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Ilaria Pretelli (ed)

Conflict of Laws in the Maze of Digital Platforms

Le droit international privé dans le labyrinthe des plateformes digitales

Actes de la 30e Journée de droit international privé du 28 juin 2018 à Lausanne

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Summary

Further Input

Ljupcho Grozdanovski*

The Need to Rethink the Subordination Criterion in the Context of Collaborative Work

Table of Contents

1. Introduction

1. *"Caring is sharing"* has become a theme in recent studies dealing with a fairly new phenomenon which goes by many names: platform economy, collaborative

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economy, gig economy[1]… Based on the sharing paradigm, online platforms such as *Ebay, Etsy, Airbnbn, Uber, Blabla Car, Mechanical Turk* have developed a number of diverse business models that facilitate the exchange of goods or the provision of services between non-professionals and consumers.

2. In spite of its advantages, collaborative economy raised some challenging legal issues, considering that platforms have affected a number of markets (transport, housing etc) while circumventing existing regulations in those markets, primarily because the legal qualification of the platforms and of their services is not entirely clear. Scholars as well as national and European legislators reflected on the possibility of platform-specific regulations. In the Commission Communication on Online Platforms and the Digital Single Market,[2] the "right regulatory framework for the digital economy"[3] is emphasized, but this doesn't necessarily translate to the enforcement of new, tailor-made legislation. The Commission rather urged for the application of already existing legislation such as the General Data Protection Regulation and the Network and Information Security Directive.[4] This is not to say that there will not be future secondary legislation on aspects dealing with online platforms. However, the general attitude of the EU Institutions in terms of regulation seems to be one of "wait and see".[5]

3. In such a context of regulatory stand-by, it was for the European Court of Justice (hereafter the ECJ) to bring more clarity as regards the legal qualification of the services provided via the Uber app. In the *Uber* case of 2017,[6] the Court found that the Uber application is inherently linked to a transport service and must be classified as "a service in the field of transport", thus falling outside of the scope of application of Directive 2000/31 on information society services.[7] Although this case deals only with Uber, the ECJ did set out some criteria of interpretation of platforms' activities, thus setting the tone and the approach to be adopted, should another Uber-like case be brought before the Court.

1 See, *inter alia*, HATZOPOULOS/ ROMA, Caring for Sharing? The Collaborative Economy Under EU Law; RANCHORDAS, Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy.

2 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Online Platforms and the Digital Single Market Opportunities and Challenges in Europe, COM (2016) 288 *final*.

3 *Idem*, p. 4.

4 *Ibidem*.

5 See on this point HATZOPOULOS/ ROMA, n. 2.

6 Case C-434/15, *Uber*, EU:C:2017:981.

7 Directive 2000/31 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce"), OJ L 178/1.

4. One issue remains unresolved on an EU level: what about the people involved in platform work? What is, or could, their status be with regard to EU law? National Uber cases[8] show that there is a lingering dilemma regarding the legal qualification of workers that use online applications to provide services: should they be considered as salaried workers, as independent workers or as hybrid workers, presenting elements of both salaried and independent work?

5. Given the lack of unanimity on the legal status of platform workers, the main inquiries in the present study are the following: can collaborative workers qualify as workers in EU law and should the EU notion of worker be subject to revision for the purpose of qualifying collaborative work?

6. For the purpose of answering these questions, we shall present the specificities of the EU notion of worker in the context of collaborative work (Section 3) in view of determining whether platform work displays the essential features of employment, as defined in EU law (Section 4) and in view of suggesting an "updated" interpretation of the subordination criterion (Section 5).

7. It should be stressed that the ECJ has not yet ruled on the status of collaborative workers. However, recent case law on atypical work does provide some clues on the approach the Court may adopt, depending on the types of future claims likely to be brought by such workers. Considering that there is available national case law regarding the legal qualification of Uber drivers, we shall attempt to anticipate the ECJ's response, should the issue of these drivers' status be raised before the Court.

2. Scope of the Study and Preliminary Remarks

2.1. Underlying Services

8. According to the European Agenda on Collaborative Economy, two qualifications of the services provided via online platforms are possible: a *prima facie* legal qualification and a subsidiary legal qualification. In light of the said Communication, as long as collaborative platforms provide a service for remuneration, at a distance, by electronic means and at the individual request of a recipient of services, they provide an *information society service*,[9] governed by Directive 2000/31.

9. Exceptionally, online platforms can offer services falling outside of the scope of application the said Directive. The Commission qualifies these as *underlying*

[8] In the UK see Employment Appeal Tribunal, UKEAT/0056/17/DA. For Germany, see for *e.g.* DAVIES, Uber loses appeal in UK employment rights case, available on https://www.theguardian.com/technology/2017/nov/10/uber-loses-appeal-employment-rights-workers (last visited on 15 September 2018).

[9] European Parliament Resolution of 15 June 2017 on a European Agenda for the collaborative economy (2017/2003(INI)), p. 5.

services[10] that may include transport services or short-term rental services. If a platform provides s.c. underlying services, it "could be subject to the relevant sector-specific regulation, including business authorizations and licensing requirements generally applied to service providers."[11]

10. The present study will focus only on the provision of underlying services since it is for those services that the application of sector-specific regulations – *i.e.* the EU law provisions on workers – is relevant.

2.2. Treaty Provisions

11. The present study will focus on the status of collaborative workers for the purpose of applying the EU law provisions on the free movement of workers and on the benefit from workers' rights. The provision of services within the meaning of Article 56 TFEU will not be examined nor will the issues raised in relation to platforms' liability or to other areas affected by the platform economy such as Consumer Protection, Data Protection and Competition law.

12. While it is true that a Member State national who is a platform worker could, potentially, qualify as a service provider[12] and rely on her status of EU citizen,[13] we shall focus on the EU law provisions in the fields of labour movement and labour policy for one simple reason: it is only when a platform worker can qualify as a worker within the meaning of EU law, that she can argue the benefit from worker-specific rights.

