

05-10-2020

## **Position paper on the European Commission's report on the working conditions of platform workers**

### **Introduction**

The European Commission (EC) has published a study on working conditions of platform workers.<sup>1</sup> Platform work is understood as all labour provided through, on, or mediated by online platforms in a wide range of sectors. The report identifies key challenges related to platform work, such as employment status, autonomy, and information available to the workers about their working conditions, non-discrimination and dispute resolution. The study details the variety of policy responses in the Member States and delineates certain policy options for ensuring a higher degree of protection of platform workers.

The present position paper argues that the said challenges are primarily caused by overly-rigid labor market regulations and therefore should be addressed not by introducing new legislation, but by allowing voluntary agreements between parties involved. This approach would be in line with the characteristics of the sharing economy, which relies heavily on interpersonal trust, connections, feedback, and market mechanisms. Intervention on the part of the EU or Member States may have negative effects and is not advisable.

The breakthrough of the gig economy was preconditioned by the absence of regulation, i.e. more freedom to create and act. Attempts to introduce centralized rigid regulations would be a step backwards and would deny the very essence of working through online platforms. Applying employment standards to platform workers may be detrimental on a larger scale since this particular market segment has developed in essence to avoid rigid labor regulations. More importantly, the interaction between the platform worker and the operator is based on provision of services as the former purchases services of the platform operator, therefore social protection is out of scope of such a relationship.

---

<sup>1</sup> European Commission. 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>>.

05-10-2020

In recent years, there has been a significant growth and interest in the gig economy built upon the premise of online platforms that connect customers with service suppliers. New business models characterized by on-demand labor have disrupted existing industries and created new ways to fulfill shortages for companies and individuals. It may be expected that the COVID-19-induced lock-down will only advance the spread of such online platforms. They bring more opportunities to traditional businesses by closely connecting suppliers and customers and reducing transaction frictions.

## THE WORK DIMENSION

One of the fields that the EC is considering for revision is the work dimension. The work dimension includes, among other things, the autonomy of work, surveillance, direction and performance appraisal, and the physical environment. In these areas the EC is contemplating measures of ensuring greater stability and protection of workers that would enhance their bargaining powers.

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. Certain issues outlined by the EC as being problematic, such as the physical environment or allocation of tasks, are characteristic to particular tasks rather than platform work as a whole. Therefore the true object of the EC's policy considerations on the matter is not platform work *per se* but particular operations such as ridesharing services. Also, the issues raised are specifically common to only one of many forms of work performed via online platforms. Therefore 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.

***In this sense primacy 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.*** Most importantly, it must

05-10-2020

be kept in mind that the platform functions as an intermediary between the service provider and the end-user and does not operate as an employer since 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. In this sense the platform does not “employ” the service provider, but the service provider buys the service of connectivity through the platform.

In the majority of 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 on 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.

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

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, such as a non-compete clause, service costs and others, from the contracts.

A lack of legal certainty regarding possible dispute resolution may precondition the need for more rigid rules on contracts. Given that national courts are overloaded with cases, individuals may feel less assured that they will be able to have their disputes resolved. Therefore

05-10-2020

the state must commit itself to ensuring prompt dispute settlement, alternative dispute resolution means included. It is inefficient to engage in patchwork regarding particular terms and conditions of contracts. Rather, it is more beneficial to focus on establishing proper dispute resolution means for people to defend their interests on their own terms.

## THE EMPLOYMENT DIMENSION

Another field targeted by the EC is the employment dimension which primarily focuses on the status of platform workers. Lately, 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. However, others argue that this precise approach contradicts the nature of platform work and may have detrimental effects.

It is well-established 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. 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 employee classification test to these workers 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 increased 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 less guarantees for consumers.

**Relying solely on the basic classification criteria proves to be insufficient and rigid when assessing complex and unorthodox business models. The pluralistic business**

05-10-2020

**landscape rarely follows the same operational model.** Instead of establishing an exhaustive list of criteria that would define employment 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 ridesharing, 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 labour rights for self-employed (digital) platform workers and has added new rights specifically for drivers.<sup>2</sup> At the same time in the UK, the government is exploring worker classifications,<sup>3</sup> and it has been decided that Uber drivers are to be regarded as workers<sup>4</sup> that should have access to minimum wage and paid holidays.<sup>5</sup> Several European courts have ruled that digital platform workers cannot be qualified as employees as the former have the ability to independently manage

---

<sup>2</sup> GERARD, J. F. "Better protection for gig economy workers," 2019. Available online: : <<https://www.lexology.com/library/detail.aspx?g=035bd2b8-4d12-4b80-b516-fc0ae7fb4d3d>>.

