in several jurisdictions an intermediate category has been created to offer a “secondary entrance” to a limited set of social rights. Irrespective of labels and legislative techniques adopted, the main purpose of the legal recognition of such an intermediate category is to broaden the scope of protection to the advantage of people who may be “*substantially distinguishable from ‘employees’*”<sup>(251)</sup>, without labelling them as employees. This has resulted in numerous initiatives clarifying the legal status of this category of workers through various routes: (i) introduction of a new and distinct legal employment status; (ii) extension of labour protection by legislative intervention typically social security coverage, including sometimes health and safety provisions) to certain forms of self-employment, (iii) introduction of a presumption of subordination for certain categories of workers or beyond certain thresholds<sup>(252)</sup>, (iv) the interpretative activism of courts, and (v) introduction of soft regulation. Despite the extension of protective measures that has taken place over time, it would not be correct to maintain that quasi-subordinate employment is a third category of employment, different from employment or self-employment. In practice, it is still included in the self-employment category.

Drawing preliminary conclusions by many national experiences, it could be said that the unintended consequences of an in-between category far outweigh those envisaged by its proponents as they have resulted in an increased level of uncertainty, paving the way for a possible legal arbitrage<sup>(253)</sup>. Crafting an intermediate category has created more room for mischief. A number of objections have been presented against the creation of an intermediate category of workers between employees and self-employed. The above concerns also apply to a category specifically designed to meet the needs of platforms. Many scholars have recommended a cautious approach towards *ad hoc* solutions<sup>(254)</sup>. Creating an intermediate category of workers such as dependent contractors or dependent self-employed persons implies to identify suitable definitions. First and foremost, proposing a new legal bucket for grey-zone cases may complicate matters, rather than simplifying the issues surrounding classification. Moreover, crafting such a new model could be fraught with practical difficulties regarding classification, as an automatic extension of the scope of labour law to economically dependent workers could deprive this subject of its legitimacy<sup>(255)</sup>. More importantly, this solution overestimates the role of the legal constraints, since legally redefining who benefits from statutory protections might not address the power of firms to choose how to arrange their workforce.

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<sup>(251)</sup> See also DAVIDOV G. (2005), *Who is a Worker?* in *Industrial Law Journal*, 34(1), p. 61 ff. (arguing that “*the idea has been to extend protection to individuals that normally do not, and should not, enjoy the protection of labour laws*”).

<sup>(252)</sup> Perhaps not surprisingly, both the techniques were used in Italy, before the recent legislative intervention which limited the scope of the intermediate category and established employee status is the default.

<sup>(253)</sup> For a complete review, see CHERRY M. A. and ALOISI A. (2017), “*Dependent Contractors in the Gig Economy: A Comparative Approach* in *American University L. R.*, 66(3), pp. 635-689.

<sup>(254)</sup> WEISS M. (2016), *Tecnologia, ambiente e demografia: il diritto del lavoro alla prova della nuova grande trasformazione* in *Dir. rel. in.*, 3, p. 654.

<sup>(255)</sup> For instance, fixing a thresholds may involuntarily encourage the development of contracts that skirt the boundaries of the definitions (for instance by specifying numbers of working hours that are just below the qualifying thresholds).

## 5 Final remarks and policy recommendations.

This report has tried to map a broad array of app-enabled working arrangements, clustering the findings into three main subsets (passenger transport services, professional crowdsourcing, on-demand work at the household's premises). Due to the high level of heterogeneity among platforms, as suggested by Eurofound speaking of non-standard forms of work, "*a general discussions or policy recommendations (...) are of little use*"<sup>(256)</sup>. The research has reviewed national practices as well as legislations introduced with regard to labour platforms and, more broadly, new forms of Internet-enabled work. It has to be argued that developing specific legislation targeting platforms might prove to be unfruitful. Conversely, different approaches are needed, taking into account the defining characteristics of each employment form. Unnecessary regulatory burdens should be avoided as well as the permanent state of exception, grounded on the allegedly distinctive class of the innovation sector, should be denied. These strong intermingling of old and new challenges constitutes the underlying reason why gig work has catalysed so much attention in recent times. In a sense, this analysis constitutes an open-ended assignment, as the scrutiny of the platform economy has catalysed a much wider discussion over the future of work.