2.3. Operative Concepts

13. For the purpose of the present study, collaborative economy, platform economy and gig economy will be used as synonyms. The term *collaborative economy* will be understood within the meaning of the European Agenda for Collaborative Economy, *i.e.* as referring to business models where activities are facilitated by collaborative platforms that create and open marketplace for the temporary usage of goods or services often provided by private individuals. The collaborative economy involves three categories of actors: service providers who share assets, resources, time and/or skills – these can be private individuals offering services on an occasional basis ("peers") or service providers acting in their professional capacity ("professional services providers"); users of these; and intermediaries that

[10] *Idem*, p. 6.
[11] *Ibidem*.
[12] Article 56 TFEU and Directive 2006/123 on services in the internal market, OJ L 376/36.
[13] Article 20 TFEU and Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158/77.

connect – via an online platform – providers with users and that facilitate transactions between them ("collaborative platforms"). Collaborative economy transactions generally do not involve a change of ownership and can be carried out for profit or non-for-profit.[14]

14. The notion of platform will be understood within the meaning of the OECD Technical Report on new forms of work in the digital economy.[15] According to this Report, "the scope of the term "online platforms" (…) can include more than "Internet platforms", but is defined narrower than "digital platforms", the latter of which could include, for example, operating systems, which are beyond the scope of the Report. Over-the-top (OTT) service providers are also often called (Internet/online/digital) platforms (…). The term "platform" is used equivalent to "online platform". The firms that operate online platforms, also called digital matching firms or online intermediaries, are referred to as "platform operators".[16]

15. More specifically, labour platforms will be defined as platforms that connect producers with consumers. These platforms "also provide the infrastructure and the governance conditions for the exchange of work, and facilitate the corresponding compensation. A platform's overall goal is to enable producers and consumers to find each other, engage in the exchange of goods and services for money, and in some cases build lasting commercial relationships."[17]

16. The notion of atypical or non-standard work will be understood within the meaning of the OECD Technical Report on new forms of work in the digital economy: "in its broadest sense, [non-standard work] arrangements are defined by what they are not: full-time dependent employment with a contract of indefinite duration, or what is generally considered the "standard" work arrangement. This definition generally implies that self-employed own-account workers and all part-time workers fall under "non-standard workers". While problematic – as this lumps together precarious and non-precarious forms of work – this convention is followed by a large part of academic international and national research."[18]

17. For the purpose of the present study atypical or non-standard work will be understood as an *umbrella concept* which includes platform work.

[14] European Parliament Resolution of 15 June 2017 on a European Agenda for the collaborative economy (2017/2003(INI)), p. 3.

[15] New Forms of Work in the Digital Economy, 2016 Ministerial Meeting on the Digital Economy, OECD Digital Economy Papers, 260/2016.

[16] *Idem* at 8.

[17] ILO Future of Work Research Paper Series, The Architecture of Digital Labour Platforms: Policy Recommendations on Platform Design for Worker Well-Being, 3/2018, at 1.

[18] New Forms of Work in the Digital Economy, 2016 Ministerial Meeting on the Digital Economy, OECD Digital Economy Papers, 260/2016, at 23.

18. The notions of salaried work and independent work will be defined in Section 3 of this study.

3. The EU Notion of Worker *prima facie* Inclusive of New Types of Work

3.1. The Contractualist *vs* the Essentialist Approach in Defining Employment

19. In most European labour laws, there is a binary divide of work in self-employed and salaried employment.[19] The main distinguishing criterion between the two types of work is, essentially, the extent of freedom the worker enjoys in performing her tasks. Traditionally, employees "benefit from contracts with their employers that include significant substantive terms that are imposed by law. In essence, employees agree to be economically dependent on their employers by relinquishing control over many aspects of their work lives (and, to some extent, their economic futures)."[20] Independent contractors do not relinquish control over their economic lives to others: "generally speaking, they are independent businesses working with multiple other businesses or clients without significant limitations, except those to which they may agree by contract or laws that may pertain to businesses in their sector."[21]

20. While the contractual definition of employment is dominant in most of the European labour laws such as those in Belgium,[22] Spain[23] and France[24], the ECJ's view of employment for the purpose of applying Article 45 TFEU can be qualified as

[19] NERINCKX, The "Uberization" of labour markets: some thoughts from an employment law perspective on the collaborative economy, p. 247.

[20] The Hamilton Project, HARRIS/KRUEGER, Discussion Paper 2015-20 (December 2015), A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The Independent Worker, available on: http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf, at p. 5 (last visited on 15.09.2018).

[21] *Idem*, p. 7.

[22] Loi relative aux contrats de travail (3.7.1978). As per Art. 3, *employment is established through a contract by virtue of which a worker commits ("s'engage") to providing work, for remuneration, under the authority of an employer.*

[23] Real Decreto Legislativo 2/2015, de 23 de octubre, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores, Art. 1para. 1: Estaleyserá de aplicación a los trabajadores que voluntariamentepresten sus servicios-retribuidosporcuentaajena y dentrodelámbito de organización y dirección de otra persona, física o jurídica, denominadaempleador o empresario.

[24] Cass. Soc., 22 juillet 1954, Bull. civ. IV n°576. *The Cour de Cassation defined employment as being an agreement under which a person commits ("s'engage") to work on behalf ("pour le compte") of another person and under her authority ("sous sa subordination") for remuneration*

"essentialist". While ruling on whether a trainee could qualify as a worker for the purpose of applying Article 45 TFEU, the Court ruled, in the *Lawrie-Blum* case,[25] 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 she receives remuneration.[26]

21. Although much can be said about the *Lawrie-Blum* case,[27] we shall stress only two points. First, as is the case with all the autonomous notions in EU law, the definition of worker set out in the *Lawrie-Blum* case is irrespective of the corresponding definitions in the Member States' national laws. Second, the emphasis on the essence of work allowed the ECJ to broaden the *personal scope of application* of the notion of worker and applied Article 45 TFEU not only to "contractual" employed workers, but also to interns,[28] students,[29] sportspersons[30] and other categories of persons who would presumably not qualify as salaried workers under the Member States' national laws.

