

THE GIG ECONOMY AND LABOUR REGULATION: an international and comparative approach

A ECONOMIA DO GIG E O REGULAMENTO DO TRABALHO: uma abordagem internacional e comparativa

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This paper deals with the main labour implications of the so-called “gig-economy”. The gig-economy is usually understood to include chiefly two forms of work: “crowdwork” and “work on-demand via apps” (De Stefano, 2016a; Smith and Leberstein, 2015, Sundarajan, 2016).

Crowdwork is work that is executed through online platforms that put in contact an indefinite number of organisations, businesses and individuals through the internet, potentially allowing connecting clients and workers on a global basis. The nature of the tasks performed on crowdwork platforms may vary considerably. Very often it involves “microtasks”: extremely parcelled activities which still require some sort of judgement beyond the understanding of artificial intelligence (e.g. tagging photos, valuing emotions or the appropriateness of a site or text, completing surveys) (Howe, 2006; Irani, 2015a). In other cases, bigger works can be crowd-sourced such as the creation of a logo, the development of a site or the initial project of a marketing campaign (Kittur et al, 2013; Leimeister and Durward, 2015; Kuek et al., 2015). In “work on-demand via apps”, jobs related to traditional working activities such as transport, cleaning and running errands, but also forms of clerical work, are offered and assigned through mobile apps. The businesses running these apps normally intervene in setting minimum quality standards of service and in the selection and management of the workforce. These forms of work are growing in numbers and importance. In 2016, a study of the University of Hertfordshire and UNI Global estimated that almost 5 million UK workers and 8 million

Artigo recebido em 20/04/2018.

Artigo aprovado em 09/10/2018 e 25/10/2018.

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The opinions expressed in this article are the Author’s only and do not necessarily reflect the position of the International Labour Office.

RDRST, Brasília, Volume IV, n. 02, 2018, p 68-79, Mai-Ago/2018



German workers have worked for companies in the gig-economy (Huws and Joice, 2016a; Huws and Joice, 2016b). The growth of these forms of work is also clearly recognisable in the United States (Hathaway and Muro, 2016; Smith and Leberstein, 2015).

These forms of work, of course, present some major differences among each other, the more obvious being that the first is chiefly executed online and principally allows platform, clients and workers to operate anywhere in the world, whilst the latter only matches online supply and demand of activities that are later executed locally. Nonetheless, various arguments also exist to treat them jointly.

Despite the many dissimilarities that exist between the two, in fact, these forms of work share several features that make a common analysis opportune. First and foremost, they are both enabled by IT and make use of the internet to match demand and supply of work and services at an extremely high speed. This, in general, allows minimising transaction costs and reducing frictions on markets. As such, these work practices show the potential of resettling the boundaries of enterprises and challenging the current paradigm of the firm and of granting a level of flexibility unheard in the past for the businesses involved (Cherry, 2016; Finkin, 2016). Workers are provided “just-in-time” and compensated on a “pay-as-you-go” basis; in practice they are only paid during the moments they actually work for a client, paving the way to a sheer commodification of labour (De Stefano, 2016d).

A fundamental risk, indeed, is that these activities are not even recognised as work. Indeed, they are often designated as “gigs”, “tasks”, “favours”, “services”, “rides” etc. The terms “work” or “workers” are very scarcely used in this context, and the very same catchphrase “gig-economy” epitomizes this, as the term is often used to indicate a sort of parallel dimension in which labour protection and employment regulation are assumed not to apply by default. To give an example, when the bikers of Foodora, a food delivery service, went on strike in Italy, the managers of the company stated that working for Foodora is only a means of earning some pin money “for those who like to ride the bike” rather than a real job (Coccorese, 2016). Another convenient rhetoric is to present these workers as a sort of individual small business or micro-entrepreneurs, falling by definition beyond the scope of social protection. Whilst this could in theory be true for some of the persons involved in platform work, this is by no means a common, let alone universal, condition in the gig-economy (Berg, 2016; Huws and Joice, 2016a). A powerful rebuttal of this rhetoric can indeed be found in the landmark UK judgement that found

two Uber drivers to be “workers” under UK law.² The Tribunal, indeed, dismissed as “*faintly ridiculous*” the notion that “*Uber in London is a mosaic of 30,000 small businesses linked by a common ‘platform’*”. Nor, according to the Tribunal, does the company merely assist the drivers “*to ‘grow’ their businesses*”, since “*no driver is in a position to do anything of the kind, unless growing his business simply means spending more hours at the wheel*”. As it will be discussed below, The Tribunal went on describing the many factual circumstances under which, in its opinion, Uber drivers must be regarded as workers. Notably, many of these circumstances were also considered in the case *O’Connor v Uber* by the District Court, Northern District of California.³

Therefore, to promote labour protection in the gig-economy, the first thing that is needed is a strong advocacy to have jobs in this sector fully recognised as work. This is an essential step to counter the strong risk of commodification that these practices entail.

