Maintaining the status quo and fostering competition among platforms would better serve the platform workers and consumers

14-02-2022

The European Commission has proposed a Directive of the European Parliament and Council on improving working conditions on platform work (hereinafter – the Draft Directive, the Directive). The proposal lays down intricate requirements for platforms whose application is likely to have serious unintended consequences for the consumers and workers contrary to the directive objectives.

The fact that individuals themselves decide to engage in platform work suggests that they regard some conditions of platform work, such as remuneration and flexible timetables, as more advantageous, and thus more attractive. It may also be indicative of the desire to distance oneself from employment relationships and related regulatory restrictions on work activities, such as minimum rest, maximum working hours, subordination to the employer, etc.

The breakthrough of the gig economy was preconditioned by the laxity, or even absence, of regulation, i.e., more freedom to enterprise and act. However, both at the European Union (EU) and at the national level, there are growing concerns about subjecting platform work to more encompassing and rigid regulations. The best way forward is to maintain the regulatory status quo of platform work, foster competition among platform operators, and establish efficient and easily accessible dispute resolution mechanisms. Due to the nature of platform work, it would be prudent to create conditions for the sharing economy to develop further and ensure a regulatory environment that would meet the flexibility needs of platform workers. In contrast, an increase in regulation and imposing labor standards on platform work may have detrimental effects on the sector, consumers, the national economy, and the EU.

1. Matchmaking to meet everyone's needs

Although platforms undercut the traditional providers in terms of prices, they are also under intense price pressure due to competition between transport or delivery platforms. For example, ride-sharing services tend to reduce fares and thus the charges for drivers are considerably based on the state of competition in the market (Schmidt, 2017). Through this and by expanding the driver network, the company's network effects are increased. The competitive situation is similarly unstable for delivery services, which have opened up a market that was previously only served by supermarkets and restaurants (Singh, 2019). The need for these services mainly grew during the pandemic.

In addition, some researchers argue that labor platforms (such as ride-sharing, delivery, etc.) rely on the model of "business growth before profits", meaning that they operate a "hyper-outsourcing" model (Srnicek, 2017), in which both workers and fixed capital or training costs are outsourced. Work is usually outsourced, and workers are not regarded as employees but as independent and self-employed contractors who are paid based on the order. In this way, the platform companies not only save a considerable part of direct labor costs such as paid holidays, overtime bonuses, or sick days, but also the indirect costs of social security contributions or training and, in the case of work from anywhere in the world, they can put costs out to tender and compete with costs from low-wage countries.

In practice, self-employed persons have the opportunity to work via different platforms simultaneously. The enforcement of the proposed Directive would deprive the workers of this opportunity since labor regulations typically put a cap on working hours and the number of employers. In addition, working through various platforms (or having this possibility) implies that persons are not trapped in platforms. Workers always maintain the opportunity to do analogous work (e.g., driving services) through employment contracts in private companies. Platforms merely offer additional means (instruments) for work organization, but they do not monopolize the rules of providing certain services.

2. Regulating the Autonomy of Work and the Relevance of "Performance Review"

The European Commission aims to tackle the alleged issues with the work dimension, including the autonomy of work, surveillance, direction, and performance appraisal.

2.1. The degree of subordination, not just its existence, makes the worker an employee

One suggested measure is establishing effective control over the worker if at least two criteria from the Directive apply[1]. However, this is an obsolete point of view from the industrial labor age, which assumes that the sheer fact or act of subordination automatically implies employment. Scholars acknowledge that traditionally understood subordination is disappearing from modern labor relations. This is due to changes in the work itself and the achievements of modern management methodologies. Thus, rather than determining whether subordination exists or not, an assessment is made of the character and degree of subordination (compared to the opposite characteristic – independence) (Martišienė, 2011), including the proportionality of the measures foreseen.