22. The ECJ's "essentialist" approach also allowed for a more flexible approach as regards the interpreting of the *temporal aspects* of employment. Considering that "the rights guaranteed to migrant workers do not necessarily depend on the actual or continuing existence of an employment relationship",[31] the Court found that Article 45 TFEU applied in cases dealing with actual, past[32] and future workers.[33]

23. Given its open-ended nature, the EU notion of worker constitutes a framework concept, the content of which can vary from one case to another.[34] The scope of application of the said notion could thus conveniently stretch in view of encompassing work relations that would arguably not fall under the employment category in most of the Member States' national laws. Due to its inherent flexibility, the EU notion of worker would therefore require no revision in the context of collaborative

[25] Case 66/85, *Lawrie-Blum*, EU:C:1986:284.

[26] *Idem*, para. 17, emphasis added.

[27] See for eg. WHITE, A Round-up of Cases on Free Movement of Workers; FORCH, Freizügigkeit für Studienreferendare; CARLIER, La libre circulation des personnes dans l'Union européenne.

[28] Case 66/85, *Lawrie-Blum*, EU:C:1986:284.

[29] See, namely, case 293/83, *Gravier*, EU:C:1985:69; case 24/86, *Blaizot*, EU:C:1988:43

[30] See, namely, case 36/74, *Walrave*, EU:C:1974:140; case C-415/93, *Bosman*, EU:C:1995:463.

[31] Case 39/86, *Lair*, EU:C:1988:322, para. 31.

[32] See, namely, joined cases 389/87 and 390/87, *Echternach and Moritz*, EU:C:1989:130, case C-291/05, *Eind*, EU:C:2007:771.

[33] See, *inter alia*, case 39/86, *Lair*, EU:C:1988:322; case 293/83, *Gravier*, EU:C:1985:69; case C-258/04, *Ioannidis*, EU:C:2005:559; case C-20/12, *Giersch*, EU:C:2013:411.

[34] *The ECJ confirmed this reading namely in the Martinez Salla case, in which it stressed that* there is no single definition of worker in EU law and that the substance of this definition varies according to the area in which it is to be applied. See case C-85/96 *Martínez Sala*, EU:C:1998:217, para. 31.

work. A closer look at the ECJ case law may, however, lead to a more nuanced opinion, depending on the types of cases in which the issue of the status of collaborative workers is at stake. These cases are of two types: those dealing with issues of *labour mobility* and those dealing with issues of *labour policy*.[35]

3.2. Qualifying Platform Workers in the Context of Labour Mobility

24. In order for Article 45 TFEU and Regulation n° 492/2011 to govern the situation of a platform worker, the latter would have to be qualified as a migrant worker. This, in principle, implies movement from one Member State to another. In the context of the gig economy, identifying a trans-border element can be difficult. In the case of Uber drivers for e.g., one may argue that the Uber platform is not particularly encouraging of intra-Union labour mobility, given that Uber drivers can easily access clients via the Uber app in their countries of residence. The ECJ has not yet ruled on the possibility to apply Article 45 TFEU to platform workers. It is, however, possible to imagine a few scenarios where the issue of this application could be brought before the Court.

25. Suppose a Dutch national moved to Belgium in order to pursue a nine-to-five job. Suppose that after one year, she lost her employment and began working for an Uber driver while continuing to look for a steady job in Belgium. It should be reminded that in the *Antonissen* case,[36] the ECJ ruled that employment seekers preserve their status of migrant workers in a host Member State.[37] After a reasonable period of job searching – six months in *Antonissen* – the employment seeker is held to provide evidence that she continues her search and has genuine chances of being engaged.[38] The question that could potentially arise in the case of our Dutch

[35] The distinction between labour mobility and labour policy reflects, *mutatis mutandis*, the decoupling that has been suggested between employment and social security protection under national law. Experts and Legal Scholars suggest that there be a basic "safety net" of rights guaranteed to s.c. non-standard workers, regardless of the legal qualification of their work contracts. See, on this point, Innovative Approaches for Ensuring Universal Social Protection for the Future of Work, ILO Future of Work Research Paper Series, 1/2018 at 5.

[36] Case C-292/89, *Antonissen*, EU:C:1991:80.

[37] *Idem*, para. 21.

[38] *Ibidem*. In a similar line of arguments, the non-discrimination principle applies not only to employment seekers, but also to intermediaries who assist the latter in finding employment in a Member State other than that of which they are nationals. See case C-208/05, *ITC*, EU:C:2007:16, respectively para. 26 and 33; case C-379/11, *Caves Krier Frères*, EU:C:2012:798. Of course, employment seekers without genuine chances of employment cannot rely on Article 45 TFEU indefinitely. They can argue the right to remain in the territory of a host Member State on the basis of the said Article, so long as they do not become an unreasonable burden for the host Member State's social aid schemes.

national is the following: which circumstance would allow her to qualify as a migrant worker within the meaning of Article 45 TFEU? Her status of employment seeker or her status of Uber driver?

26. Suppose that after a reasonable period of employment seeking, our Dutch national failed to find steady employment in Belgium, but continued working as an Uber driver on a fairly regular basis. Suppose she applied for unemployment benefits but her request was rejected on the grounds that the activity pursued via the Uber app qualified her as an independent contractor, not entitled, as such, to any right to unemployment benefits under Belgian Law. Suppose our Dutch argued the benefit from workers' rights on the grounds of Regulation n° 492/2011, while claiming that the activity of Uber driver constitutes salaried work as it displays the essential features of such work, within the meaning of the *Lawrie-Blum* case.

27. These are only a few of potentially many scenarios that may arise in relation to the legal qualification of collaborative workers under Article 45 TFEU. While it is difficult to foresee all the circumstances where the said qualification would be relevant, it is possible to distinguish two types of claims: those dealing with the exercise of the free movement of workers and those dealing with the enjoyment of rights guaranteed to migrant workers under Regulation n° 492/2011.

