The Role of European Institutions in Promoting Decent Work in the "Collaborative Economy"

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Abstract This chapter aims at discussing the European approach to regulating the so-called "collaborative economy", by looking at the main legislative initiatives regarding this set of fast-growing digital companies. Despite the potential efficiencies and benefits for customers, more recently, a counter-narrative has started revealing the "broken promise" of managing a contingent workforce mobilised on a "just in time" and "just in case" basis. The second section briefly describes the "collaborative economy" landscape and the dissemination of the heterogeneous category of "non-standard forms of employment" in the European scenario. The third section discusses the *Uber* case, the most visible symptom of a consolidated tendency towards fragmentation of the once solid relationship between the worker and the employing entity. In this respect, a recent ruling by the European Court of Justice on the nature of the service provided by the "transport platform" is analysed in depth. The fourth section investigates the European communications and resolutions which adapt the current legal framework and provide guidelines for regulating work in the collaborative economy, namely the Communication on the European agenda for the collaborative economy, the European Pillar of Social Rights, and other Parliamentary initiatives. The study is based on a theoretical and descriptive methodology. This chapter concludes by recommending a cautious regulatory approach. It has been highlighted that many online platforms are still in their business "infancy", and experts genuinely do not know how they will develop. Consequently, legislative headlong rushes may end up crystallising the present state of the art, thus hindering "peripheral" entrepreneurial initiatives and blocking innovation. Surgical regulatory interventions shall help platform companies to adjust and improve their business model, in order to enter a new phase of "shared social responsibility".

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1 Introduction

The ride-hailing company *Uber* and other labour platforms such as *Deliveroo* and *UpWork* represent an emblematic prototype of broader trends that are reshaping the world of work. These trends include the casualisation and flexibilisation of employment relationships, the fierce global competition, the expansion of the service-based sector at the expense of the manufacturing sector, the rise of precariousness, and the fragmentation of the traditional workplace (Collins 1990; Weil 2014).

Indeed, the number of entrepreneurial initiatives adopting a decentralised and coordinated network of production and distribution of assets and services is on the rise. Although the current debate, still at an early stage, is absorbed mostly by antitrust law-related issues concerning the alleged unfair competition brought about by platforms in traditionally regulated markets (where companies are subject to more restrictive rules), legal scholars now insist on investigating how crowdsourcing and work on-demand are threatening secure employment relationships and jeopardising workers' rights. Such a perspective is of the utmost importance: for the purposes of this short essay, the emphasis will be put on the "professionalised" segment of the collaborative economy (Codagnone et al. 2016b), bearing in mind that the original scheme "*has progressed from a community practice into a profitable business model*" (Böckmann 2013; Hatzopoulos and Roma 2017). Despite the potential efficiencies and benefits for customers, more recently, a counter-narrative has started revealing the "broken promise" of managing a contingent workforce mobilised on a "just in time" and "just in case" basis (De Stefano 2016).

In order to evaluate the European approach to regulating the so-called collaborative economy, it is crucial to look at legislative communications, resolutions, proposals and decisions regarding this set of fast-growing digital companies. Accordingly, the second section of this article will briefly describe the "collaborative economy" landscape and the dissemination of the amalgamated category of "non-standard forms of employment" in the European scenario (ILO 2016). An assessment of its dimensions will be carried out after providing a consolidated terminology aimed at apprehending a socio-economic phenomenon under constant mutation. The study is based on a theoretical and descriptive methodology.

Arguably appealing, this apparently new shift also relies on more complex and up-and-coming societal values, such as trust between strangers and cooperation between neighbours. While *Uber* (portrayed in section three) is currently at the centre of an intricate regulatory challenge (Prassl 2017), the crowd-based economy seems to be here to stay. That is why lawyers, practitioners and lawmakers should concentrate on how the (social) level playing field can be restored or achieved. In this respect, it might be interesting to see how far the Court of Justice of the European Union has gone with the preliminary ruling exercised by a Spanish commercial tribunal on the nature of the service provided by *Uber*.

In the very near future, legislative interventions should absorb the legal grey area where platforms are operating and accumulating their business advantage, since these arrangements are increasingly becoming the way how people make a living—not merely an occasional diversion to earn extra money in their spare time. Thus, the fourth section of this article will analyse European initiatives aimed at adapting the current legal system and providing guidelines for regulating work in the collaborative economy. First and foremost, we will focus on the European Communication on Collaborative Economy (356/2016) which has set a range of factors in order to distinguish professional services from "true-sharing" or voluntarist activities (Cherry and Aloisi 2017).

Afterwards, this article will sketch out the main contents of the European Pillar of Social Rights, issued at the beginning of 2017, after an engaging consultation. Although the subsidiarity principle still plays a major role within the employment field, the European Commission is trying to extend rights and protections to all new work patterns, irrespective of their legal form, by means of a social package to be defined precisely. Still on the same subject, the parliamentary efforts will be reviewed critically.

This chapter concludes by recommending a cautious regulatory approach. It has been highlighted that many online platforms are still in their business "infancy", and we genuinely do not know how they will develop. Consequently, legislative headlong rushes may end up crystallising the present state of the art, thus hindering "peripheral" entrepreneurial initiatives and blocking innovation. Having decided how to treat platforms whose influence and command on the ultimate provider is intense, "surgical" regulatory interventions shall help the collaborative economy companies to adjust and improve their heterogeneous business model, building a new phase of "shared social responsibility" (Das Acevedo 2016).