The peculiarities of the digital market may radically reshape how work is allocated, organized, monitored, and performed. However, there are no common issues that all platform workers face. A systemic analysis of the Directive

[1] Article 4.2 of the Draft Directive:
"Controlling the performance of work within the meaning of paragraph 1 shall be understood as fulfilling at least two of the following:
(a) effectively determining, or setting upper limits for the level of remuneration;

proposal suggests that the true target of the EC is not platform work *per se*, but particular operations – such as ride-sharing and food delivery services. This is why any attempts to regulate platform work would unjustly affect other forms of services (e.g., consultants, lawyers, architects, *etc.*), even if they did not share the same challenges which the EC is concerned about.

The proposed and, as was mentioned, obsolete approach to employment relations leads to cherry-picking the characteristics of labor to justify intervention and not mirroring the actual diverse labor market. Many scholars and national courts suggest that subordination is not the only criterion for separating modern work from self-employment. The criterion of profit/risk sharing is no less significant. Research suggests that profit/loss risk sharing should be considered a decisive factor in distinguishing between dependent and self-employment. Lithuanian case law has already used this feature and formulated its content as follows: 1) who covers the costs related to the performance of activities; 2) who distributes and uses the received income; 3) who invests (own or borrowed funds); and 4) the amount of the benefit to the person and the proportion of his income (Martišienė, 2011).

2.2. Both the consumers and drivers give each other rankings not the platform

The enforcement of the Directive is likely not only to drive up the prices of services. The consumers would be deprived of the possibility to choose their service providers based on relative information, e.g., the quality of the work. In ride-sharing platforms, both the client and the service provider can rank each other and offer advice or directly send appraisal notes. In most cases, the client may also deny the services of a person, whose ranking does not satisfy the needs of the consumer. The proposed regulation neglects to acknowledge that the platform acts as a means for greater certainty and transparency to drivers and consumers because namely consumers rate their service provider (e.g. the driver), and the service providers (e.g. drivers) likewise have the possibility to rate their clients. This means that the platform does not itself autonomously rank the service providers. Upon entering a contract, the service provider adheres to the platform's internal rules based on which it provides its connectivity services.

(b) requiring the person performing platform work to respect specific binding rules with regard to appearance, conduct towards the recipient of the service or performance of the work;
(c) supervising the performance of work or verifying the quality of the results of the work including by electronic means;
(d) effectively restricting the freedom, including through sanctions, to organize one's work, in particular the discretion to choose one's working hours or periods of absence, to accept or to refuse tasks or to use subcontractors or substitutes;
(e) effectively restricting the possibility to build a client base or to perform work for any third party."

2.3. Primacy should be given to workers' valued contractual freedom

The platform functions as an intermediary between the service provider and the end-user and does not operate as an employer. The platform can neither prevent service providers from carrying out their tasks via other platforms or mediums nor is the platform a determinant condition for the provision of services. Rather than getting employed, the service provider (worker) buys the connectivity service through a platform and it acts as a means of expanding the driver's operations. Accordingly, priority should be given to the principle of contractual freedom between the platform worker and operator to decide upon particular conditions of their relationship, assuming that the worker finds the particular conditions acceptable.

In most cases, platforms serve the purpose of more efficiently connecting the service provider and the customer without imposing requirements on how the service must be provided, allowing more leeway for the platform worker to decide what one finds to be most convenient in terms of working conditions. The responsibility for health and safety falls upon platform workers themselves, who, notably, use their own materials and equipment.

A standardized service contract is concluded between the platform operator and a person buying platform connectivity services, and the premise is that the signatories fully understand their intent and conditions of their relationship. Given that there is no single dominant platform in the market, individuals can choose companies that best suit their interests. In addition, by being able to conclude contracts freely, companies are encouraged to compete in order to attract service providers. In this case, the sole function of governments is to ensure that individuals willing to pursue platform work are provided with the necessary information to make a decision to engage in platform work instead of prohibiting certain conditions from the contracts.

The nature of work and the personal characteristics of those who work are changing. For a long time, employment relationships have been defined as relationships that occur in manual and low-skilled work. However, in modern times neither an employed person nor a self-employed is any longer the *persona miserablis*. A modern working person is educated, skilled, self-confident (Martišienė, 2011). This leads to assuming that entering a civil contract, and not an employment contract was namely the intention for signing up at a platform application or site, since services in platforms may also be done under employment contracts in other companies.