Secondly, the gig-economy should not be conceived as a separate silo in the economy. The strong links of the gig-economy with broader trends in labour markets such as casualization of work, demutualisation of risks and informalisation of the formal economy should not be overlooked, to designate comprehensive solutions to labour problems in modern and future labour markets. In this respect, it is essential to consider how many important dimensions of work in the gig-economy share similar attributes with other non-standard forms of employment (De Stefano, 2016a; De Stefano, 2016b). Recognising these similarities helps to avoid unnecessary subdivisions in labour discourses and allows including work in the gig-economy into policies and strategies aimed at improving protection and better regulation of non-standard work, both in general and when addressing specific work arrangements such as casual work or disguised employment relationships (ILO, 2016).

This will also be pivotal in avoiding hastened legislative responses such as creating specific categories of employment to classify workers in the gig-economy (for a criticism to this approach, see Cherry and Aloisi, 2016) or weakening existing regulation to allegedly better the prospect of developments of businesses in this sector. It should also be noted that basic concepts of employment regulation such as control are not alien to the gig-economy and some existing regulation seems to be compatible with forms of work in this sector (Sachs, 2016; Rogers, 2016; De Stefano, 2016a). For instance, it is true that platform drivers are under no

² Employment Tribunal, *Mr Y Aslam, Mr J Farrar and Others v Uber*, Case Numbers: 2202551/2015 & Others, 28 October 2016. For a rebuttal of the “convenient rhetoric of pin money”, see, instead, Berg, 2016.

³ United States District Court, Northern District of California, *O’Connor et al. v. Uber Technologies, Inc., et al.*, Order Denying Cross-Motion for Summary Judgement, 11 March 2015, Document 251.

obligation to show up for work: this is a feature shared by the majority of work arrangements in the gig-economy. Nonetheless, when drivers, and workers in general, accede to platforms or apps and take jobs channelled therein they accept to abide by the policies and instructions unilaterally set by the platforms and apps. From the decisions currently available, it emerges for instance that Lyft drivers are instructed to, among other things, “*be the only non-passenger in the car*”, “*keep [the] car clean on the inside and outside*”, “*go above and beyond good service such as helping passengers with luggage or holding an umbrella for passengers when it is raining*”, “*greet every passenger with a big smile and a fist bump*”:⁴ all this while driving their own car and supposedly being independent contractors. Uber drivers must pass a background check and “city knowledge exam” before being hired. Background checks are also carried out by Lyft and other apps such as Taskrabbit, Wonolo and Handy.⁵ As to the ability to accept or reject tasks, whilst, in one of the cases tried about Uber, it is reported that the service agreement provided that a driver “*shall be entitled to accept, reject and select*” among the rides offered by the app and “*shall have no obligation to accept*” any ride,⁶ in other decisions it is reported that an Uber Driver Handbook states “*We expect on-duty drivers to accept all [ride] requests*” and that the company will “*follow-up with all drivers that are rejecting trips.*”⁷ Handy, another work-on demand app, has instead been reported to provide suggestions “*about how to listen to music (only with headphones, with permission from the customer) and go to the bathroom (discreetly)*” whilst cleaning at the customer’s home (Kessler, 2015a). The Employment Tribunal in London found that, besides fixing the fare, Uber “*sets the (default) route and the driver departs from it at his peril*” and “*imposes numerous conditions on drivers (such as the limited choice of acceptable vehicles)*” as well as “*instructs drivers as to how to do their work and, in numerous ways, controls them in the performance of their duties*”.⁸

All these practices and policies, therefore, seem to contradict the idea that control is never exerted on the work performance. This is all the more true since platforms and apps can also constantly monitor this performance by means of the rates and reviews provided by customers (Dzieza, 2015; Sachs, 2015). Indeed, they also communicate to workers that they can be deactivated unless they do not maintain a certain satisfaction rate, which can indeed be

⁴ United States District Court, Northern District of California, *Cotter et al. v. Lyft Inc.*, Order Denying Cross-Motion for Summary Judgement, 11 March 2015, Document 94.

⁵ TaskRabbit, Terms of Service, available at <https://www.taskrabbit.com/terms> (accessed 14 November 2016); Wonolo Terms of Service, 9 May 2016, available at <http://wonolo.com/terms/> (accessed 14 November 2016). Handy, Terms of Use, available at <https://www.handy.com/terms> (accessed 14 November 2016)

⁶ Labor Commissioner of the State of California, *Berwick v. Uber Technologies, Inc.*, 3 June 2015.

⁷ *O’Connor et al. v. Uber Technologies, Inc., et al.*, Order Denying Cross-Motion for Summary Judgement (n. 3).