<sup>3</sup> SUMMERS, N. "UK government will final settle the gig economy 'worker' debate" 2019. Available online: <<https://www.engadget.com/2018/02/07/uk-gig-economy-worker-rights-consultation/>>.

<sup>4</sup> The UK has separate classifications for employees (with additional employment rights and responsibilities that don't apply to workers), workers, and the self-employed/contractors. Available online: <<https://www.gov.uk/employment-status>>.

<sup>5</sup> BUTLER, S., "Uber loses appeal over driver employment rights," The Guardian, 2018. Available online: <<https://www.theguardian.com/technology/2018/dec/19/uber-loses-appeal-over-driver-employment-rights>>.

05-10-2020

their time and they are free to select their shifts, and refusing a shift did not trigger any sanction from the company.<sup>6</sup> In April 2018, the Labour Tribunal of Turin, Italy, rejected a claim from six platform workers of the food-delivery company, *Foodora*, seeking to be reclassified as employees.<sup>7</sup> In reaching his decision, the judge relied extensively on the fact that these workers were free to decide when to work and to disregard previously agreed shifts, returning a verdict that the six workers were self-employed.

## **THE SCOPE AND POSSIBLE IMPLICATIONS OF EU AND STATE INTERVENTION INTO CIVIL RELATIONS**

*With regards to 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. The variety of state decisions on the classification of workers suggests that any efforts to harmonize principles that separate employees from contractors are most likely to fail and will 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 from independently deciding on their preferred work mode.

*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 into the market with rigid requirements and restrictions may not bring desired results. Equity research analysts at Barclays have estimated that the reclassification of workers could cost Uber an additional \$3,625 per driver in California. This would increase the company's annual operating loss by more than \$500 million.<sup>8</sup> Any new regulations may bring additional operational costs and result in decreased amount of contracts, loss of flexibility for workers, and

---

<sup>6</sup> DE STEFANO, V. "EU Court of Justice's decision on employment status does not leave platforms off the hook." Wolters Kluwer, 2020.

<sup>7</sup> Ibid.

<sup>8</sup> Griswold, A., "How much it would cost Uber and Lyft if drivers were employees," Yahoo Finance, 2019. Available online: <<https://finance.yahoo.com/news/much-cost-uber-lyft-drivers-151818345.html>>.

05-10-2020

increased 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.

The EC report suggests that *voluntary and non-legislative actions* have produced positive effects for some platform workers. Indeed, 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 catalogue of behaviors to be avoided.

Instead of adopting rigid requirements and limits, governments should opt for defining social responsibility by default, which could promote transparency of internal processes, especially in case of sanctions such as downgrading or deactivation of workers' accounts.<sup>9</sup> 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.

Forcing people 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 this instance an alternative could be *zero-hour contracts* that are the closest alternative to platform work and could ensure the flexibility needed.

---

<sup>9</sup> De Stefano, V. EU Court of Justice's <...>.

05-10-2020

However, such contracts are prohibited in the majority of EU states and the EU has itself discouraged them. When considering policy initiatives in terms of platform work the use and benefits of zero-hour contracts should also be revisited. Work 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 minimal amount of work hours. Such contracts provide the possibility to better accommodate the worker's personal needs, it also allows working for multiple employers as it not only ensures flexibility in the work regime, but also ensures a sanction-free refusal to take upon an employer's work task.

## **Conclusions**

1. Centralized rigid regulations of platform workers and reclassification would be a step backwards and would deny the very essence of working through online platforms.
2. The reclassification of service providers into employees in the traditional sense would reduce the supply of services and increase their cost for the consumers. The labor markets of the majority of EU Member States are not prepared to accommodate the particular individual needs of platform workers if they were reclassified.
3. The most efficient and sustainable strategy for governments is to ensure an enabling environment and foster competition between platform operators, to ensure more availability of information to the society and to provide an efficient legal infrastructure for dispute resolution.
4. Predetermining conditions of platform work by regulatory intervention deprives the ability of individuals to decide on their preferred work module and conditions, reduces flexibility and possibilities to individualize work, all of which are the benefits of the gig economy.



05-10-2020

5. An online platform acts as an intermediary more efficiently linking the service provider with the end-user, therefore primacy must be given to the principle of contractual freedom and, accordingly, personal responsibility.
6. Extrapolating policy options for ride-sharing to platform work in general is ill-founded and unjustified. Long working hours and legal uncertainty regarding a particular status of a service provider are the most characteristic to drivers and are not common to all platform workers.
7. The divergence between measures on platform workers and their status applied by EU Member States presupposes that a rigid standard of employee classification criteria is inherently flawed as it would entail patchwork instead of bringing stability and foreseeability into the legal framework and the market.