2 An Umbrella Definition for Work in the "Collaborative Economy"

Buzzwords never come alone. Hence, terms such as "sharing economy", "collaborative economy", "platform economy" and "gig-economy" could be used interchangeably, underestimating the nuances of meaning, if any. Furthermore, it should be noted that the vocabulary employed by the main operators misrepresent the exchange of labour that lies at the very heart of these socio-economic patterns: "gigs", "rides", "tasks", "favours" are elusive euphemisms in lieu of "jobs", aimed at conveying a sense of non-remunerated activities and obscuring the reality of underlying arrangements (Butler 2017). Nevertheless, while it is hard to retrace a homogeneous model among platforms classified under this comprehensive label, an autonomous archetype can be described without fear of contradiction. In doing so, similarities will be over-represented at the expense of divergencies. The fact is that

each feature may entail several legal implications and would deserve to be analysed in depth, but due to space constraints not all could be included.

To cut to the chase, and renouncing to the mere ambition of crafting a monolithic definition, a far-reaching notion of collaborative economy could be constructed by borrowing the European Commission's definition which brings platforms at the core of the debate on the future of work:

> Business models where activities are facilitated by collaborative platforms that create an open marketplace for the temporary usage of goods and services often provided by private individuals.

It should quickly become apparent, though, that the original altruistic aspiration has made room for purely commercial arrangements. Thus, the economic actors involved in this subset of transactions are: (i) providers (they can be private individuals—peers—or professional services providers); (ii) users (they can be individuals, families or businesses); and (iii) platforms that connect them and exercise a certain degree of "intrusion" on the material execution, as will demonstrated at a later stage (Smorto 2017). For the purpose of this essay, the above-mentioned formula has to be integrated by zooming in on those platforms:

> (1) that work as digital marketplaces for non-standard and contingent work; (2) where services of various nature are produced using preponderantly the labour factor (as opposed to selling goods or renting property or a car); (3) where labour (i.e. the produced services) is exchanged for money; (4) where the matching is digitally mediated and administered although performance and delivery of labour can be electronically transmitted or be physical; (5) where the allocation of labour and money is determined by a collection of buyers and sellers operating within a price system. (Codagnone et al. 2016a)

As this topic is going viral, it is worth understanding boundaries and set a reasoned perimeter both for academic and regulatory purposes. However, at the moment, a case-by-case assessment rather than a one-size-fits-all approach is necessary, especially when it comes to dealing with unresolved legal dilemmas regarding the demarcation of the relevant market, the classification of workers and the nature of the service provided by online intermediaries, just to list a few.

2.1 Crowdsourcing and on-Demand Work

Although the array of non-standard forms of employment is rich and varied, under this heading, we first pay special attention to "crowdwork" and "on-demand work", alternative (and flexible) working arrangements facilitated by online intermediaries. Legal scholarship tends to "*focus separately* [...] *on online and offline workers, because their places of work (remote versus face-to-face) and relationships with clients (telemediated versus direct) create very different patterns of work, exposing them to different risks*" (Huws et al. 2016)

In particular, crowdwork (or "crowdsourcing") includes services delivered remotely (i.e. over the Internet), encompassing different varieties of activities,

routine (so-called click work) as well as creative and cognitive ones, such as conceiving marketing campaigns or editing long-form journalistic or academic articles. The list of common performances, also labelled as "human intelligence tasks", is rather long, ranging "*from data entry and admin work over graphic design and coding to legal and business consulting*" (OECD 2015). The model consists in breaking down a complex task into its smallest constituent parts and offering each of them to an always available, globally dispersed labour force.

Platforms conceived in this way may propose new opportunities to mobility-impaired professionals, stay-at-home-parents or highly educated and previously unemployed married women with children. Empirical findings are in line with these assumptions. Online intermediaries "employ" a very large contingent workforce, thus reshaping the twentieth-century notion of firm, thanks to lower transactions costs: this manner of arranging a digital infrastructure results in the "pulverisation" of the stable employment relationship.

At the same time, operators do not repudiate the classical hierarchical structure in the management of the relevant relationships, as they exert directive, control and disciplinary prerogatives of certain intensity by means of algorithmic governance, pervasive surveillance, rating system and quality standards (Calo and Rosenblat 2017). Platforms usually reserve the right to reject the final deliverable with no justification, retaining it without paying for the service. They take screenshots of the provider's monitor thanks to special software specialised in remote real-time surveillance. In order to monitor the worker's performance, they may assign "control" tasks to double check the quality of the service.

These "human cloud platforms" are accused of channelling *artificial* "artificial intelligence" (The Economist 2006), as this sort of task is commonly perceived as served by obscure algorithms while, on the contrary, humans are the most suitable "machine" when it comes to labelling items, transcribing audios, editing documents, interacting with costumers, recognising irony and detecting obscene contents. This, in turn, results in workers commonly paid a low rate of pay and forced to brag and beg to secure work.

On-demand work via platforms refers to services delivered materially (mostly performed on a local basis, at the household's premises), such as accommodation, transportation, delivery, maintenance and handyman, cleaning or personal services. In this case, "traditional" tasks are channelled through virtual networks that benefit from digital device penetration (based on effective geo-location systems, ubiquitous connections and online payments).

The common narrative describes such jobs as side-activities for young students or unemployed people—this has been proven to be incorrect or, at least, imprecise (OECD 2016a). On the contrary, under the veil of enhanced flexibility, stress and unpaid waiting time are the rule (Berg (2016), workers spend 18 min of unpaid work for every hour worked and paid). For instance, cycle couriers have to wear a commercial uniform, use their own vehicle, show up in a hotspot, then log onto the app from their smartphone and deliver fresh meals from a restaurant to the customer's address as quickly as possible. They are paid on piecework or, more rarely, an hourly basis.

