

Lessons learned & challenges of the future

*Overview of Regulatory Development in
the EU linked to the Online Platform
Economy and its Impact on OSH*

Overview

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1. The online platform economy and OSH

Definitions and concepts

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- ▶ No singular definition of “online platform economy”
- ▶ **Conceptual confusion** due to lack of systematic distinction between related phenomena (*digital/sharing/collaborative/gig economy ; crowd/gig/piece/on-demand work*)
 - ▶ Over-arching development: **digitalisation of society and the economy**
 - ▶ within which **online platforms** are central: online spaces for social/economic interaction
 - ▶ The “**online platform economy**” is the entire economy involving these online platforms
 - ▶ **NB:** Different from the “**collaborative economy**”, which focuses on only on the offering of temporary usage of goods or services, and from the “**sharing economy**” which is about not-for-profit exchanges (e.g. carpooling)

Definitions and concepts

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- ▶ Online platforms can impact the **provision of labour**
 - ▶ Through organizing/intermediating the sale/delivery/provision of goods/services
- ▶ The work provided on, via, through, by online platforms is “**online platform work**”
 - ▶ Comprises a great **variety of working arrangements**
 - ▶ low/high skilled, (hyper-)temporary/permanent, manual/digital, informal/professional
 - ▶ Generally, the arrangement is ‘**a-typical**’ in some way
 - ▶ triangular, temporary, distance/tele-/home work
 - ▶ It can thus comprise many forms of **non-standard employment**
 - ▶ **crowd-work**: outsourcing of tasks to a large pool of workers
 - ▶ **piece-work**: worker is paid fixed piece rate
 - ▶ **home-work**: individuals subcontracted to complete work off-site
 - ▶ **gig/on-demand work**: freelance work as main income

The regulation of online platform work

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- ▶ Regulatory opportunity: addressing **undeclared work**
- ▶ Regulatory challenges of online platform economy:
 - ▶ **moving target**,
 - ▶ ***fait accompli* and regulation-avoiding strategies**,
 - ▶ developments presented as '**new**',
 - ▶ activities **difficult to fit into pre-existing regulatory categories**
- ▶ Online platform work raises difficult questions: **to what extent does/should employment law, including OSH, apply?**
 - ▶ Regulations conceived for employment
 - ▶ Features of **triangularity, temporariness, informality, autonomy and mobility** make it more difficult to establish "employment relationship"
 - ▶ Possible responses: stepping up **enforcement** of existing rules, **extending** the definition of 'employment', devising a **new category** of 'independent worker' or a **presumption** of employment, **extending protection** to self-employed or providing **specific protection**

OSH implications

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- ▶ Direct OSH effects of online platform work
 - ▶ **General OSH risks** for online platform workers
 - ▶ All the risks of the work activities themselves (e.g. cleaning, transport, construction, ICT)
 - ▶ likely to be aggravated (lower average age; lower training levels; loss of protective effect of common workplace; rapid pace of work)
 - ▶ Continuous real-time evaluation and performance rating induces stress
 - ▶ **Specific OSH risks** for **physical** online platform work
 - ▶ work takes place in private settings -> lack of awareness about OSH standards
 - ▶ **Specific OSH risks** for **digital** online platform work
 - ▶ As the work is very individual, the worker may suffer isolation
- ▶ Indirect OSH effects of online platform work (**uncertainty about application of employment rules**)
 - ▶ OSH standards, occupational health care, surveillance and enforcement may be inapplicable
 - ▶ General employment law may not apply: **job and income insecurity** -> stress

2. National regulatory and policy responses in relation to online platform work

France

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- ▶ France has been on the forefront in dealing with online platform work
- ▶ **Act of 8 August 2016 on work, modernisation of social dialogue and securing of career paths** provides:
 - ▶ insurance for accidents at work for independent platform workers in an economically and technically dependent relationship
 - ▶ a right to continuing professional training for online platform workers
 - ▶ a right to a validation of their working experience with the platform
 - ▶ a right to constitute a trade union, to be a member of a union and to have a union represent their interests
 - ▶ a right to take collective action in defence of their interests
- ▶ **The third Occupational Health Action Plan 2016-2020** proposes an action framework to deal with the use of digital tools:
 - ▶ Raising awareness among companies to integrate in their risk assessment questions linked to digitalisation
 - ▶ Conceiving collective work spaces for teleworkers
 - ▶ Addressing these issues at EU level -> possible adaptation of the digital screens directive
- ▶ The **loi Thévenoud** of 1 October 2014 prohibits activities such as Uber's transport online platform

