

Online Platform Work at European Level

Sacha Garben

Executive Summary

- ▶ The online platform economy raises a key legal question: to what extent should various labour and employment regulations - often designed with a 'traditional' bilateral, standard, open-ended employment relationship in mind - be applied to the a-typical nature of online platform work?
- ▶ Across Europe, countries have been dealing with this issue in different ways. Many cases have been brought before national courts, with differing results. In the UK, legal proceedings have led those working for online platforms to be qualified as 'workers' in a number of instances. In Denmark, a collective agreement concerning online platform work was pioneered, in Germany a Code of Conduct was created and France has adopted a special law giving rights to online platform workers.
- ▶ At EU level, the proposal for a Directive on Transparent and Predictable Working Conditions may provide some online platform workers with additional protection.

Introduction

In our increasingly digitalized economy and society, a crucial role is played by online platforms. These platforms - dynamic websites that constitute digital public squares or marketplaces - can impact the economy and our society in various ways and their regulation (or lack thereof) is increasingly the subject of public and political debate. The way in which Facebook deals with personal and public information, the influence of Airbnb on our habitat, Uber's effects on the taxi sector: these issues regularly make headlines and regulators are faced with the thorny question of how to deal with the disruption that these developments seem to bring.

A key legal question at the heart of this issue is to what extent the various labour and employment regulations, that have often been designed with a

'traditional' bilateral, standard, open-ended employment relationship in mind, can and should be applied to the often a-typical working arrangements used in the online platform economy.

The drivers, riders, cleaners, designers, translators, technicians and others working in the online platform economy are often formally contracted as independent, and their working arrangements tends to exhibit features that are difficult to square with the traditional employment relationship, such as the use of own materials (e.g. the driver's car), autonomy concerning working hours (e.g. deciding to work by logging into a smartphone app), the short duration of the relationship (e.g. the translation of a single sentence), and the multilateral character of the relationship (e.g. the driver, the platform and the passenger). At the same time, the worker may well be economically dependent on the platform work, and the



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contractual independence can be constructed in rather artificial ways (e.g. a driver that works fulltime for a platform for several years but is formally contracted per journey).

These atypical working arrangements are often not as stable and secure as standard employment, and a number of occupational health and safety (OSH) risks are connected to online platform work. Some are therefore arguing that employment rules should apply to online platform work, and that if the current legal definitions do not provide for this, they have to be amended accordingly. Others argue that the traditional labour protections are not suitable for the 'new' and 'innovative' aspects of online platform work and that such application would inhibit their dynamic development.

Across Europe, countries have been dealing with these questions, and also the EU has become involved. This policy brief gives a concise overview of the main issues and developments.

Labour in the Online Platform Economy

“Online platform work” includes all labour provided through, on, or mediated by online platforms. It features a wide array of standard and non-standard working relationships, such as (versions of) casual work, dependent self-employment, informal work, piece-work, home-work and crowd-work, in a wide range of sectors. The actual work provided can be digital or manual, in-house or outsourced, high-skilled or low-skilled, on-site or off-site, large- or small scale, permanent and temporary, all depending on the specific situation. In order to constitute work and to be part of the online platform economy, it must however be provided for remuneration, thus excluding ‘sharing’ activities (which is why the “collaborative” or “sharing economy” is not an appropriate denomination).

While there is a potential that online platform work will transfer transactions that were conducted in the shadow economy to the formal sector, the regulation of the activities of online platforms has generally not been straightforward. This is due to dynamics of the sector, the rule-avoiding behaviour of many online platforms, and the narrative - fostered by the online platforms - that their activities are ‘new’ and ‘unprecedented’ features emerging from rapid technological change that should not be treated similarly to any existing economic activities. Furthermore, not in the least, this difficulty results from the fact that some aspects of online platform working do not fit easily into pre-established regulatory categories.

This latter consideration applies particularly to employment law, including on OSH. Online platform work poses a range of both pre-existing and new OSH risks, both physical and psycho-social.