Needless to say, none of the protections due to employees (subordinate workers) is guaranteed: overtime compensation, paid sick or maternity leave, compensation for injuries or health insurance. In addition to this, costs associated with equipment, maintenance and repairs are at the provider's own expense: no reimbursements for expenses are due. This is feasible since in their "participation agreement" (i.e. non-negotiable contract) platforms specify that the worker is performing his duty as an independent contractor. The most common clause in these "click-wrap agreements" points out that providers use the platform at their own risk.[1] Gig-economy platforms are based on an inescapable duty of loyalty which "blocks" workers in a system with scarce possibility of jumping from an app to a rival one due to high switching costs. In addition to this, workers' accounts may be deactivated, excluding them from the platform with no justifications.

Moving on to other issues, it must be noted that, undoubtedly, the impact of "*platformisation*" in many sectors can be appreciated from a consumerist point of view (Wallsten 2015). According to studies (PricewaterhouseCoopers 2015), consumers welcome the sharing economy because of lower prices, more choice, a sense of community and greater accessibility. If anything, the volume and speed of this profound transformation should warn of the unprecedented effects on the social fabric. Underestimating the fact that most labour-related, fiscal and social security costs are unpaid is tantamount to ignoring a ticking bomb. Nowadays, it seems that "*commercial* "*sharing*" *platforms operate in an institutional vacuum and stand to some extent "above the law*" (Codagnone et al. 2016a) especially when it comes to the way "*producers*" are treated (Bruns 2009).

Literature and journalistic investigations have striven to demonstrate the "dark side" of the sharing economy, maintaining that digital platforms' prerogatives involve: persistent monitoring power, unilateral arrangement of terms and conditions and deactivation privileges. These inquiries have probably diminished the allure of these meant to be independent positions. In considering the background, scholarship has traced three main reasons explaining the rise of the contingent workforce: (i) the need to cope with short-run fluctuations in the demand for goods and services, (ii) the desire to reduce labour costs, (iii) the urgency to meet market pressures on the short-term result and efficiency (Dokka et al. 2015; Eurofound 2015).

The last few months have witnessed the exponential rise of platforms. As for the dimensions of the phenomenon, the value of the collaborative economy in the EU varies from survey to survey, from report to report. It has to be acknowledged that, despite the unstoppable collection of data, it is hard to overcome many intrinsic problems such as the distinction between active and non-active accounts or the use of multiple identities to register on different platforms.

In the absence of official data, we may refer to few consistent, systematic or complementary appraisals. We could describe this group of workers as a subset of

[1]See, for example, Amazon Mechanical Turk's Participation Agreement: https://www.mturk.com/mturk/conditionsofuse.

"alternative work arrangement" (Eurofound 2015), estimated at around 17% of the workforce in 2015. According to more generous estimates, the value of the collaborative economy in Europe exceeds €20 billion (Geron 2013). A very detailed document prepared by PwC for the European Commission (DG GROW)[2] finds that platform economy amounts to nearly €4 billion in revenues and has intermediated €28 billion of transactions (85% of this value is gained by the provider) (Vaughan and Daveio 2016). Yet, participation in the collaborative economy is "*relatively small—but growing*": only 5% of European consumers have participated in this framework, making no more than €1000 (the median of earning stands at around €300). According to a report commissioned by the European Commission (De Groen and Maselli 2015; Harris and Krueger 2015), there would be around 100,000 active workers in the European collaborative economy, representing 0.05% of the total workforce. Of these platform workers, more than 6 out of 100 shall be accounted for as *Uber* drivers. In considering the impact on the labour market, the same paper warns to also take into account the number of jobs that may be or have been lost because of the emergence of collaborative schemes.

What is more, it is contentious whether contracts in the collaborative economy are entered into in order to alleviate the high rate of unemployment or rather because of the total absence of more stable and permanent alternatives. In any case, surveys and reports have demonstrated how online platforms are not generating sufficient income (Fabo et al. 2017). If that should also be the case in future, there could be the risk of platforms acting as brokers for poor and precarious work, rather than for creating labour opportunities. Accordingly, the following section will look into the implications of the sustained growth of this promising subgroup of alternative working arrangements, by taking the *Uber*'s example as a role model to describe the vertical disintegration (or, even better, "*fissuring*") of the traditional structure of the firm.

Available research reveals pervasive directives, reinforced surveillance, constant assessment, arbitrary disciplinary action and very little or no margin in deciding how to complete a task. The model does not contain any entitlement such as overtime, paid holiday leave, maternity leave, sickness payments and statutory minimum wages. Furthermore, workers are excluded from fundamental principles and rights at work such as freedom of association, collective bargaining or protection against discrimination. As a result, advantages such as job market activation, enhanced flexibility and frictionless mobility are coupled with harsh working conditions, income insecurity, less work-related benefits.

[2]The report defines 5 key sectors (peer-to-peer accommodation, peer-to-peer transportation, on-demand household services, on-demand professional services, collaborative finance). According to the authors, there are 275 collaborative economy platforms in 9 member states (Belgium, France, Germany, Italy, Poland, Spain, Sweden, The Netherlands, and the UK).

3 How *Uber* May Drive the Collaborative Economy Crazy

Uber embodies a "disruptive" and controversial force in many cities, where high population density and the inefficiencies of public urban mobility have paved the way to a new competitive player, currently favoured by the apparent "obsolescence" of some sector-specific rules and demonised by outraged reactions of incumbents. The transport sector is a test bench where observing how the initiatives aimed at fixing market failures could result in hindering competition, innovation and consumer choice. Also, *Uber* represents the most visible symptom of a consolidated tendency towards fragmentation between a worker and the employing entity, as described in the previous paragraph. One of its main competitive advantages stems from the fact that drivers do not enjoy full employment rights, being questionably labelled as "independent contractors".