28. Regarding the exercise of the free movement of workers, an Uber driver could argue the application of the *Lawrie-Blum* definition of worker if she found that a host Member State's national law restricted the free movement of platform workers. This could be the case if, for e.g., platform work was considered to be illegal by virtue of the host Member State's national legislation or if the platform worker's right to stay in the territory of that State was at stake, given the risk that she may become a burden for that State's social security system.[39] In such cases, the ECJ would presumably examine the presence of the essential features of employment, with little or no regard of the host Member State's labour law provisions. After all, in the *Raccanelli* case,[40] a PhD candidate was qualified as worker within the meaning of Article 45 TFEU, in spite of the diverging German law provisions.

29. If, however, the Uber driver's claim dealt with the benefit from migrant workers' rights on the grounds of Regulation n° 492/2011, the ECJ's response would presumably be different. For e.g. the *Kristiansen* case[41] dealt with the entitlement of unemployment benefits of a fellowship student. Under Belgian law, research

[39] In a recent "EU citizenship" case, the ECJ essentially ruled that Union citizenship should not serve as a status that would allow Member States' nationals to be "*social security parasites*", in cases where they would move to, and reside in, a host Member State with no purpose other than that of profiting from benefits granted in that State. See case C-333/13, *Dano*, EU:C:2014:2358.

[40] Case C-94/07, *Raccanelli*, EU:C:2008:425.

[41] Case C-92/02, *Kristiansen*, EU:C:2003:652.

fellowships are not considered as salaried work and do not entail the right to unemployment benefits upon their termination. The ECJ ruled that in the absence of harmonization at Union level, the conditions for the entitlement of such benefits were to be determined *entirely* on the grounds of Belgian law.[42]

30. A combined reading of the *Racannelli* and *Kristiansen* cases is revealing of a double speed ECJ case law. On the one hand, when the issue is that of labour mobility for the purpose of applying Article 45 TFEU, the ECJ does not shy away from giving extensive interpretations of the notion of worker. On the other hand however, when the issue is that of the rights of migrant workers under Regulation n° 419/2011, the absence of exhaustive Union harmonization as regards the enjoyment of certain rights (unemployment benefits for instance) may urge the ECJ to exercise some self-restraint, and leave it to the Member States to exercise their discretion in determining the conditions under which the benefit from such rights is made possible. A similar kind of self-restraint can be seen in cases dealing with other Secondary law provisions, covering various labour policy aspects such as working time or agency work. However, recent ECJ case law on atypical work reveals a more *inclusive* interpretation of the said provisions, aimed at stretching the scope of application of these provisions to non-traditional workers.

3.3. Qualifying Platform Workers for the Purpose of Benefitting from Workers' Rights

31. Suppose that a French national residing in France drew her revenues exclusively from her work as an Uber driver. Suppose that she argued the application of Directive 2003/88 (The Working Time Directive), in particular its provisions on night work.[43] Could she rely on the salaried worker status in order to argue the application of the said Directive before the competent authorities of her Member State of residence? This has proven to be somewhat problematic from a national law perspective, as is shown in recent ECJ cases on atypical work. Indeed, many national laws do not set out adequate legal status for atypical workers who run the risk of falling in a "grey zone" with little or no protection. In this context, some recent ECJ cases inspire hope, in the sense that the Court interpreted EU secondary law in areas of labour policy in a way that provides *some level* of protection of

[42] *Idem*, para. 37.

[43] Art. 8, Dir. 2003/88: "Member States shall take the measures necessary to ensure that: normal hours of work for night workers do not exceed an average of eight hours in any 24-hour period (a); night workers whose work involves special hazards or heavy physical or mental strain do not work more than eight hours in any period of 24 hours during which they perform night work (b).For the purposes of point (b), work involving special hazards or heavy physical or mental strain shall be defined by national legislation and/or practice or by collective agreements or agreements concluded between the two sides of industry, taking account of the specific effects and hazards of night work."

atypical workers, in spite of the disparity between the Member States' national labour laws.

32. One of the salient traits of atypical work – collaborative work included – is the altered work patterns. In many cases, modern-day workers do enjoy some discretion in deciding on the periods of task performance. This can be seen as a sign *par excellence* of independent work, since in the traditional view of employment, working periods are predetermined by the employer. The *Hälvä* case[44] is relevant here. A Finish association provided accommodation for children in an environment as close as possible to a family environment. The children's caretakers were s.c. "relief parents" whose work pattern was set out in accordance with the children's activities and rest periods. Before the Finnish courts, the relief parents requested compensation in respect of overtime and work in the evening and during weekends. In support of this claim, they argued that they qualified as salaried workers and not as family workers. The national courts dismissed their action, namely on the grounds that the relief parents were not employees since they were free to decide on their work periods. The referring court asked the ECJ if Directive 2003/88 (The Working Time Directive)[45] applied with regard to the rules on working time and rest periods.

33. The Court found that the absence of continued supervision of the relief parents was *not sufficient* for concluding that their working time was not predetermined.[46] While examining the level of discretion of the claimants in the main proceedings, the ECJ concluded that they were, in reality, not entirely free to decide on all the aspects of their work.[47] The relief parents could, therefore, qualify as salaried workers and rely on Directive 2003/88 in their claims for compensation of overtime work, week-end work and evening work.

34. The cited case can be understood as illustrating two tendencies of the ECJ. On the one hand, the leitmotiv in recent ECJ case law on atypical work seems to be the *effective benefit* from the rights granted to salaried workers by virtue of EU Secondary Law in areas relative to labour policy. This case law is fairly *rights-driven*, revealing a clear intention of the ECJ to not leave atypical workers without adequate protection.

35. On the other hand, it seems that the disparity between the Member States' national laws can be transcended through the establishing of autonomous notions for the purpose of applying the relevant EU Secondary Legislation. Indeed, for the

[44] Case C-175/16, *Hälvä*, EU:C:2017:617.
[45] Directive 2003/88 concerning certain aspects of the organisation of working time, OJ L 299/9.
[46] Case C-175/16, *Hälvä*, EU:C:2017:617, para. 36, emphasis added.
[47] *Idem*, para. 40.