The fact that online platform workers share many similarities with both temporary workers and agency workers, means that they are probably exposed to the same OSH risks, with studies consistently showing higher injury rates among non-standard workers (Howard, 2017). Furthermore, any physical health and safety risks could be anticipated to be worse because of the loss of the protective effect of working in a public workplace, as most of this work is transacted in private automobiles or homes (Tran and Sokas, 2013). This may mean that their equipment does not meet ergonomic criteria and that other environmental factors are not optimized for working. Moreover, online platform workers tend to be of younger age, which is a well-known independent risk factor for occupational injury (Huws, 2016). In addition, platform work, through competitive and rating mechanisms, encourages a rapid pace of work without breaks, which may induce accidents (Huws, 2016). Pay not being continuous but per-assignment adds such time pressure. The lack of appropriate training further increases the risk of accidents, and this while several key activities typically carried out by online platform workers are in occupations that are notoriously dangerous, such as construction and transport (Huws, 2016).

Digital online platform work carries risks such as permanent exposure to electromagnetic fields, visual fatigue and musculoskeletal problems. Digital online platform work carries further psycho-social risks, such as isolation, stress, technostress, technology addiction, information overload, burn-out, and postural disorders, and cyber-bullying, while all online platform work can induce stress through continuous time evaluation and rating of performance, competitive mechanisms for allocating work, uncertain payment and blurring of work-life boundaries. Finally, job insecurity, known to contribute to poor overall health among contingent workers, is salient among online platform workers.

These risks would make it all the more important for OSH regulations to apply to online platform work, but this application is highly uncertain. The application of OSH rules and employment law in general is not easy, as the involvement of online platforms in the organization and provision of (digital and manual) labour tends to complicate the classification and regulation of the responsibilities as regards the work in question. The almost inevitably triangular (or



multilateral) nature of the arrangements, their often-temporary nature, the sometimes relatively high measure of autonomy of the worker in terms of working place and time, and the at times informal (citizen-to-citizen) nature of some of the activities, and the absence of a common workplace all challenge the application of the concept of the standard, permanent, binary employment relationship.

These challenges however do not seem to be unique to the online platform economy. The past few decades have seen an increase in the use of non-standard forms of work, such as casual work, on-call work, temporary agency work, informal work and dependent self-employment. Many of the working arrangements set up by the online platforms coincide, or closely resemble, these forms of atypical work or a mixture thereof, sometimes with the only difference that they make use of a digital tool.

The precarious position of online platform workers is further aggravated by the fact that the specific features of online platform work tend to hamper the collective organization of workers, and thus the defence of their rights and interest, as well as the development of social dialogue. Most workers on online platforms do not know each other, there is a high turn-over of workers, set working patterns may be lacking, workers may not consider the work they provide for/on/via the online platform as their primary professional activity, and putting workers in direct competition with each other – through individual ratings and the competitive method of work allocation – is an operational feature of many online platforms. These factors are not conducive to the solidarity and collaboration needed for effective unionization – and the fact that they may be considered “self-employed” problematizes such unionization in legal terms (Garben, 2018).

The Regulation of Online Platform Work in Europe

A first approach is to ‘simply’ apply existing regulations to online platform work. In many countries, this would entail a case-by-case determination whether the online platform worker is an employee, or self-employed, or in some countries falls in a third category in between. Depending on the (flexibility of the) test applicable to determine labour status, this may already include many online platform workers in the category of employee, or in an intermediate category, meaning that (most) employment and OSH rules would apply – at least in legal terms. Active enforcement by the competent authorities and access to courts for workers are

necessary for this approach to be effective, however, considering the systematic rule-avoiding behaviour of many online platforms. EU Member States that seem to largely follow this approach at present are the UK, Ireland, Sweden and the Netherlands (Garben, 2017). On the other hand, in Denmark and Belgium, the approach of applying the current legal provisions will usually lead to online platform workers being classified as ‘self-employed’, leaving most employment law inapplicable.

A second approach is to take specific action to narrow the group of persons that will be considered ‘self-employed’, through the addition of an intermediate ‘(independent) worker’ category or a rebuttable presumption of employment. The UK already has such an intermediate category of ‘worker’, and the Netherlands and Belgium feature a rebuttable presumption of employment. The cases concerning the status of online platform workers in these countries however show that these mechanisms do not necessarily resolve the categorisation difficulties, and that in the end, a case-by-case assessment (by courts) is still necessary, with the legal uncertainty that this entails. It should be noted that this approach could also be adopted organically, most notably by courts, as they can adapt the tests of self-employment that they have often themselves developed to the specific features of online platform work, for instance by placing less emphasis on ownership of key assets of the business (such as cars in the context of passenger transport) and more emphasis on *de facto* control mechanisms (such as rating and pricing systems operated by the platforms).