3. Listing effective control criteria will fail to meet the actual needs of the market

There has been a rise in criticism of gig-economy companies suggesting that they are misclassifying workers who should, in fact, be considered employees and provided benefits (Ossowski, 2021; ILO, 2021; Aloisi, 2018). However, others argue that this very approach contradicts the nature of platform work and may have detrimental effects (Griswold, 2019; Ossowski, 2021; Schrager, 2020).

It is well-established in legal theory that a contractor is someone who is free from the control and direction of the hiring entity in connection with the performance of the work, does work that is outside the usual course of the hiring entity's business and is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed (Kilhoffer *et al.*, 2020). However, many individuals and industries fail this test if followed formally. In other cases, people who have been contracting their work for decades run the risk of losing the possibility to engage in their form of work. These include insurance brokers, freelance journalists, doctors, lawyers, architects, accountants, and many others, from translators to "owner-operator" truckers. Applying the control criteria as set in Art. 4 of the draft Directive could cost them their independence, flexibility, and, if employers did not find it worthwhile to hire them, possibly their livelihoods. For the consumers, this means higher service prices and, possibly, reduced availability of services. It must also be kept in mind that rigid regulations force some service providers into the shadow market, which means fewer guarantees for consumers and workers.

Relying solely on the basic control classification criteria proves to be insufficient and rigid when assessing complex and unorthodox business models. The pluralistic business landscape rarely follows the same operational model. Instead of establishing an exhaustive list of criteria that would define employment (i.e. effective control), it is expedient to shift the focus onto proving that certain contractors are indeed service providers and not employees. This would entail a different assessment approach. Service providers are primarily characterized by their independence in operations, responsibility, and liability. For example, when classifying a particular relationship, one must assess whether the worker is provided with necessary work tools and equipment, whether the worker is financially responsible for both the equipment and services provided and who bears the costs of providing the services. One must also determine whether the worker has the exclusive right to decide on providing the services, meaning that the platform worker may accept, reject, or ignore a particular order at one's discretion. In cases of ride-sharing, strict requirements for the vehicles may be considered merely a civil contract requirement and not an implication of employment relations.

The divergence of national decisions demonstrates that no common principles of classifying platform workers may be established, and issues are solved on a case-by-case basis depending on a particular platform and its terms – rather than addressing any common issues related to platform work as such. Governments around the world are already pursuing the balance between protecting worker rights and allowing the benefits of flexibility and opportunity that gig-business models propose. For example, France has provided some labor rights for self-employed (digital) platform

workers and has added new rights specifically for drivers (Gerard, 2019). At the same time, the UK government is exploring worker classifications (Summers, 2019). Several courts of European states have ruled that digital platform workers cannot be qualified as employees, as the former have the ability to independently manage their time and they are free to select their shifts, and refusing a shift does not trigger any sanction from the company (De Stefano, 2020).

4. The employment presumption and related dispute resolution may disincentivize platforms from growing and operating

According to the Draft Directive, the platform is assumed to be an employer and must enter an employment contract with the worker if specific predefined criteria apply. In practice, this means that a mere hypothesis would double or triple the platform's expenses to cover the price of the workplace. The presumption may be overturned only in court, making the potential losses of the platform even higher. In addition, initiating court proceedings does not pause the presumption of employment. Such a requirement does not only unjustly increase the platform's costs without an actual assessment of its operations. It means that the platform would be more incentivized to terminate a service contract with the driver, for example, since litigation would be more expensive. The Directive does not stipulate any safeguards if the presumption of employment is overturned, which only increases the uncertainty of the application of the Directive. This, in turn, may force out platforms from the EU since the potential risks of operating in this market would be too high to bear in comparison to other states, where no such regulations are in force.