The fact that these alternative arrangements tend to be considered as something absolutely new may be questioned and it has been challenged in the previous chapters. Regulators should not be seduced by the assertions to distinctiveness of these rising models. The alarm on the irremediable obsolescence of existing legal notions is somehow misplaced. Nevertheless, recent episodic legislative interventions may have created an infinite series of subcategories, instead of handling these "manifestations" as parts of a unique family. At this stage, the lawmakers' reluctance to legislate is not to blame, not only because an extreme "activism" could impede the growth of this fast rising business segment. In the last decades, indeed, the proliferation in contractual solutions has increased the room for legal arbitrage, not to mention the profound differences among European Member States determining an uneven playing field in the pillar of social rights<sup>(257)</sup>. This moment of transition may encourage an in-depth reflection on how to reinforce and redesign established institutional solutions in the field of social protection. Platform worker do not necessarily need new regulations, but a more effective enforcement and an unambiguous framework. Paradoxically, a courier performing the same activity can be classified as a quasi-subordinate worker in Italy, as a self-employed worker in France, as an employee in Germany, as a "zero-hours" contract worker in the UK or as an intermittent worker in Belgium. Definitely, a strong showing of fragmentation and weakness.

Thus, a harmonised frame of reference is much more desirable, while a patchwork of differing legislations may result in an open invitation to legal arbitrage or jurisdiction shopping. It is worth emphasizing that such fragmentation can be reduced thanks to uniform measures, which in turn may lower the costs associated with expansion, and hence encourages business development. Fortunately, there is no shortage of international initiatives aimed at promoting *Code of Conducts*<sup>(258)</sup> or *Guidelines*<sup>(259)</sup>, in

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<sup>(256)</sup> Eurofound (2015), *New forms of employment*, Publications Office of the European Union, Luxembourg.

<sup>(257)</sup> Last January, the European Parliament adopted a resolution on a European Pillar of Social Rights. European Commission Brussels, 26.4.2017 COM(2017) 250 final Communication from the Commission to the European Parliament, the Council, the European and Social Committee and the Committee of the Regions Establishing a European Pillar of Social Rights. A list of rights to be guaranteed to employees and all workers in non-standard forms of employment is provided including equal treatment, health and safety protection, protection during maternity leave, provisions on working time and rest time, work-life balance, access to training, in-work support for people with disabilities. This initiative could be quite rightly considered a significant step forward, especially if read in connection with the unequivocal reference to rights to adequate information, consultation and information, freedom of associations and representations, collective bargain and collective action. See European Parliament resolution of 19 January 2017 on a Pillar of Social Rights (2016/2095(INI)), available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0010+0+DOC+XML+V0//EN>.

<sup>(258)</sup> AUSTRIAN CHAMBER OF LABOUR, AUSTRIAN TRADE UNION CONFEDERATION, DANISH UNION OF COMMERCIAL AND CLERICAL WORKERS, GERMAN METALWORKERS' UNION, INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 117, SERVICE EMPLOYEES INTERNATIONAL UNION, UNIONEN, CHERRY M. A., DURWARD D., KLEBE T., KÄMPF T., BERG J., DE STEFANO

order to discipline the minimum levels of payment by the platforms, increase the transparency of criteria applied in the operation of internal rating systems, and ensure the legitimacy of content exchanged online <sup>(260)</sup>. At the same time, representative bodies should be set up in these new digitally mediated non-standard work environments <sup>(261)</sup>. The anecdotal evidence shows that ICT-based casual work might jeopardise working conditions. It is therefore urgent to address the special need for protection of platforms workers, designing rules aimed at contrasting groundless rejections of the work done or unfair deactivation of their accounts.