While it is contentious as to whether its template may be successfully translated into other sectors on account of the uniqueness of transport networks, dozens of start-ups have been established and announced to be the "*Uber of something*". After rapid success and global expansion, the platform is progressively getting into the eye of the cyclone (De Franceschi 2016), since it allegedly does not comply with requirements that traditional taxi companies have to meet in order to operate. The European approach to regulating *Uber*'s business varies from state to state: the service has been directly or indirectly banned in Belgium, Denmark, France, Germany, Italy, Portugal and Spain. It cannot be denied that *Uber* has little in common with authentic collaborative practices (some commentators have proposed a different definition: "*crowd-based capitalism*"). Indeed, the company has become a dominant synonym for the decline of labour-intensive industries, and hence for "reinventing" jobs.

The eponymous car-hailing start-up connects passengers to (amateur or professional) drivers offering rides thanks to a mobile app, which can localise their respective positions and estimate the fare for the trip, thanks to a smartphone equipped with the application. The rider can observe how long the driver would take to show up and pick her up at his location, while the driver cannot refuse unprofitable rides since she ignores the destination and the fare in advance. When the ride is over, the customer pays the price automatically via electronic card and can evaluate the "chauffeur" by using a 5-star rating system which affects whether the worker receives further work. Both the driver and the rider are subject to rating.

Uber retains between 20 and 30% of the fare as a commission payment but the price of the service cannot be negotiated since it is set automatically. A tip is expressly forbidden (but drivers are devising creative ways of asking for it). From the outside, this is the general scheme—something could change among different services (from *UberPop*, private citizens not professionally licensed offering rides to *UberX*, professional drivers holding a "medallion", i.e. a licence, and driving Private Hire Vehicles).

The "Term of Service" configures and regulates the relationship between *Uber* and its users (drivers and passengers) as well as between the users. Perspective

Uber drivers (or "partners", a least according to the internal "jargon") must apply on the *Uber* website and pass a quick practical test in order to access the platform. This procedure encompasses a driver's licence check—the vehicle needs to be of a certain type and less than 10 years old—and control of the car registration number and insurance. According to local special rules, drivers may be subject to a city knowledge test. Moreover, just to clarify how penetrating the role of the company is, the "driver booklet" invites the driver to wear smart clothes, it suggests keeping the radio volume low or to play classy music.[3] The driver has to pay for all running expenses (petrol, insurance, taxes) and the car, and assumes all responsibility should an accident occur. *Uber* offers cut-price insurance to all its drivers (Aloisi 2016).

Suffice it to observe here that flexibility is merely virtual and does not work in the drivers' favour since many of them depend on the job and are tied to the platform by other means, such as reputation, data, loans for a lease or a new purchase (Todolí-Signes 2017). Service providers are not in control of their time. In fact, to keep the personal rating over the minimum threshold (and, in the words of *Uber*'s terms, "*if the average rating still falls below the minimum after multiple notifications, you will lose access to your account*"), a driver needs to satisfy the customer, accept a certain number of rides and stay available online at least a number of hours per week. In case of suspension, specific rehabilitation programmes are planned, thus confirming the hypothesis of the power of command exerted over drivers.

At first glance, the *Uber* app performs different activities: (i) directly, efficiently and quickly matching riders to passengers, (ii) real-time tracking of individuals thanks to geo-localisation capabilities, (iii) calculation and fixing of prices, taking into account the distance and time, and arbitrarily implementing surge pricing techniques in order to engage drivers and to maximise profits on the occasion of demand peaks (Cachon et al. 2016), (iv) implementing standards of conduct allowing the two parts to rate each other at the end of the trip, (v) promoting "improvement courses" (i.e. training) when the rate goes below a certain threshold. In view of the above, many legal scholars have concluded that "*such conditions suggest a level of control that goes beyond the mere provision of an introduction between two independent parties, and which resemble closely a traditional employment relationship*" (EU-OSHA 2015; Huws et al. 2016).

3.1 The Legal Disputes Before the Court of Justice of the European Union and Local Tribunals

Last December, the Court of Justice of the European Union (CJEU) ruled that an intermediation service such as that *UberPop* must be regarded as *"a service in the*

[3]O'Connor v. Uber Technologies, Inc., No C-13-3826 EMC, 2015.

field of transport" rather than an information society service. In particular, the Court took the view that the service provided by the platform is more than a matching activity connecting, by means of a digital app, a nonprofessional driver with a private individual wishing to make "urban journeys". Indeed, the provider of that lucrative intermediation service simultaneously organises and offers urban transport services.[4] In C-434/15 *Asociación Profesional Elite Taxi v Uber Systems Spain* (2014) ECLI:EU:C:2017:981 the Court observed 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"*. The decision by the Luxembourg court defined the nature of the services provided by *Uber* and, consequently, the applicable regulation. Consequently, such a service must be excluded from the scope of the freedom to provide services in general as well as the directive on services in the internal market and the directive on electronic commerce (Geradin 2016). The repercussions of this ruling are far-reaching.

Taking the time to step back, a Catalan trade association named *Associación Profesional Élite* filed a lawsuit against *Uber System Spain* alleging unfair competition practices. To put it bluntly, representatives of the incumbent taxi companies wondered why *Uber* supplies its services without authorisation from the Spanish Transport Authorities. Traditional taxi companies had no interest in justifying an exemption from licensing requirements.

Conversely, the ride-hailing platform maintained to be a mere matchmaker (like an "*eBay for gigs*"), providing a technological intermediation service which connects riders to drivers, through its application. Based on this viewpoint, the service should be covered by law provisions designed to ensure the free movement of services in the EU (E-commerce Directive, *lex specialis* in relation to the Service Directive). In this case, pursuant to Article 4, no prior authorisations or similar requirements are due and the "internal market clause" applies (Art. 3[2]).

Put differently, can *Uber* claim to fall under the scope of art. 49 (freedom of establishment) and art. 56 (freedom of movement for services)? Is *Uber* under the scope of the Service and/or E-Commerce Directive? Presumably, if that is the case, the service shall be subject to no prior authorisation in the providers' home State, and other Member states shall be prevented from raising any obstacles. A State may impose an authorisation regime, diverging from the liberalised system, if public policy, public health, public security and consumer protection make this a necessity.