A lack of legal certainty regarding possible dispute resolution may precondition the need for more rigid rules on contracts. Given that national courts may be overloaded with cases, individuals may feel less assured that they will be able to have their disputes resolved. Therefore, the state must commit itself to ensure dispute settlement efficiency, alternative dispute resolution mechanisms included. It is inefficient to engage in patchwork regarding particular terms and conditions of contracts. Instead, it is advisable to focus on establishing proper dispute resolution means for people to defend their interests on their own terms. For example, Portugal has introduced a new, simplified judicial procedure to target the growth of false self-employment through changes in 2013 and 2017 (Law n.º 63/2013, August 27 and Law n.º 55/2017, July 17). It provides workers with a speedier court decision recognizing the existence of an employment relationship (Menéndez, 2020).

5. Disrupting the disruptors of traditional businesses will affect workers and consumers

With regard to the classification of the relationship between the platform worker and operator, it must be noted that a particular relationship depends on the entirety of characteristics that cannot be established in advance. This variety of characteristics of platform work suggests that any efforts to harmonize principles that separate employees from contractors are most likely to fail and result in a patchwork of different rules for different jobs. Therefore, private parties should be allowed to individually decide on the nature of their relationship. Establishing a rigid scheme of separating employment and provision of services deprives individuals of independently deciding on their preferred work mode. This in turn will make the EU a less competitive global player in the global market.

The costs and implications of employee reclassification (i.e. employing a service provider under a labor contract instead of an agreement on provision of services) suggest that intervening in the market with rigid requirements and restrictions may not bring desired results. Equity research analysts at Barclays estimate that the reclassification of workers could cost Uber an additional USD 3,625 per driver in California. This would increase the company's annual operating loss by more than USD 500 million (Griswold, 2019). Any new regulations may bring additional operational costs and result in a decreased amount of contracts, loss of flexibility for workers, and higher prices or reduced service provision due to all of the factors that make platform work appealing to both platform workers and consumers. In addition, new restrictions on flexibility may force platform workers into the shadow market; accordingly any attempts to increase their social protection would be fruitless. However, there are also cases where courts have decided that self-employed drivers be deemed as traditional workers. For example, in 2021 the UK Supreme Court ruled in favor of 35 Uber drivers, who were considered self-employed, to be classified as workers (Ossowski, 2021). Yaël Ossowski (2021), deputy director of the global consumer advocacy group Consumer Choice Center, stated that the "ruling sends the signal that rideshare companies are not welcome in the UK" and that this is "not what consumers want". She continued by emphasizing the importance of flexibility in the sector as it has propelled the growth of companies like Uber, Lyft, and others and it has been beneficial for both drivers who want independence and consumers who want convenience and competitive prices. However, obligatory reclassification of workers may not only drive the prices up but could even result in major players exiting the market and thus cause job losses (Browne, 2021).

6. Alternatives to better meet the needs of the self-employed and their clients

6.1. Soft-law measures instead of increased rigidity

Decision-making is the most effective when left at the lowest chain possible, without intervention into market mechanisms. An example could be the Code of Conduct adopted by several German platforms, which is meant to discipline the minimum levels of payment by the platforms, increase the transparency of criteria applied in the operation of rating systems, and ensure the legitimacy of content exchanged online. The document lists some best practices for governing work in these new digitally mediated non-standard work environments and offers a catalog of behaviors to be avoided. Another example may be found in France where a law introduced the possibility for platform operators to draw up a social responsibility charter with a certain number of guarantees for workers. The administration may also approve the platform operator's charter, provided that workers using the platform have been consulted in advance. The idea is that platform operators can make commitments to improve working conditions, with the understanding that their compliance with these commitments cannot be used to presume an employment relationship (Lane, 2020).

Instead of adopting rigid requirements and limits, governments might consider defining social responsibility by default, which could promote transparency of internal processes (De Stefano, 2020). In addition, greater information and counseling, rather than intervention, would enable individuals to make independent and informed decisions when entering contracts with online platforms. In this sense, greater personal responsibility should be fostered instead of deciding for the worker in advance, especially given that the effective control criteria can already be assessed under various other EU requirements and conditions, e.g. constituting illegal work. This also suggests an assumption that, in cases where the Draft Directive duplicates currently existing rules, the new patchwork on top might not work since the outcomes of the Directive rely heavily on its enforcement, not on sanctions.