Working Time Directive[48] to apply, a person would have to qualify as a worker within the meaning of that Directive. It is precisely on this point that one can argue the existence of *conceptual uniformity* in EU law, since the *Lawrie-Blum* case seems to provide a common standing definition of salaried worker, used for the qualification of workers in both labour mobility cases and labour policy cases.

36. The question is, however, the following: in spite of its open-endedness and high adaptability, can the *Lawrie-Blum* definition of worker apply to *all* types of atypical work? Are there aspects of this definition that would benefit from an update due to the specificities of platform work?

37. For the purpose of this study, we argue that the *Lawrie-Blum* definition of worker could apply to platform workers but that a new approach may be envisaged, namely in the interpretation of the subordination criterion.

4. Applying the Essential Features of Employment to Platform Work

38. The defining elements of employment within the meaning of *Lawrie-Blum* are of two types: *substantial aspects*, related to the economic nature of an occupational activity, and *personal aspects*, related to the structural and organizational aspects of an occupational activity.

39. If one were to examine platform work through the prism of the ECJ case law relative to these two types of features, one would conclude that collaborative work *in principle* meets the substantial aspects of employment (4.1.). The personal aspects of employment pose a greater challenge since the relationships between platforms and platform workers do not *prima facie* reveal the presence of subordination. This may be an incentive to either review the traditional understanding of the subordination criterion, or to consider that platform workers are independent or "hybrid" workers but not salaried (4.2.).

4.1. Platform Work Displaying the Substantive Features of Employment

40. In the context of the ECJ case law, employment is "genuinely economic" in the presence of remuneration and of an effective pursuit of an occupational activity.

41. As regards remuneration, the pursuit of an activity for compensation generally reveals its genuinely economic nature, regardless of *the "level of productivity of the worker or the origin of the funds from which the remuneration is paid".*[49] Monetary

[48] Directive 2003/88 see n. 46.

[49] *Case* 344/87, *Bettray*, EU:C:1989:226, para. 15.

compensation naturally constitutes remuneration. However, the ECJ found that remuneration could comprise food, clothing or housing.[50] With regard to platform work, there would be no particular difficulty in discerning its economic nature from the viewpoint of remuneration, since the provision of services via online platforms is usually performed for some form of compensation.

42. The more delicate issue is that of the effective pursuit of collaborative work. Effectiveness is a feature that stems from the *regularity* of work performance, as assessed through the measurability of the working hours. Unlike marginal or ancillary activities,[51] "genuine employment" is effectively pursued if it is performed on a regular basis and in predetermined periods of task performance. The emergence of atypical work has somewhat upset the traditional views on "genuine employment", as it raised the issue of whether the measurability of the working hours continues to be relevant in the context of modern-day work relations. Recent ECJ case law on altered work patterns seems to point toward the fact that predetermined and stable work patterns are no longer *the* quintessential prerequisite for the qualification of salaried work. In the context of the said case law, two main issues seem to arise: the *relevance* of the measurability of working hours for the purpose of qualifying employment and the *calculation* of the latter for the purpose of benefitting from workers' rights.

43. As regards the relevance of the working hours, the ECJ's stance is fairly clear: the qualification of salaried work does not depend on the presence of predetermined work patterns. In the *Genc* case,[52] the ECJ ruled that a person could qualify as a worker, "independently of the limited amount of the remuneration for and the number of hours of the activity."[53] In this context, the fact that an Uber driver does not perform her activity according to a predetermined work pattern does not *prima facie* affect the possibility to qualify her as a salaried worker.

44. The more complex issue with regard to platform work is that of the calculation of the working hours for the purpose of benefiting from workers' rights. How many working hours would be required for an Uber driver to benefit from her right to annual leave? A recent ECJ case law may provide a few clues on this point. In the *Greenfield* case,[54] the case at issue in the main proceedings dealt with the right to annual leave of a person whose work contract did not set out predetermined work periods but did set out a minimum number of hours required for the benefit of the right to annual leave. While stressing that the right to take annual leave *has no connection* with the altered work pattern of the worker,[55] the ECJ found that the

50 Case 196/87, *Steymann*, EU:C:1988:475; case C-456/02, *Trojani*, EU:C:2004:488.
51 See case 197/86, *Brown*, EU:C:1988:323, para. 21.
52 Case C-14/09, *Genc*, EU:C:2010:57.
53 *Idem*, para. 26, emphasis added.
54 Case C-219/14, *Greenfield*, EU:C:2015:745.
55 *Idem*, para. 33, emphasis added.

entitlement to minimum paid annual leave, within the meaning of Directive 2003/88 (The Working Time Directive),[56] must be calculated by reference to the days, hours and/or fractions of days or hours worked and specified in the contract of employment.[57] Baring in mind the *Greenfield* case, if Uber drivers claimed to be salaried workers before the ECJ, their altered work patterns would *in principle* not prevent them from relying on EU Secondary for the purpose of benefitting from rights such as the right to annual leave. Of course, this may be cause for future concern for Uber. Indeed, if the latter is considered as an employer, it may be held to guarantee the right to paid annual leave to its drivers and perhaps compensate accumulated unpaid annual leave. This was, essentially, the issue in the *King* case.[58] When a British national working under a self-employed commission contract took annual leave, it was unpaid. Upon termination of the employment relationship, he sought to recover payment for this annual leave while relying on 7 of Directive 2003/88,[59] which the ECJ found he was entitled to do.

45. An analogy can be drawn between Uber drivers and the workers in the *Grienfield* and *King* cases, leading to the conclusion that Uber drivers could, potentially, rely on Directive 2003/88 for the purpose of benefitting from the right to annual leave. Two cautionary remarks should however be made. First, it is not certain that the said analogy can be established in cases dealing with the benefit from *other* rights such as pension, unemployment etc. Future ECJ case law will provide more clarity on this point.