Without going into the details and putting aside the intricate corporate structure, this case opposes two conflicting logics. If the answer of the CJEU was that *Uber* is

[4]Case C-434/15: Request for a preliminary ruling from the Juzgado Mercantil No 3 de Barcelona (Spain) 7 August 2015 – Associación Profesional Élite v Uber System Spain, S. L., OJ 2015, C. 363/21.

running an "information society service" ("*any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services*", Art. 1.2 of Directive 98/34/EC as amended by Directive 98/48/EC), its regulation would be limited to protecting objectives of public interest and proportionate to the fulfilment of the same objectives. Nevertheless, this interpretation does not perfectly fit *Uber*, while it is appropriate for authentic digital intermediaries through electronic means, e.g. platforms which do not exert any managerial prerogative on the provision of the underlying service.

Such a service must be excluded from the scope of the freedom to provide services in general as well as the directive on services in the internal market and the directive on electronic commerce. Thus, the ride-hailing company must comply with rules governing traditional taxi association at the national level. Concomitantly, Member States might use this window of opportunity to update obsolete rules on urban public transport.

While many analyses have covered the issue from the perspective of competition law, the *Uber* case also raises so much attention on allegedly circumventing labour laws. This is why one may propose a two-stage reading in conjunction with a landmark case ruled by a British Employment Tribunal.[5] In the "landmark judgment" *Aslam v Uber Bv,* the court focused on the "practical realities" of the relationship between *Uber* and its drivers.

By conceptualising the conclusions, *Uber* drivers could be reclassified as workers (eligible for minimum wage, sick leave and paid holiday provisions) instead of independent contractor, as maintained by the company in the "terms of service" (Sachs 2016).

In particular, the British court, denying the fact that the company exercises a mere enabling activity of interactions between two opposite groups of users, emphasised that *Uber* does not provide the opportunity for personally negotiating the content of the obligation, while tasks are performed personally, with no possibility of being replaced temporarily ("*the notion* [...] *is to our minds faintly ridiculous*"). In line with these assertions, let us quote some of the main arguments:

> (1) The contradiction in the Rider Terms between the fact that ULL purports to be the drivers' agent and its assertion of "sole and absolute discretion" to accept or decline bookings. (2) The fact that Uber interviews and recruits drivers. (3) The fact that Uber controls the key information (in particular the passenger's surname, contact details and intended destination) and excludes the driver from it. (4) The fact that Uber requires drivers to accept trips and/or not to cancel trips, and enforces the requirement by logging off drivers who breach those requirements. (5) The fact that Uber sets the (default) route and the driver departs from it at his peril. (6) The fact that UBV fixes the fare and the driver cannot agree a higher sum with the passenger. The supposed freedom to agree a lower fare is obviously nugatory.) (7) The fact that Uber imposes numerous conditions on drivers (such as the limited choice of acceptable vehicles), instructs drivers as to how to do their work and, in numerous ways, controls them in the performance of their duties. (8) The fact that Uber subjects drivers through the rating system to what amounts to a performance management/

[5]Case 2202551/2015 & others, *Aslam, Farrar & Ors* v. *Uber BV & Ors,* judgement of 28 Oct. 2016.

> disciplinary procedure. (9) The fact that Uber determines issues about rebates, sometimes without even involving the driver whose remuneration is liable to be affected. (10) The guaranteed earnings schemes (albeit now discontinued). (11) The fact that Uber accepts the risk of loss which, if the drivers were genuinely in business on their own account, would fall upon them. (12) The fact that Uber handles complaints by passengers, including complaints about the driver, (13) The fact that Uber reserves the power to amend the drivers' terms unilaterally.

More recently, Appeal Tribunal fully upheld Employment Tribunal's findings. If this trend continues, and if the multifactorial analysis defined in the Communication on the Collaborative Economy should be applied in a strict sense, there might be a "knock-on effect" in Europe.

This assumption seems to be grounded, also in the light of Advocate General Szupunar's opinion. Indeed, it must be said that the response of the Court of Justice is based on an assessment of the relationship between the platforms and its drivers. In May, the Advocate General issued a non-binding opinion stating that the service offered by *Uber* is a "composite" one since it includes two main components: the one provided by electronic means, and the other part essentially consisting in urban transport.

It is worth emphasising Szupunar's analysis: two requirements need to be met for a composite service to be classified as falling within the concept of "information and society service", thus benefiting from liberalisation. Firstly, the "material" activity has to be economically independent of the service rendered by electronic means (such as platforms for the purchase of airline tickets or hotel reservations), secondly, the provider has to supply the service as a whole or to exert a significant influence over the conditions of the electronic service (the prevailing part). The observations of the Advocate General seem to follow settled case law on the intrinsic connection between the two activities, as the digital infrastructure would not exist without rides. Accordingly, *Uber* is not considered to be a mere match-making intermediary (something like a "broker") between drivers and passengers, but rather "*a genuine organiser and operator of urban transport*".

Although the issue relating to workers' classification is extraneous to the subject of the opinion, many of the arguments used could be read in the sense of considering them as employees rather than contractors.

However, it should be noted that many scholars suggest a similar interpretation according to which, platforms like *Uber* "*are directly involved in the provision of the transportation service and are unlikely to qualify as mere providers of online services*" (Hatzopoulos and Roma 2017) due to their conditions on cars, facilities and prices and should therefore be considered a supplier of transportation services. It is also undeniable that this allegation is sufficiently substantiated by the fact that *Uber* creates added value by providing rides and exerting significant indirect control over how drivers perform their jobs (Rosenblat and Stark 2016). Accordingly, demonstrating the intense power of command could be even easier if the platform under scrutiny should offer a tangible service.