Therefore, reaffirming the major binary divide between workers genuinely self-employed and those in an employment relationship would be helpful in the attempt to reduce labour market segmentation and rising inequalities <sup>(262)</sup>. Solutions should be sought by interpreting the notion of employment in a resilient way. Moreover, as claimed in the previous section, the existing legal framework should be exploited to its maximum possibilities as appropriate, also taking into account the great diversity of arrangements and contexts. Understandably, another answer might be closing legal loopholes that incentivise exploitative compartments by a marginal group of deceitful companies <sup>(263)</sup>. In this respect, many scholars have always loudly advocated to extend the scope of rights such as unionisation, collective bargaining, social security, and legal protection (such as minimum wage laws) to cover online workers. The application of existing regulation is to be reinforced, in order "to avoid the risk that these workers are considered by default as falling in a normative vacuum with no access to labour rights" <sup>(264)</sup>. Despite minor attempts, at the moment, "platforms are self-regulating entities and their development has been largely extra-legal" <sup>(265)</sup>. While it is correct that the internal mechanism can boost the implementation of certain legal standards, the myth of self-regulation – defined as the freedom from any outside interference – is not panacea.

It can be argued that platform-mediated arrangements are particularly keen sites for investigating how classical legal notions and formats can adapt to new dynamics. Having decided how to treat platforms whose influence and command on the ultimate provider is intense, "surgical" regulatory interventions <sup>(266)</sup> shall help the collaborative economy companies to adjust and improve their business model, building a new phase of "shared social responsibility". In this sense, the current European attitude is perceived as a fair balance between supporting entrepreneurs' confidence and implementing workers' protections, but considerable efforts need to be done in order to ensure a stable and sustainable future.

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V., KEZUKA K., LIEBMAN W., SCHOLZ T. and SCHRÖDER P. A. (2016), *Frankfurt Paper on Platform Based Work*, Frankfurt. Improvements are needed to make gig work fully beneficial also to workers. Several distinct priorities appear urgent. See ALOISI A., DE STEFANO V. and SILBERMAN M. S. (2017, May 29), *A Manifesto to Reform the Gig Economy*, retrieved from <https://goo.gl/fX67S9> (setting achievable objectives for a healthy "digital transition" such as employment contracts for "regulars", a reference to the collective agreement of "comparable" professionals, working standards for all – whether professionals or amateurs, portability and interoperability of ratings, the removal of exclusivity clauses binding workers, to list but a few).

<sup>(259)</sup> See *OECD Guidelines for Multinational Enterprises*, available at: <http://www.oecd.org/corporate/mne/>.

<sup>(260)</sup> See *Paid Crowdsourcing for the Better, Guideline for a prosperous and fair cooperation between companies, clients and crowdworkers*, available at: <http://crowdsourcing-code.com/>. Moreover the German trade union IG Metall has launched [www.faircrowdwork.org](http://www.faircrowdwork.org), a platform supporting crowdworkers and promoting the share of information.

<sup>(261)</sup> An example is offered by *Foodora* couriers in Vienna, Austria, who recently established the first works council for platform- or app-based workers. Other grassroots initiatives are taking place all around Europe.

<sup>(262)</sup> For instance, under Swedish labour law, the social partners have the possibility to define the employee notion based on industry practice through the means of collective agreements. Adapting the concept of employment to new forms of work is therefore easier.

<sup>(263)</sup> Concomitantly, it is important to claim that innovation should not be a basis for an exemption or a *sui generis* status. CODAGNONE C., ABADIE F. and BIAGI F. (2016), *The Future of Work in the 'Sharing Economy'. Market Efficiency and Equitable Opportunities or Unfair Precarisation?* (arguing that platforms cannot stand above the law).

<sup>(264)</sup> DE STEFANO V. (2017), *Labour is not a technology – Reasserting the Declaration of Philadelphia in Times of Platform-Work and Gig-Economy in IUSLabor*, 2, p. 1-16.

<sup>(265)</sup> FINCK M. (2017), *Digital Regulation: Designing a Supranational Legal Framework for the Platform Economy*, LSE Legal Studies Working Paper No. 15/2017. Available at SSRN: <https://ssrn.com/abstract=2990043>.

<sup>(266)</sup> DAS ACEVEDO D. (2016), *Regulating Workforce Relationships in the Sharing Economy in Emp. Rts. & Emp. Pol'y J.*, 20(1), p. 10.



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