6.2. Current labor regulations are not fit to accommodate the consumers and the self-employed

Forcing former service providers and atypical workers into formal and traditional employment relations poses another conundrum, given that the employment framework may be ill-prepared to handle unorthodox work through platforms. It must be kept in mind that platform workers may not wish to engage in traditional employment or are unable to do so due to the peculiarities of their status. The latter may occur in instances where the person does not have a work permit due to immigration status. Furthermore, the majority of traditional employment contracts do not meet the need for flexibility that is provided by platform work.

In such cases, an alternative could be zero-hour contracts that are the closest alternative to platform work and could ensure the needed flexibility. However, such contracts are prohibited in the majority of EU states, and the EU has

discouraged them so far. When considering policy initiatives in terms of platform work, the use and benefits of zero-hour contracts should be revisited. Working under a zero-hour contract provides the possibility for the worker to determine the preferable amount of work while being guaranteed at least some income in cases where the worker does not exceed the set minimum amount of work hours. Such contracts provide the possibility to better accommodate the worker's personal needs. They also allow working for multiple employers by providing not only flexibility in the work regime but also a possibility of a sanction-free refusal to take on an employer's work task.

Conclusions

- The essence and combined characteristics of the operations of platforms suggest that they are not to be expected to provide stable income and workload for their users. Accordingly, platforms do not expect their contractors to work on a stable basis. Instead, the platforms offer connectivity services both to the consumer and worker.
- Centralized rigid regulations of platform workers would negate the very essence of working through online platforms and the employment presumption would unjustly deprive individuals of the ability to decide on their preferred work module and conditions.
- Imposing labor standards to platform work will reduce the supply of services and increase their cost for the consumers. This may lead to many platform workers losing their income. It would result in decreased possibilities to get employed in this sector, which is particularly relevant for those suffering the consequences of nationwide lockdowns and unemployment due to the pandemic.
- The Directive duplicates effective control requirements which can already be established under the EU *acquis* that covers labor relations and social protection. This implies that the issues that the EC aims to tackle are created not by an abundance of rules, but rather by the lack of their enforcement mechanisms.
- The Directive will increase uncertainty and reduce transparency for platform work, and this will not only de-incentivize job creation but may also force the platforms out of the EU market.
- The Directive relies on industrial-era tools to regulate a dynamic and booming market segment that cannot be defined as traditional labor. Its static impact assessment and static rules might create an illusion of positive outcomes, while negative implications of this approach are not considered.
- The role of the platform is to provide additional instruments for the clients and service providers to interact with, and so the clients rate their service providers, not the platform.
- Automatically assuming the person's status as employed deprives the workers of the possibility to choose their preferred work and its module. It contradicts the workers' intentional will to enter a civil contract with the platform and the provider's freedom to enter contracts.

- Given the relatively short period since the rise of platform work and the EC's proposal to regulate it, it would be prudent not to rush with interventions and instead monitor the market in order to better understand how it operates, particularly given the examples that platforms tend to introduce *inter-partes* rules on their social responsibility. The use and benefits of zero-hour contracts should be revisited since they could best mirror the benefits of platform work through a civil contract.