46. Second, there is some doubt on how the ECJ case law on altered work patterns would apply in more complex scenarios. Suppose a person performed several online gigs with variable frequency. In such a case, it would be difficult to determine which platform should potentially assume the role of employer. Indeed, if a worker works for Lyft and Uber, it would not be entirely clear how the calculation of the working hours should be performed. The aim of the present study is not to provide a one-size-fits-all solution to the potential problems that may arise as regards platform work. Suffice it to say that, given the ECJ's case law, it is not unreasonable to think that, if the Court were to rule on the *genuine economic nature* of collaborative work, the finding would likely be affirmative, at least in a case dealing with an Uber

[56] Directive 2003/88 see n. 46.

[57] Case C-219/14, *Greenfield*, EU:C:2015:745, para. 32.

[58] Case C-214/16, *King*, EU:C:2017:914.

[59] Dir. 2003/88, Art. 7 (Annual leave): "Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice (para. 1). The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated (para. 2)."

driver whose primary source of income is work via the Uber app. This scenario is, indeed, the closest to a salaried work model.

47. If the substantive features of salaried work (remuneration and effectiveness) can, *mutatis mutandis*, be found in platform work, the analysis of employment's structural features (subordination) is more delicate since it concerns the possibility to view the *organization of platform work* as comparable to that of employment. Herein lies the main inquiry of this study: should the subordination criterion, as set out in the EU notion of worker, be revised due to the specific relationship between platforms and platform workers?

4.2. Difficulties Related to the Structural Features of Employment

48. On the side of the employer, subordination implies a set of powers over the employee. These powers essentially comprise "the existence of command and control by a specific employer over its employees."[60] On the side of the employee, subordination primarily translates to economic and personal dependency:[61] the employee relies on the employer for subsistence.[62]

49. For a long time, the dominant view of subordination in most of the national labour laws was that of the "Master-Servant" paradigm by virtue of which, employment is a contract that creates *personal subordination* of the employee vis-à-vis the employer, implying a "subjecting [of the] worker to the directorial/ managerial powers of the employer (employers' prerogative)."[63]

50. Atypical work – platform work included – upsets the traditional view of the employee as a subordinate. An increasing number of salaried workers exercise some level of discretion in deciding on various aspects of their task performance, without being personally and directly micromanaged by their employers. In this context, it may seem tempting to think that subordination is an archaic criterion, which served its purpose in another era but is profoundly ill adapted to modern-day labour relations. This assertion would have to be taken with a grain of salt. On the one hand, although subordination may seem a primitive tool for the purpose of defining

[60] DAVIDOV, Subordination vs Domination: Exploring the Differences, p. 373.

[61] MEIER, The New Employment Relationship. How "Atypical" Work Contracts Challenge Employment Law, Labour Law and Social Security Systems, p. 36: "[the *raison d'être* of subordination is] the existence of a personal and economic dependency of the employee towards the employer. The employee, who, because of this dependency, is the weaker party in the contractual relationship, needs to be protected by the law against exploitation, an unsafe work environment, discrimination, and exhaustion."

[62] *Ibidem*.

[63] See European Parliament, Committee on Employment and Social Affairs. Study on economically dependent work/parasubordinate (quasi-subordinate work) by Professor Adalberto Perulli, PE 324.303, DV\479950EN.doc at 6.

employment, it is nonetheless a workable tool from an EU law perspective, namely in view of determining the *proper* Treaty provisions that should govern a given situation. Subordination is thus necessary for defining the scope of application of Article 45 TFEU and, consequently, for the drawing of the demarcation line between the free movement of workers and the other freedoms of movement *i.e.* that of services and that of establishment.

51. On the other hand however, assuming that the Master-Servant paradigm is obsolete but that subordination continues to be a "keeper" in defining salaried work, the following question arises: how should subordination be understood nowadays? The changing nature of work necessarily affects the content and the extent of an employer's powers and alters the traditional meaning of the employer-employee relationship. There is consequently a shift in the understanding of subordination: the personal hierarchy within the meaning of the Master-Servant Paradigm gradually gives way to the determining of where the organizational power over key aspects of work performance lies.

5. A Shift in the Definition of the Subordination Criterion

5.1. The Gradual Abandonment of the Master-Servant Paradigm

52. In some of its cases, the ECJ did not entirely cast away the Master-Servant paradigm. The Court interpreted Art. 2 of Directive 2003/88 (The Working Time Directive)[64] as setting out a requirement that the worker be *physically present* at the place determined by the employer and be *available* to the employer in order to be able to provide the appropriate services immediately in case of need.[65] Given this interpretation, an Uber driver would hardly meet the criterion of subordination, in the absence of a formal requirement of physical presence, a place of work and a predetermined work period imposed by Uber.

53. Atypical work incites one to ponder over what subordination exactly entails. In many new types of work, the employer's directorial and managerial powers are not as obvious as they are in the nine-to-five work model. This begs the following question: if subordination can no longer be viewed as a checklist of powers the employer exercises over the employee, what would be *the* feature that *sanctions* the presence of subordination in a work relationship?

[64] Directive 2003/88 see n. 46.

[65] See case C-151/02, *Jaeger*, EU:C:2003:437, para. 63; case C-258/10, *Grigore*, EU:C:2011:122, para. 53.