4 From Deregulation to Innovation? From Litigation to Regulation?

Rebutting the charge of ill-adapting out-dated legal arsenal and national regulations to this new mode of doing business, starting from 2015, the European institutions developed a framework for (collaborative) online platforms. This journey's milestones are several: after the adoption of the Single Market Strategy in October 2015, the Commission focused its attention on carrying out a public consultation and a valuable Eurobarometer survey.

Finally, two Communications on Online Platforms and the Collaborative Economy were released between May and June 2016. Since the first is rather wide-ranging (it contains principles such as a level playing field for comparable digital services, responsible behaviour of online platforms, transparency, openness and non-discrimination), a hands-on analysis of the Agenda for the Collaborative Economy will be provided.

4.1 The Commission's European Agenda for the Collaborative Economy

Although programmatic, the non-binding guidance on how existing EU law should be applied to the collaborative economy is pretty clear and rather specific, revealing a deep knowledge of the values and concerns at stake. The Communication, built on several "impulse papers", admits the importance of the collaborative economy from a socio-economic perspective, by taking into consideration its growing dimension and its potential contribution in fostering competitiveness and growth.

The Commission emphasises that platforms are already subject to existing EU rules in areas such as competition, consumer protection, protection of personal data and single market freedoms. Compliance with and enforcement of these rules is then crucial in order to restore a level playing field. Also, the European Commission proves to be aware that "*regulatory grey zones are exploited to circumvent rules designed to preserve the public interest*" (p. 2). The document deals with five key issues:

(a) market access requirements and the underlying services;
(b) liability regimes;
(c) protection of users;
(d) labour law and worker classification;
(e) taxation

According to the Commission, the emergence of the collaborative economy is a powerful "stress test" to assess the validity of objectives pursued in existing legislations both towards new and traditional service providers. As for point (a), it needs to be stressed that, under EU law, barriers such as business authorisation,

licensing obligations or minimum standard requirements must be justified by a public interest objective, proportionate to achieve the public interest and non-discriminatory, according to the fundamental freedom of the Treaty and the Services Directive.[6]

Moreover, whereas barriers to entry cannot be eliminated for traditional service providers, the Commission recommends making things easier for participants in the collaborative economy, provided that many activities such as customer reviews are already "sourced out" and may be used to address specific public policy concerns regarding access, quality or safety. Nevertheless, total bans and quantitative restrictions have to be handled as a last resort measure together with administrative procedures, when required, that have to be clear, transparent and simple.

Another cornerstone of the Communication resides in the classification of activities. If the distinction between true and commercial sharing can easily be rooted in the switch between "compensation costs versus remuneration", regulators are constantly asked to distinguish between professionals and individuals who turn to collaborative economy platforms on an occasional basis, when services are provided for free or at a price that barely covers costs. Experts suggest establishing a narrow set of criteria such as the frequency with which a service is rendered, the provider's profit-seeking motive (although reasons behind the commitment should not matter from a legal point of view) and the relevant payment (Petropoulos 2017). Yet the issue is far from being unravelled. Lines between categories are now increasingly tangled (and sometimes this uncertainty seems to be sought deliberately in order to avoid due legal compliance).

In particular, this paragraph focuses on the multilayer analysis drafted by the Commission as regards the offer of the *"underlying service*" as a way to understand which regulative *corpus* should be applied to the platform. According to the 2016 document, if the platform results in the provision of a "real-world" service (i.e. transport, delivery, cleaning and short-term rentals), in addition to an information society service,[7] it could be subject to "*relevant sector-specific regulation, including business authorization and licensing requirements generally applied to service providers*".

The provision of the "underlying service" has to be assessed concretely by considering three key concurring elements: (i) the determination of the price; (ii) the definition of principal contractual terms, other than price; (iii) the ownership of assets used to offer the underlying service. Other criteria may be considered: for example, the fact that the platform incurs the cost and assumes all the risks related to the service or whether an employment relationship exists with the worker performing the particular task. The criteria are not extremely stringent since, for

[6]Directive 2006/123/EC on services in the internal market, O.J. 2006, L. 376/36. This Directive excludes from its scope of application: transportation services, financial services, healthcare services, temporary work agencies and social services.

[7]See Article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC.

instance, merely assisting the very provider of the underlying service or arranging a rating system does not "*constitute proof of influence and control*".

When most indexes are satisfied, there are robust signals that the collaborative platform exercises a noteworthy influence or control over the provider of the underlying service, thus the platform may be considered as offering much more than the mere intermediation service. To sum up, orchestrating or participating in the underlying service means acting as a service provider, employing providers to perform the offered services and requiring compliance with the sector-specific regulation in force at European and national level. Moreover, if the platform does not merely act as broker or a "notice board", but offers ancillary services, this cannot be read as an index of influence or control over the underlying service.

As for point (d), although labour law is still a national competence, a minimum threshold set by the European Union (the so-called social *aquis*) cannot be ignored. The Commission refers to the notion of worker developed by the Court of Justice ("*... for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration*"). The Communication indicates three criteria to be met in order to detect the existence of an employment relationship: (i) the existence of subordination; (ii) the performance of effective duties; (iii) the presence of remuneration.

The clarification of the Commission is relevant to the extent of this analysis: a subordinate relationship can be described as the exercise of the power of direction by the platform, which determines the content of the activity, how the performance is accomplished and the form and quantity of the remuneration. It has to be stressed that management and control on a continuous basis is not decisive, just as limited working hours or a low rate of productivity are not enough to exclude the existence of an employment relationship. What is relevant to this line of reasoning is that an employment relationship can be identified, according to the OECD's assessment, when platform workers have no choice but to follow detailed instructions by the operator, or when the latter utilises customer ratings to control or even dismiss providers.