The UK

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- ▶ UK features a **third category of “workers”**: people engaged in ‘intermediate’ labour activities, often casual
 - ▶ set of baseline rights such as basic health and safety rights, the national minimum wage and working time rights
- ▶ Employment status of online platform workers has still been difficult
 - ▶ The House of Commons Work and Pensions Committee has proposed the introduction of an **assumption of the employment status of “worker” by default**
 - ▶ Prime Minister Theresa May commissioned the “Taylor review”:
 - ▶ development of legislation and guidance that adequately sets out the tests that need to be met to establish employee or dependent contractor status. This should retain the best elements of case law and better reflect the reality of modern day casual work in terms of the **control exercised by employers over their staff**
- ▶ Employment status of online platform workers has been considered by UK courts, including high-profile judgment of October 2016 by a **London Employment Tribunal, upholding claim of Uber drivers** who argued that they were employed, rather than working for themselves, and subsequent judgments followed the same trend concerning **CitySprint, Pimlicoplumbers**
- ▶ A **Deliveroo** driver was however considered self-employed by the High Court in July 2018

The Nordic countries

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- ▶ Increasing media/political attention to online platform economy (often called 'sharing economy')
- ▶ Differing reforms of transport rules in response to *Uber* (FI liberalizing taxi-services and DK restricting it)
- ▶ Reflection and research projects undertaken; most importantly the **Nordic Future Group** which considers the OSH implications of online platform work in detail
- ▶ Under current employment rules, online platform workers would often be considered employees in Sweden but as self-employed in Denmark
- ▶ In Denmark, **a landmark collective agreement has been signed between the Danish cleaning services digital platform Hilfr and the United Federation of Danish Workers**, guaranteeing the same conditions as elsewhere on the Danish labour market. The 1-year 'trial' agreement — in force from 1 August 2018 — covers pensions and sickness benefits, holiday pay and collectively agreed wages. After 12 months, a revision will be carried out and training, education, and **OSH may be included**.
- ▶ The framework for the agreement was created by the Danish Government, aiming to ensure fair competition by creating the same rules for all (for example in relation to taxation). An agreement was reached in the Danish Parliament on automatic sharing of information by platforms to tax authorities.

The Netherlands

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- ▶ Dutch employment law has the binary distinction between 'employed' and 'self-employed', but also features a **presumption of employment** and **the notion of 'fictive employment'** (only for primary economic activities)
- ▶ Still, whether someone is considered employed or self-employed will depend on a case-by-case assessment, usually by courts, and is quite **unpredictable**
- ▶ **In a recent case concerning a Deliveroo rider, a Dutch lower court held that the rider was self-employed and added that the legislator should consider intervening to find solutions for labour in the online platform economy**
- ▶ Government seems open to the possibility of regulating online platform work but no concrete initiative has been taken yet
- ▶ Studies commissioned by the government have highlighted the problem of employment status in the case of online platform work (eg study by Rathenau Instituut)
- ▶ Uber's transport services have been condemned in Dutch courts (Centrale Raad van Beroep); while not directly concerned with the employment status of the drivers the judgment is relevant in its analysis of the **'control'** Uber exercises over the transport business

Belgium

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- ▶ Launch of online platforms and narrative of “sharing economy” was welcomed but controversies have emerged
- ▶ Act of 25 August 2012 amending the Employment Relations Act
 - ▶ introduced in some sectors a **rebuttable presumption that work is performed under a contract of employment** if a number of criteria are fulfilled
 - ▶ Belgian courts have not been asked to apply this to online platform workers
 - ▶ general case law suggests that Belgian **courts are reluctant to re-classify self-employment** and are not inclined to take into account elements of socio-economic dependency
- ▶ Advantageous tax regime, taking effect from 1 July 2016, has been introduced for individual service providers who operate through a digital platform (excluding supply of goods and letting)
- ▶ There have been **contradictory judgments from Belgian courts** about the admissibility of *Uber* and the application of Belgian transport rules to its activities

Ireland

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- ▶ In reaction to the UK employment status cases, discussions have also started in Ireland concerning online platform work
- ▶ Current position: *“In Ireland if individuals working in the gig economy were to take a similar case and achieve a similar outcome, they would be entitled to the national minimum wage and holiday pay. In addition, the company concerned would have to pay taxes on behalf of the individuals working for it”* (Minister for Jobs, Enterprise and Innovation Information, 2016)
- ▶ It has been reported that the Workplace Relations Commission recently requested the Economic Social and Research Institute to produce a report on the topic of the online platform economy
- ▶ The Competition (Amendment) Act 2017 introduces two novel categories of worker : **the “false self-employed worker” and the “fully dependent self-employed worker”**. While not specifically concerned with OSH/online platforms, this classification may have wider application in the future
- ▶ The online platform *Uber* is currently not allowed to offer its core product, i.e. paid trips in private cars, in Ireland, because of transport regulations

Other Member States

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▶ Germany:

- ▶ Research commissioned by the government
- ▶ In 2017, 8 Germany-based platforms have signed a **Code of Conduct** in which they agree to conclude local wage standards as a factor in setting prices on their platforms

▶ Czech Republic:

- ▶ development of the National Action Plan ("Work 4.0") which includes a revision of the Labour Code's chapter dealing with OSH and working conditions while working from home, and the development of a methodology for monitoring and evaluation of impact of changes and characteristics of digital types of work on mental and physical health and social aspects of the life of workers

▶ Austria:

- ▶ government intends to initiate a process to **develop EU-wide guidelines for crowd work** during Austria's tenure in the presidency of the EU in the second half of 2018

▶ Croatia:

- ▶ currently working on regulations on new forms of employment, including digital platforms
- ▶ a Program on Protection at Work is being developed, which will include online platform work

3. EU regulatory and policy responses in relation to online platform work

The European Commission

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- ▶ Various policy documents dealing with online platforms
- ▶ Opines that for EU law, an **employment relationship** has to be established on the basis of a **case-by-case assessment**, considering the **reality of the relationship**, looking cumulatively at the existence of a **subordination** link, the **nature of work** and the presence of **remuneration**
- ▶ Commission has proposed two legislative measures in the context of the European Pillar of Social Rights that may impact online platform workers' social and employment rights:
 - ▶ **Access to Social Security initiative**: Commission has proposed a recommendation that urges Member States to provide (i) similar social protection rights for similar work regardless of employment status, and (ii) the transferability of acquired social protection rights;
 - ▶ **Revision of the Written Statement Directive** to reinforce the rights of that Directive about the information the worker is entitled to receive in their employment contract and to define core labour standards for all workers including those in (very) atypical employment relations (possibly a special clause on 0-hours/on-call work)

The European Parliament

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- ▶ Fair working conditions and adequate legal and social protection should be ensured for all workers in the ‘collaborative economy’
- ▶ EP has called for broadening Written Statement Directive to cover all forms of employment, and to **ensure existing minimum standards “for work intermediated by digital platforms and other instances of dependent self-employment”**.
- ▶ EP has furthermore
 - ▶ recalled that the right to healthy and safe working conditions also involves protection against workplace risks as well as limitations on working time and provisions on minimum rest periods and annual leave
 - ▶ urged MS to fully implement the relevant legislation, to apply their national law on (self-)employment based on the **primacy of facts and to enforce it** accordingly, to **invest in labour inspections** and to consider updating the regulatory framework
 - ▶ requested the Commission to **examine how far the Directive on Temporary Agency Work is applicable to specific online platforms**

The CJEU

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- ▶ Case **C-434/15, Asociación Profesional Elite Taxi**
- ▶ **Central question:** whether *Uber's* activities are
 - ▶ “**information society services**”, in which case market access should be granted and restrictions on its operation should have been notified and can only be accepted in limited circumstances, or
 - ▶ “*transport services*” which can in principle be freely regulated by MS
- ▶ The CJEU held that
 - ▶ “the intermediation service provided by Uber is based on the selection of non-professional drivers using their own vehicle, to whom the company provides an application without which (i) those drivers would not be led to provide transport services and (ii) persons who wish to make an urban journey would not use the services provided by those drivers. In addition, Uber exercises decisive influence over the conditions under which that service is provided by those drivers. On the latter point, it appears, inter alia, that Uber determines at least the maximum fare by means of the eponymous application, that the company receives that amount from the client before paying part of it to the non-professional driver of the vehicle, and that it exercises a certain control over the quality of the vehicles, the drivers and their conduct, which can, in some circumstances, result in their exclusion”.
 - ▶ Therefore: “**inherently linked to a transport service** and, accordingly, must be classified as “**a service in the field of transport**”” which can be freely regulated by the MS

4. Concluding remarks

Concluding remarks

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- ▶ The online platform economy, and online platform work, raises many **regulatory questions**
 - ▶ While there are opportunities (limiting undeclared work),
 - ▶ there are also many challenges, connected to the dynamics of the sector, the strategies of the online platforms, as well the atypical features of online platform work
- ▶ **A central question is whether, in light of the significant physical and psycho-social risks connected to online platform work, (all) employment/OSH standards do/should apply to (all) online platform work, and if so, how to ensure this**
- ▶ Currently, both at EU and national level, this question is resolved mostly in a reactive, case-by-case manner by judiciaries, which is specific but also unpredictable and haphazard
- ▶ Regulatory and policy responses have **varied**, with France being the most proactive adopting a specific law providing basic protection for online platform workers
- ▶ A **common policy response** may be warranted at European level
- ▶ Further research is needed to further explore and stay abreast of this fast-changing area

Thank you for your attention!

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