Bibliography

Browne, R. (2021) "Uber employment rights setback is a 'gut punch' to its prospects in the UK". Available [online]: https://www.cnbc.com/2021/03/18/uber-is-reclassifying-uk-drivers-as-workers-heres-what-happens-next.html.
De Stefano, V. (2020) "EU Court of Justice's decision on employment status does not leave platforms off the hook" in *Regulating for Globalization,* Wolters Kluwer, 2020.
De Stefano, V. (2020) "EU Court of Justice's Decision on Employment Status Does Not Leave Platforms Off the Hook", [in]: *Regulating for Globalization,* Wolters Kluwer.; Aloisi A. (2018) "The Role of European Institutions in Promoting Decent Work in the "Collaborative Economy", [in]: Bruglieri M. (eds) *Multidisciplinary Design of Sharing Services. Research for Development.* Available [online]: https://doi.org/10.1007/978-3-319-78099-3_11.
Gerard, J. F. (2019) "Better protection for gig economy workers" in *Lexology*. Available online: https://www.lexology.com/library/detail.aspx?g=035bd2b8-4d12-4b80-b516-fc0ae7fb4d3d.
Griswold, A. (2019) "How Much It Would Cost Uber and Lyft If Drivers Were Employees", [in]: *Yahoo Finance*. Available [online]: https://finance.yahoo.com/news/much-cost-uber-lyft-drivers-151818345.html
Kilhoffer, Z., Lenaerts, K., Smits, I., Hauben, H., Waeyaert, W., Giacumacatos, E., Lhernould, J.P., Robin-Olivie, S. (2020) New Study Looks at the Challenges Faced by Platform Workers. Available [online]: https://ec.europa.eu/social/main.jsp?catId=89&furtherNews=yes&langId=en&newsId=9582
Lane, M. (2020) "Regulating Platform Work in the Digital Age", [in]: *GoingDigital Toolkit Policy Note*, No. 1. Available [online]: https://goingdigital.oecd.org/toolkitnotes/regulating-platform-work-in-the-digital-age.pdf
Martišienė, B. (2011). Priklausomą ir savarankišką darbą atskiriančių požymių pokyčiai. ISSN 1392-1274. TEISĖ 2011 80.
Menéndez, U. (2020) "Recent Developments in Employment Disputes in Portugal", [in]: *Lexology*. Available [online]: https://www.lexology.com/library/detail.aspx?g=da11d99f-8dc3-4a6f-8262-52affa8986e5
Ossowski, Y. (2021) "What Does the UK Supreme Court Ruling on Uber Mean for the Gig Economy? Business and legal experts react". Available [online]: https://consumerchoicecenter.org/what-does-the-uk-supreme-court-ruling-on-uber-mean-for-the-gig-economy-business-and-legal-experts-react.
Schmidt, F. A. (2017) "Digital Labour Markets in the Platform Economy", Friedrich-Ebert-Stifung.
See, e.g. Ossowski, Y. (2021) "What Does the UK Supreme Court Ruling on Uber Mean for the Gig Economy? Business and legal experts react". Available [online]: https://consumerchoicecenter.org/what-does-the-uk-supreme-court-ruling-on-uber-mean-for-the-gig-economy-business-and-legal-experts-react; ILO (2021) "World Employment and Social Outlook 2021: The role of digital labour platforms in transforming the world of work"; Aloisi A. (2018) "The Role of European Institutions in Promoting Decent Work in the "Collaborative Economy", [in]: Bruglieri M. (eds) Multidisciplinary Design of Sharing Services. Research for Development. Available [online]: https://doi.org/10.1007/978-3-319-78099-3_11, etc.
See, e.g., Griswold, A. (2019) "How Much It Would Cost Uber and Lyft If Drivers Were Employees", [in]: Yahoo Finance. Available [online]: https://finance.yahoo.com/news/much-cost-uber-lyft-drivers-151818345.html; Ossowski, Y. (2021) "What Does the UK Supreme Court Ruling on Uber Mean for the Gig Economy? Business and legal experts react". Available [online]: https://consumerchoicecenter.org/what-does-the-uk-supreme-court-ruling-on-uber-mean-for-the-gig-economy-business-and-legal-experts-react; Schrager, A. (2020) Taking the Freedom Out of Freelancing; Hawkins, A. J. (2020) "An Uber and Lyft shutdown in California looks inevitable — unless voters bail them out". Available [online]: https://www.theverge.com/2020/8/16/21370828/uber-lyft-california-shutdown-drivers-classify-ballot-prop-22, etc.
Singh, S. (2019) "The Soon To Be $200B Online Food Delivery Is Rapidly Changing The Global Food Industry', [in]: *Forbes*. Available [online]: https://www.forbes.com/sites/sarwantsingh/2019/09/09/the-soon-to-be-200b-online-food-delivery-is-rapidly-changing-the-global-food-industry/.
Srnicek, N. (2017) "Platform Capitalism", [in]: *Polity Press*, Cambridge, p. 76.
Summers, N. "UK government will finally settle the gig economy 'worker' debate" 2019. Available online: https://www.engadget.com/2018/02/07/uk-gig-economy-worker-rights-consultation/.