However, taking a closer look, one may connect this analysis with the previous one on the provision of the underlying service. If so, the existence of an employment relationship would be sufficient to "reclassify" the platform as a provider of the "real-world" service, thus resulting in the subject to sector-specific requirements in a circular way. In the light of this scrutiny, "*Uber is the one most likely to qualify as being based on an employment relationship*" (Hatzopoulos and Roma 2017).

As for the nature of the work and the presence of remuneration, the debate on how to set a threshold for distinguishing between "peers" (or amateur/occasional providers) and professional service providers are still fierce. The European Commission support analysis mentions different elements: annual turnover for transport services, and the frequency of the activity for the accommodation sector (i.e. the services are offered regularly or marginally). A key question to answer in this context is: which threshold would be adequate in which sector to safeguard micro-earners, to reduce possible income tax loss and to protect consumers, while permitting a proper volume of non-professional occupation to prosper?

The Communication concludes advocating an intervention of Member States aimed at "*assessing the adequacy of national employment legislation*" in relation "*to the different needs of workers and self-employed individuals in the digital world as the innovative nature of collaborative business model*" and to "*provide guidance on the applicability of their national employment rules in light of labor patterns in the collaborative economy*" (Cauffman and Smits 2016).

Much could be done by implementing the present rules when suitable and by crafting new solutions when loopholes are authentic.

4.2 The European Pillar of Social Rights and the Parliamentary Resolution on Collaborative Economy

Last April, the European Commission presented its proposal on the European Pillar of Social Rights (hereinafter "EPSR") in two legal forms with identical content: a Commission Recommendation, adopted on the basis of Article 292 TFEU and effective as of that date, and a proposal for an interinstitutional proclamation by the Parliament, the Council and the Commission. To this must be added a Communication, two "staff working documents" and many other papers.

The institutional effort is aimed at building an EPSR achieving the goal of "upward convergence" towards better working and living conditions across the EU thanks to pre-existing initiatives, new legislation and soft law measures. It consists of 20 "rights and principles" grouped under three broad groups of recommendations: (i) equal opportunities and access to the labour market, (ii) fair working conditions and (iii) social protection and inclusion. The second section of the Pillars is more pragmatic and presents four concrete propositions encompassing contracts, wages, information about employment conditions and protection in case of dismissals and social dialogue and involvement of workers.

The document advocates the prevention of *"employment relationships that lead to precarious working conditions"*: abuse of atypical contracts should be prohibited. Moreover, in order to extend social protection to workers with an atypical contract (or status) as a result of more flexible forms of work in an increasingly digitalised economy, the EPSR is launching a consultation with social partners. According to Garben (2017), the ambition of the initiative is *"to provide new and tangible minimum protection and security for workers in atypical employment and for the (dependent) self-employed"*. From a social convergence perspective, the "Pillar package" could contribute to expand the personal scope and increase the level of protection afforded for certain groups of people (workers, unemployed, self-employed and others) who still find themselves on the margins of the job market (Rasnača 2017).

The EPSR, indeed, will require further legislative initiatives in order to raise the pan-European social standards, as both the recommendation and the proclamation

are soft law instruments without legally binding force. This is not necessarily a criticism.

In the meantime, in October, the European Commission issued a proposal to reinforce social standards for workers with ultra-flexible working hours and no regular salary. The first step could be a possible revision of the Written Statement Directive in order to make sure that all EU workers in need of information receive a written and timely confirmation of their working conditions. Underlining that effective improvements are possible, the REFIT evaluation demonstrates how the notification of a written statement to employees is not an excessive burden compared to the benefits it brings, e.g. legal certainty for both parties and fewer litigations.

After publishing an in-depth analysis on the situation of workers in the collaborative economy, last January, the European Parliament adopted a resolution on a European Pillar of Social Rights, including a methodical and progressive reflection on a set of pressing issues that are closely related to the social and economic risks faced by workers in the platform economy. The document calls on an update of existing labour and social standards, demanding a proposal for *"a framework directive on decent working conditions in all forms of employments, extending existing minimum standards to new kinds of employment relationship"*, in the light of *"insufficient protection of working conditions of a growing number of workers, including those in new and non-standard forms of employment"*.[8] Albeit the text does not explicitly refer to the collaborative economy, formulas such as "regardless of the type of contract or employment relationship" seem to be a restrained technicality aimed at including alternative working arrangements within the scope of the EPSR. Accordingly, it must be said that, at least, the European Parliament explicitly bars the way to possible detrimental exemptions for workers in this sector.

A list of rights to be guaranteed to employees and all workers in non-standard forms of employment is provided including equal treatment, health and safety protection, protection during maternity leave, provisions on working time and rest time, work-life balance, access to training, and in-work support for people with disabilities. This initiative could be quite rightly considered to be a significant step forward, aimed at earning Europe a "social triple A", especially if read in connection with the unequivocal reference to the right to adequate information, consultation and information, freedom of associations and representations, collective bargain and collective action. Future enforcement of these provisions may result in an extension of security and social coverage for under-protected workers.

[8]See also Commission Staff Working Document accompanying the Document Consultation Document Second phase consultation of Social Partners under Article 154 TFEU on a possible revision of the Written Statement Directive (Directive 91/533/EEC) in the framework of the European Pillar of Social Rights, p. 10 (providing an overview of the results of the first phase consultation and an analytical background to a second phase consultation of the European social partners on possible legislative action).