A third approach is to provide specific (OSH, and other employment) protection for online platform workers, regardless of their employment status. This can be through state regulation, such as in France, which has adopted the Act of 8 August 2016 on work, modernization of social dialogue and securing of career paths that provides: (i) that independent workers in an economically and technically dependent relationship with an online platform can benefit from an insurance for accidents at work which is the responsibility of the online platform in question; (ii) that these workers equally have a right to continuing professional training, for which the online platform is responsible, and should at their request be provided with a validation of their working experience with the platform, by the online platform, (iii) that these workers have the right to constitute a trade union, to be a member of a union and to have a union represent their interests, and (iv) that they have the right to take collective action in defence of their interests.

Such regulation can also be done by the stakeholders



themselves. In Denmark, a collective agreement has been signed between the Danish cleaning services digital platform Hilfr and the United Federation of Danish Workers, guaranteeing the same conditions as elsewhere on the Danish labour market. The 1-year 'trial' agreement, in force from 1 August 2018, covers pensions and sickness benefits, holiday pay and collectively agreed wages. After 12 months, a revision will be carried out and training, education, and OSH may be included. The framework for the agreement was created by the Danish Government, aiming to ensure fair competition by creating the same rules for all (for example in relation to taxation). An agreement was reached in the Danish Parliament on automatic sharing of information by platforms to tax authorities. Finally, a 'weaker' form of self-regulation has taken place in Germany, where in 2017, eight Germany-based platforms have signed a Code of Conduct in which they agree to conclude local wage standards as a factor in setting prices on their platforms.

The EU and Online Platform Work

The European Commission has set out the conditions under which it considers that an employment relationship exists in line with EU labour law, for the purposes of applying EU labour law. It considers that the CJEU's definition of "worker" as applied in the context of the free movement of workers also guides the application of EU labour law, entailing that "the essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration". Whether an employment relationship exists or not has to be established on the basis of a case-by-case assessment, considering the reality of the relationship, looking cumulatively at the existence of a subordination link, the nature of work and the presence of a remuneration.

The Commission has furthermore proposed two measures in the context of the European Pillar of Social Rights that may impact online platform workers' social and employment rights.

Firstly, it has proposed the revision of the Written Statement Directive 91/533/EEC. The proposal aims to reinforce the rights already contained in that Directive about the information the worker is entitled to receive in their employment contract by applying them to all workers irrespective of their employment status. In addition, the revised Directive (that will be entitled the Transparent and Predictable Working Conditions Directive) may define core labour standards for all workers, particularly for the protection of atypical, casual forms of employment. The proposal

(COM/2017/0797 final) defines a maximum duration of probation of 6 months (where a probation period is foreseen), the right to reference hours in which working hours may vary under very flexible contracts to allow some predictability of working time, the right to request a new form of employment (and employer's obligation to reply), the right to training, the right to a reasonable notice period in case of dismissal/early termination of contract, and the right to adequate redress in case of unfair dismissal or unlawful termination of contract. The proposal is currently under negotiation in Parliament and Council.

Secondly, the Commission has proposed a Council Recommendation on Access to Social Protection (COM(2018) 132 final), hoping to tackle the problem that up to half of people in non-standard work and self-employment are at risk of not having sufficient access to social protection and/or employment services across the EU. The Recommendation urges Member States to provide similar social protection rights for similar work regardless of labour status and the transferability of acquired social protection rights.