⁸ *Mr Y Aslam, Mr J Farrar and Others v Uber* (n. 2).

very high. Nor do companies just retain the theoretical right to do so: according to the District Court, “*Uber regularly terminates the account of those drivers who do not perform up to Uber’s standards*”.⁹ As observed by the UK Tribunal, “*Uber subjects drivers through the rating system to what amounts to a performance management/disciplinary procedure*”,¹⁰ thus exerting some of the crucial prerogatives normally reserved to employers (Prassl and Risak, 2016).

In the case of crowdwork, as already mentioned, rejection of a work by a client in a platform may determine a dramatic loss in one’s ratings, which would prevent acceding to the most remunerable jobs reserved only to those workers with the highest rates. This system allows to automatically disciplining performance that is poor or perceived to be as such and can therefore also amount to a way of exerting control. In addition, control can be exerted by allotting a fixed amount of time for a specific task or set of tasks and by monitoring systems that are peculiar to virtual work, such as taking screenshots of workers’ monitors. It has been argued that “*this often results in determination of work that is so pronounced that it equals “classical” personal dependency necessary for an employment relationship*” (Risak and Warter, 2015, 8). On the basis of what was highlighted above, this observation can indeed be extended to other work arrangements in the gig-economy.

Efforts should also be made to adapt protection to the modern reality of labour markets: for instance, a presumption of employment status could be introduced when a contract of personal service is in place or other indicators are present or a more flexible definition of “control” and “employment” could be envisaged to take into account new realities of work management. For instance, the ILO Reports that in a vast number of countries, lawmaker and courts adopted other tests based on the “economic reality” of the relationship that go beyond the mere exercise of the power to control the working activity and also look at the economic dependence of the worker upon the employer (ILO, 2016; Countouris, 2011). In the United States, for instance, the Department of Labor clarified how following the definition of employment under the Fair Labour Standards Act, the criteria that should be taken into account in determining whether a person should be regarded as an employee under the Act and therefore be entitled to minimum wage and working hour protection are based on a “multi-factor ‘economic realities’ test”. These factors typically include: “(A) *the extent to which the work performed is an integral part of the employer’s business*; (B) *the worker’s opportunity for profit or loss depending on his or her managerial skill*; (C) *the extent of the relative investments of*

⁹ *O’Connor et al. v. Uber Technologies, Inc., et al.*, Order Denying Cross-Motion for Summary Judgement (n. 3).

¹⁰ *Mr Y Aslam, Mr J Farrar and Others v Uber* (n. 2).

the employer and the worker; (D) whether the work performed requires special skills and initiative; (E) the permanency of the relationship; and (F) the degree of control exercised or retained by the employer” (US DoL, 2015).

In Italy, instead, the Supreme Court found in several cases that the legal test of “subordination”, broadly corresponding to the concept of control in common law, was also met when the employer did not continuously micromanage the worker, when the nature of the activity did not require this for the employer to maintain overall control over the working activity or organization. This does not only happen in civil law jurisdictions. The State of California Department of Industrial Relations observes that: “[e]ven where there is an absence of control over work details, an employer–employee relationship will be found if (1) the principal retains pervasive control over the operation as a whole, (2) the worker’s duties are an integral part of the operation, and (3) the nature of the work makes detailed control unnecessary” (ILO, 2016). In this respect, also the Committee on Employment and Social Affairs of the European Parliament has very recently called, “for work intermediated by digital platforms”, a “definition of employment that is less dependent on full cumulation of the relevant criteria”.¹¹

Nor should it be taken for granted that work in the gig-economy is incompatible with recognising the relevant workers as employees: some companies, such as Alfred, Instacart, Munchery, have indeed already spontaneously reclassified their workers as employees (Smith and Leberstein, 2015).

Measures should also be taken to ensure transparency in ratings and, above all, fairness in business decisions such as deactivation of profiles or changes of terms and conditions of use and payment of workers and to reduce the idiosyncratic character of one of the most important “capitals” in the gig- economy: reputation. Allowing the “portability” of workers’ existing good ratings from one platform to another would reduce the dependency of workers upon single platforms: resistance to this development would indeed be inconsistent with the purported role of platforms as facilitators rather than traditional employers. Most importantly, and this is as important for the gig-economy as for any other section of the labour market, some protection should be considered universal and be provided regardless of the employment status.