54. In the European Agenda for Collaborative Economy, the European Commission considered that there is subordination if the service provider acts under the direction of the collaborative platform and if the latter determines the choice of the activity, remuneration and working conditions. In this case, the provider of the underlying service is not free to choose which services it will provide and how.[66] While suggesting a case-by-case analysis, the Commission outlined a set of *indicia* that mainly revolve around the *power to determine the remuneration*: "where the collaborative platform is merely processing the payment deposited by a user and passes it on to the provider of the underlying service, this does not imply that the collaborative platform is determining the remuneration."[67] According to the Commission, the power to determine the remuneration is the key sign of subordination, regardless of whether the platform actually exercises management or supervision on a continuous basis.[68]

55. Although the power to determine the remuneration is a traditional employer's attribute, we are of the opinion that it should not be the sole criterion to take into account for the purpose of discerning subordination. A broader approach may be more suitable in the assessment of the *overall effectiveness* of a platform's directional and managerial powers vis-à-vis platform workers. In some ECJ cases, the issue of effective subordination was indeed broadly analyzed, namely for the purpose of distinguishing actual from false independent work. In the *Malgorzata Jany* case for e.g., dealing with the status of prostitutes,[69] it was argued that prostitution lends itself to an appearance of independence, since prostitutes are normally in a subordinate position in relation to a pimp.[70] More recently, the *Danosa* case[71] dealt with the quality of salaried worker of a sole member of a company's Board of Directors. The Court found that "formal categorization as a self-employed person under national law does not exclude the possibility that a person may have to be treated as a worker (…) *if that person's independence is merely notional*, thereby disguising an employment relationship."[72] While confirming that subordination is to be inferred on the basis of all the factors and circumstances characterizing a work relationship,[73] the Court concluded that, although Ms Danosa did enjoy some liberty in the performance of her tasks, she was held to report to, and cooperate

[66] European Parliament Resolution of 15 June 2017 on a European Agenda for the collaborative economy (2017/2003(INI)), p. 12.
[67] *Ibidem*.
[68] *Ibidem*.
[69] Case C-268/99, *Malgorzata Jany*, EU:C:2001:616.
[70] *Idem*, para. 54, emphasis added.
[71] Case C-232/09, *Danosa*, EU:C:2010:674.
[72] *Idem*, para. 41, emphasis added.
[73] *Idem*, para. 46.

with, the supervisory board.[74] There was consequently some form of subordination, deemed sufficient for the claimant to qualify as a worker.

56. It can be inferred from the altered work pattern cases that the ECJ's view on subordination changes, in the sense that it is no longer required for the employer to exercise direct control and scrutiny over *all of the aspects* of work performance; it seems to suffice that the employer preserve her powers over aspects that are considered key as regards the modalities according to which workers perform their tasks.

5.2. A Shift toward the Power to Control Key Aspects of Work Performance

57. Online platforms attempt to avoid the employer label while arguing that they are intermediaries, merely facilitating the link between service providers and service beneficiaries. Uber has become the mascot of a platform who deviates from being a simple intermediary as it actively defines the conditions under which transport services are provided. The extent and the nature of this intervention has urged legal scholars as well as national legislators and judges to examine the possibility of attributing to Uber the status of employer. In the *Berwick* case,[75] the Californian Labor Commissioner qualified Uber drivers as employees based on the following criteria: they must submit a driver's license, social security number, personal address, bank information and proof of insurance; they are entitled to select which requests they will accept or reject; the model of the car must be approved by Uber, it may not be older than ten years; Uber maintains control procedures for the driver and the passenger; Uber does not reimburse costs linked to the car; Uber sets the price of the service.[76]

58. As regards the status of employer, reference is made, in the *Berwick* case, to the power to determine control procedures as opposed to the power of direct supervision over the employees. This begs an interesting question: is there subordination if a platform merely sets out the procedures of control but does not, itself, exercise it? Indeed, Uber exercises control either through exclusive intervention (e.g. determining the remuneration) or delegated intervention to the consumers (e.g. rating of the drivers). In the ECJ *Uber* case, Advocate General Szpunar was of the opinion that non-traditional control is still control, comparable to that exercised by a traditional employer.[77]

59. Regarding the status of salaried worker, it is uncontested that Uber drivers enjoy some discretion in managing their work performance. Such discretion would

[74] *Idem*, para. 49.
[75] Cit. *in* NERINCKX, cit. n. 20, p. 225
[76] *Ibidem*.
[77] AG Opinion, case C-434/15, *Uber*, EU:C:2017:364.

normally point toward independent work. However, one of the specificities of platform work stems from the ways in which task performance is organized: unlike hierarchical work settings, platform work consists of a *network* of persons who are centralized by an online app which facilitates – or, in the case of Uber, actively organizes – the performance of various tasks. Consequently, in lieu of obstinately looking to establish a correspondence between the Master-Servant paradigm and the relationship between platforms and platform workers, it may be wiser to change the way in which subordination is viewed while inquiring on who determines the ways in which work is organized so that the provision of services via online platforms be the most *economically efficient*.

5.3. The Economic Assessment of the Employer's Powers

60. The economic reading of employment is well known both in national law and in EU law. In the US, the 1944 *Hearst* case[78] dealt with a publisher who refused to collectively bargain with a Union of newsboys on the grounds that they were not its employees. The US Supreme Court stated that employment should be inferred when "the *economic facts* of the relation make it more nearly one of employment than of independent business."[79] The Court qualified the newsboys as employees on the basis of several criteria, mostly linked to their economic dependence vis-à-vis the publisher. Regarding, more specifically, the subordination criterion, the US Supreme Court found that the newsboys' hours of work and their task performance "*are supervised and to some extent prescribed* by the publishers or their agents. Much of their sales equipment and advertising materials is furnished by the publishers with the intention that it be used for the publisher's benefit."[80] It appears that employment is present when workers pursue an economic activity for the benefit of another person or entity who "supervises and prescribes" some – not all – of the conditions relative to the task performance.