The European Parliament's position, in general terms, has been that fair working conditions and adequate legal and social protection should be ensured for all workers in the online platform economy, regardless of their status. In its Resolution of 19 February on a European Pillar of Social Rights, the Parliament has called on the Commission to broaden the Written Statement Directive to cover all forms of employment, and to include relevant existing minimum standards "for work intermediated by digital platforms and other instances of dependent self-employment, a clear distinction – for the purpose of EU law and without prejudice to national law – between those genuinely self-employed and those in an employment relationship, taking into account ILO Recommendation No 198, according to which the fulfilment of several indicators is sufficient to determine an employment relationship; the status and basic responsibilities of the platform, the client and the person performing the work should thus be clarified; minimum standards of collaboration rules should also be introduced with full and comprehensive information to the service provider on their rights and obligations, entitlements, associated level of social protection and the identity of employer; those employed as well as those genuinely self-employed who are engaged through online platforms should have analogous rights as in the rest of the economy and be protected through participation in social security and health insurance schemes; Member States should ensure proper surveillance of the terms and conditions of the employment relationship or service contract, preventing abuses of dominant positions by the platforms". On this basis, in



relation to the proposed Transparent and Predictable Working Conditions Directive, Parliament may propose to add further protections, including for workers on highly atypical working arrangements, such as online platform workers and zero-hours workers.

Finally, in an important judgment, the EU Court of Justice examined the nature of the activities of the online platform company Uber (EU:C:2017:981). The central question was whether Uber's activities were to be classified as "information society services" under EU law, in which case market access should be granted and restrictions on its operation should have been notified and could only be accepted in limited circumstances, or whether they instead constituted "transport services" which fall outside the scope of the EU rules in question and can therefore in principle be freely regulated by the Member States. In its judgment, the Court considered that the intermediation service provided by Uber is based on the selection of non-professional drivers using their own vehicle, to whom the company provides an application without which (i) those drivers would not be led to provide transport services and (ii) persons who wish to make an urban journey would not use the services provided by those drivers. In addition, Uber exercises decisive influence over the conditions under which that service is provided by those drivers. Uber determines at least the maximum fare, receives that amount from the client before paying part of it to the non-professional driver of the vehicle, and exercises a certain control over the quality of the vehicles, the drivers and their conduct, which can, in some circumstances, result in their exclusion. Therefore, it was "inherently linked to a transport service and, accordingly, must be classified as "a

service in the field of transport" which can be freely regulated by the Member States. While the judgment does not concern the labour status of the Uber drivers, the CJEU's considerations concerning the measure of control of the online platform may be relevant for future labour law cases at national and EU level in the future.

Conclusion

Regulators at national and EU level are only starting to grapple with online platform work and the disruption it entails. At national level, regulators are mulling over the various different policy options. As discussed, these include (i) applying the existing definition of employment to online platform work with the result that some fall within, and some outside, its scope (ii) enlarging the scope of application to specifically include online platform work in employment/social protection, (iii) taking specific (self-)regulatory measures to offer special protections to online platform workers. No solution is likely to be perfect and to a certain extent, it seems that any action should consider not just the precariousness of online platform work, but of (the rise of) non-standard employment more generally. At EU level, the outcome of the legislative process concerning the Transparent and Predictable Working Conditions Directive will add an interesting new dimension to the issue, and it should be commended for dealing with the rise of a-typical employment in cross-cutting way. If successfully adopted, the (national implementation of the) Directive may prove a catalyst for further national action on this fundamental issue that is not likely to dissipate in the years to come.



Further reading

S. Garben, 'Protecting Workers in the Online Platform Economy: An overview of regulatory and policy developments in the EU', *European Risk Observatory Discussion Paper, European Agency for Safety and Health at Work*, 2017

S. Garben, 'Arbeid in de Online Platform Economie', *Sociaal Economische Wetgeving (SEW)*, (Special Issue on the Online Platform Economy), 2018 (forthcoming)

V. Hatzopoulos, *The Collaborative Economy and EU Law*, Hart Publishing (2018)

U. Huws, 'A review on the future of work: Online labour exchanges, or "crowdsourcing": Implications for occupational health and safety', 2016 EU OSHA discussion paper: <https://osha.europa.eu/en/tools-and-publications/publications/future-work-crowdsourcing/view>

J. Howard, 'Nonstandard work arrangements and worker health and safety', 60 *American Journal of Industrial Medicine* (2017) 1

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About the author

Prof. Dr. Sacha Garben is Permanent Professor of EU law at the Legal Studies Department of the College of Europe, Bruges.

She is on leave from the European Commission. The views expressed in this publication are entirely personal and do not reflect the official position of the European Commission.

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