¹¹ European Parliament, Committee on Employment and Social Affairs, *Draft Report on A European Pillar of Social Rights* (2016/2095(INI)), 13 September 2016, available at: <http://www.europarl.europa.eu/sid/es/getDoc.do?pubRef=-%2F%2FEP%2F%2FNONSGML%2BCOMPARL%2BPE-589.146%2B02%2BDOC%2BPDF%2BV0%2F%2FEN> (accessed 14 November 2016)

This is the certainly the case for fundamental labour rights: no worker should be denied access to basic human rights such as freedom of association and the right to collective bargaining, freedom from forced and child labour and the right not to be discriminated; in addition, other protection of basic needs should be afforded to all workers, such as OSH measures (see Huws, 2015, for a discussion of OSH risks in crowdwork). This would already render the protective gap between employment and self-employment less dramatic. For instance, France recently introduced a specific regulation of platform-based work in its Labour Code. It provides self-employed workers with the right to accede social security as well with the rights to establish and join trade unions and to undertake collective action.¹²

Indeed, the role of workers' and employers' organisations and social dialogue will be fundamental in the governance of the gig-economy. Several forms of organisation are already a reality in this sector, both for crowdwork – with platforms that try to connect workers online and make them cooperate, for instance by reducing information asymmetries vis-à-vis platforms and clients (Silberman and Irani, 2016; Salehi et al., 2015) – and for workers executing activities in the “real” world (Said, 2016). These organisations can be either grassroots or promoted by existing actors, also on a sector level, and – most interestingly – in some cases new realities cooperate with more traditional and structured actors to organise workers in the gig-economy (IRU, 2015; Kessler, 2015b). An example of cooperation is the platform FairCrowdWork that was created by the German labour union IG Metall, which is now also collaborating with some of the creators of the Turkopticon, a platform gathering workers on the Amazon Mechanical Turk.¹³ This project is now further being developed jointly by the IG Metall and the Swedish *Unionen*. Moreover, both these unions together with several other European and North American workers' organisations recently issued the *Frankfurt Paper*, the first transnational joint statement on platform based work, calling for “transnational multi-stakeholder cooperation to ensure fair working conditions in digital labor platforms”.¹⁴

In the UK, the GMB union was actively involved in the litigation on Uber whereas the IWGB is seeking to organise Deliveroo workers, who went on strike in London last summer (Woodcock, 2016). Very importantly, also employers' associations are engaging in the debate on the digital economy (see BDA, 2015; IOE, 2016; see also McKinsey Global Institute, 2015). Recognizing in full the human character of activities in the gig-economy and their nature as work is fundamental to support these organisations, also by removing legal barriers, where

¹² Articles L. 7341-1 – L. 7342-6, *Code du Travail*, France.

¹³ <http://www.faircrowdwork.org/en> (accessed 9 January 2017).

¹⁴ <http://crowdwork-igmetall.de/> (accessed 9 January 2017).

existing, such as those that may arise from antitrust laws, that affect self-employed workers much beyond the gig-economy (De Stefano, 2016c). In this respect, for instance, the Seattle City Council approved an ordinance allowing drivers for car-hailing apps to form unions, in December 2015 (Wingfield and Isaac, 2015). This ordinance that was almost immediately challenged under antitrust regulation (De Pillis, 2016), proving all the more urgent an intervention aimed at sustaining self-organisation of workers and employers in this field. Making collective organisations of workers immune from antitrust law would be in line with the founding principles of the International Labour Organisation, and in particular with the idea that “labour is not a commodity”. This is a principle enshrined in the Declaration of Philadelphia and notably deriving from the US Clayton Antitrust Act of 1914, the first legislative instrument establishing that “*the labor of a human being is not a commodity or article of commerce*” with the specific purpose of clarifying that union activities could not be regarded as combinations in breach of antitrust laws (De Stefano, 2016d).

Self-organisation will enhance the opportunities of workers being made aware of their rights; it will thus be fundamental to support activities aimed at reaching the vastest number of workers possible with campaigns also oriented at workers in developing countries. Besides participating in the organisation of workers, the role of established unions and employees’ representative bodies could also concentrate on how to use existing instruments with regard to work in the gig-economy. An example would be to exercise codetermination and information and consultation rights, where present, with regard to the decisions of outsourcing activities via crowdwork or other forms of work on demand (Klebe and Neugebauer, 2014). Social partners could also be involved in the creation, support and spread of codes of conduct addressing issues of labour protection in the gig-economy: an existing example in this respect is a Code of Conduct concerning paid crowdsourcing, already signed by 3 crowdwork platforms in Germany and supported by the German Crowdsourcing Association. All this will be fundamental to make sure that workers have a real voice in the future developments of the gig-economy and of the world of work at large. Calls for self-regulation in this context (Cohen and Sundararajan, 2014) are worth exploring but the fundamental voice of workers must not be overlooked and self-regulation cannot be unilaterally set by businesses or aimed at satisfying only the “consumer” part of the stakeholders. As already mentioned, the challenges the gig-economy poses to the world of work are enormous: simplistic and hastened responses aimed at deregulation and shrinking workers’ protection must be avoided if opportunities stemming from the gig-economy and future technology-enabled developments in the economy are to be seized for everyone.

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