61. In EU law, the *FNV Kunsten* case[81] can be seen as an equivalent to the *Hearst* case. The issue brought before the ECJ was whether the Treaty provisions relative to Competition law applied to a collective labor agreement concluded between associations of employers and employees, which was imposed on self-employed workers (free-lance musicians). The latter performed the same work as employees and were, in fact, treated as such. It was therefore necessary to determine if affiliated self-employed workers constitute undertakings, governed by Article 101 TFEU or can qualify as employees, governed by Article 45 TFEU. The ECJ ruled that "although they perform the same activities as employees, service providers

78 US Supreme Court, *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944)
79 *Idem*, p. 322, emphasis added.
80 *Ibidem*, emphasis added.
81 Case C-413/13, *FNV Kunsten*, EU:C:2014:2411.

such as the substitutes at issue in the main proceedings are, in principle, "undertakings" within the meaning of Article 101(1) TFEU, for they offer services for remuneration on a given market".[82] Consequently, "in so far as it was concluded by an employees' organization in the name, and on behalf, of the self-employed services providers who are its members, does not constitute the result of a collective negotiation between employers and employees, and cannot be excluded, by reason of its nature, from the scope of Article 101(1) TFEU."[83]

62. One of the main criteria used by the ECJ in interpreting the status of a service provider was whether the latter determines independently her own *conduct on the market* or is *entirely dependent* on her principal.[84] The Court considered that a person may qualify as an employer if she acts under the direction of her employer as regards, in particular, her freedom to choose the time, place and content of her work, does not share the employer's commercial risks and *forms an integral part of the employer's undertaking*, thus forming an *economic unit* with that undertaking.[85]

63. The ruling of the ECJ in the *FNV Kunsten* case is paramount for two reasons. First, one can discern the Court's approach in viewing work not so much from the perspective of hierarchy, but from the perspective of economic rationality. Unlike salaried workers, independent workers, acting as rational agents in a given market, are free to determine their own conduct and bear certain risks. Second, the Court seems to adopt a more *integrative* approach in defining the notion of worker, while considering that she is "an integral part of the employer's undertaking" and forms an "economic unit" with the latter. More recently, the ECJ used the integrative approach in the *Matzak* case,[86] dealing with the status of worker of a volunteer firefighter. In this case, the Court confirmed the status of worker of the claimant in the main proceedings, while ruling that he was *integrated* into the firefighting service where he pursued real, genuine activities under the direction of another person for which he received remuneration.[87]

64. In light of the cited cases, could Uber qualify as an employer considering its behavior in the transport services market? The answer to this question may be affirmative if one considers that Uber acts as a rational economic agent, seeking to assure benefits and preserve its place in the market. It should, however, be stressed that new technologies have led to a somewhat different understanding of economic rationality. Presently operating on a global scale, Uber has a large number of workers thus making direct supervision impossible. In the quest for economic efficiency, Uber did find ways to compensate for the impossibility of exercising

[82] *Idem*, para. 28, emphasis added.
[83] *Idem*, para. 30.
[84] *Idem*, para. 33, emphasis added.
[85] *Idem*, para. 36, emphasis added.
[86] Case C-518/15, *Matzak*, EU:C:2018:82.
[87] *Idem*, para. 31.

certain of the traditional employer's powers. The assessment of the quality of the services is delegated to the service beneficiaries. The bearing of economic risks is delegated to the drivers. Uber neither provides the vehicles for the latter, nor does it reimburse the costs linked to their maintenance. This results in a fairly peculiar situation: although, much like traditional undertakings, the Uber drivers bear certain risks, unlike traditional undertakings, they are not free to decide on many aspects of the provision of transport services, during which such risks can occur. Indeed, Uber drivers suffer the costs of their vehicles' maintenance and potential accidents; if a driver ceases work due to low ratings or if the Uber app ceases to exist, the driver would have to suffer the consequences of her loss of income.

65. It follows that, in the context provided by new technologies and platform work, Uber acts as a perfectly rational economic operator in the field of transport services. One of the signs of Uber's rational behavior in the market is precisely the fact that it *holds the power to define* performance and control procedures that Uber's "economic units" – *i.e*. the drivers – are held to observe in the pursuit of their activity. This is, in our opinion, sufficient to consider that, while the Master-Servant paradigm is obsolete, subordination is not; Uber drivers *are*, with little doubt, in a subordinate position in relation to Uber.

6. Conclusion

66. In light of the ECJ case law, in particular, the *FNV Kunsten* case, it seems uncontested that Uber drivers are, structurally speaking, "economic units", forming an "integral part" of Uber's provision of transport services, while having limited margin of action on important aspects of the said. The network-type of provision of services is, in our opinion, an important incentive to modernize the interpretation of the subordination criterion while analyzing it from an economic point of view.

67. On the side of the Uber drivers, the key elements seem to be *economic dependency* and *autonomy*. These are, essentially, the criteria upheld by the US Supreme Court in the *Hearst* case. If an Uber driver provided transport services via the Uber app on a regular basis and relied on her earnings for subsistence, it can be argued that such a driver is not an independent worker.

68. On the side of Uber, the main criterion, which can be inferred from the US *Hearst* and *Berwick* cases, as well as from the ECJ's *FNV Kunsten* case, seems to be an *economic rationality test*. If it is established that Uber, like a traditional undertaking, seeks to maximize its profits in a new technologies environment, it would be relevant to determine the conduct of a rational economic operator acting in that same environment. Such an approach would allow for the drawing of the conclusion on whether an online platform unilaterally determines the essential elements (for e.g. remuneration) of the contractual relationship with the platform workers and therefore actively organizes their task performance. Much like the publishing

company in the *Hearst* case, Uber does not directly supervise all of the aspects of the work performance, but exercises enough control so that the provision of transport services be ultimately profitable. The definition of control procedures as well as the determining of the price of the transport services point toward the fact that Uber is a transport undertaking, acting as a rational economic operator in the market, who assumes some of the key powers associated with a classical employer.

69. In light of the above said, should the EU notion of worker be revised? We suggest that such revision is not necessary, nor is it necessary to create a tailor-made category of platform workers. The interpretation of the subordination criterion may, however, require some modernization. Through viewing employment as an *economically efficient organization of task performance* rather than as a personal agreement between two parties, it will be possible to determine if platform workers are truly independent economic operators or are integrated in a network of "economic units", without decisional powers on key aspects of the activity they pursue.

70. Consequently, if one day, Uber drivers decide to raise the issue of their status of salaried workers before the ECJ, one could but encourage their claim. Considering the Court's recent case law on atypical work, they just might win their case...

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