At the same time, when it comes to addressing the issue of "work intermediated by digital platform", the document calls for a decisive action aimed at clearly distinguishing workers who are *"genuinely self-employed and those in an employment relationship"*. A particularly striking feature is the reference to "symptomatic" indexes for determining the status, as well as the level of social protection and the identity of the employer. Particular concern has been aroused by the fact that platforms may abuse their dominant positions through improper terms and conditions. Likewise, as stated above, in order to tackle—in the European Parliament's words—*"the spread of socio-economic uncertainty and the deterioration of working conditions for many workers"*, the resolution urges the Commission to reinforce the implementation of already existing directives devoted to precarious employment (i.e. the Fixed-Term Work Directive, the Part-Time Work Directive and the Temporary Agency Work Directive).

At the current stage of the (soft) legislative procedure, it is easier to *"expect an indirect impact of the Pillar in the (revision of the) existing legal* 'acquis'" in the EU social dimension rather than "looking for direct legal consequences arising from the Pillar document(s) itself" (Hendrickx 2017).

Moving on to other issues, it would be interesting to expound on the draft report on a European Agenda for the Collaborative Economy prepared by the Committee on the Internal Market and Consumer Protection, then approved as a Parliamentary Resolution. The relevant aspect, in this case, is the attention paid to the safeguarding of workers' rights, conditions and protections, avoiding social dumping and combatting illegal practices. The Committee also adopts a clear and balanced position on this issue, tackling "the risk that on-demand workers might not enjoy genuine legal protection" (this original version has been amended) but recognising that the collaborative economy *"generates new and interesting entrepreneurial opportunities, jobs and growth, and frequently plays an important role in making the economic system not only more efficient"*.

In June, the European Parliament has called on the Commission *"to publish guidelines on how Union law applies to the various types of platform business models in order, where necessary, to fill regulatory gaps in the area of employment and social security*". According to the European Parliament, in fact, *"certain parts of the collaborative economy are covered by regulation at local and national level"* (Para 14) therefore member States are encouraged to *"step up enforcement of existing legislation"* by recurring to all available tools.[9] Its main demand is to *"to ensure fair working conditions and adequate legal and social protection for all workers in the collaborative economy, regardless of their status"*. The resolution is not binding and, at the time of writing, is still subject to public debate. The Parliament has urged *"the Commission to work together with the Member States to provide further guidelines on laying down effective criteria for distinguishing between peers and professionals, which is crucial for the fair development of the collaborative economy"* (Para 15).

[9]Para. 15.

Hailed as a "landmark moment" for Europe,[10] these initiatives might create an "important political momentum" that must be seized, in times of political disenchantment and distrust. Despite its more exhortatory than mandatory nature, the Pillar deserves a great deal of praise since it marks a new ambitious stage in the process of strengthening the EU social dimension, neglected for a long time. In order to restore the level playing field, the "integrationist logic" could be applied to avoid a downward spiral of reductions in labour standards, thus preventing unfair business competition and delivering new and more effective rights for workers.

5 Towards "Social Responsibility by Design"

The aim of the previous paragraphs was to further elucidate the fact that employment implications of the collaborative economy cannot be underestimated at this stage. As we hope to have demonstrated, the collaborative environment is, simultaneously, a place for experimenting in new forms of investment and a legally uncertain labyrinth. At the same time, the manipulative forces of platforms raise many concerns. The promise of new employment opportunities may turn into a "social race to the bottom" if the "*laissez-faire*" approach should last above and beyond (Fabo et al. 2017).

The second goal of this contribution was to reconcile new forms with old challenges. In this respect, claiming that these models need to be supported or incentivised merely because of their allegedly innovative nature and their increased contribution to the participation of young workers in the labour market seems to be groundless.

On the other hand, the constant trend reveals that collaborative business models may be used to overcome or substitute a stable organisation of the workforce with economically or at least organisationally dependent workers. It has to be said that the standard employment relationship between employer and employee appears to be "under attack", traded with a *smart* new paradigm where users are imaginatively turned into "their own boss" where they can enjoy the rewards—and face the risks—of this opaque situation. Indeed, it would almost appear that the chance to externalise costs associated with direct employment is a powerful driver for the proliferation of such arrangements. Much of this criticism also asks for intervention in fields such as consumer protection (including privacy and data security) and the promotion of public health and safety.

Much could be done by the existing rules in view of new and emerging practices; further research will be required on this specific topic—possibly on a state-by-state and service-by-service basis. In view of the above, analysing the

[10]See EUROPEAN COMMISSION (2017), *Statement of President Juncker on the Proclamation of the European Pillar of Social Rights*, retrieved from http://europa.eu/rapid/press-release_STATEMENT-17-4706_en.htm.

widespread factual complexity of the collaborative economy should be the regulatory authorities' first priority.

In fact, a mere "wait-and-see" approach is costly and risky since each Member State (or even municipality, region or local authority) is tackling the issues arising from this economic segment by using different, sometimes contradictory, tactics (Noto la Diega 2016a). A common frame of reference is much more desirable, while a patchwork of differing legislations may result in an open invitation to legal arbitrage or jurisdiction shopping. In this sense, the European current attitude is perceived as a fair balance between supporting entrepreneurs' confidence and implementing workers' protections.

It goes without saying that a "one-size-fits-all" intervention is unlikely to achieve its regulatory goals effectively. Given the unprecedented scale and scope of the "collaborative transformation", a reckless or "*hastened regulation or deregulation on a weak evidence base is likely to result in unintended consequences rather than achieve the desired objective(s)*" (OECD 2016a). Negotiating a more equilibrated social compact related to social platforms is urgent.

Over the next few years, the number of workers "*piecing together a livelihood from a range of different tasks*" (Huws et al. 2016) could pose a threat to the social fabric, as the precarious employment models developed in these contexts are here to stay. Thus, the enabling role of platforms in creating new and decent job opportunities cannot be hampered. That is why European institutions have to enable a competitive and inclusive playing field where platforms comply with certain obligations with regard to employment rights, putting an end to the constant circumvention of statutory protections afforded to workers classified as employees or, if so, regulations for genuine casual work. Therefore, exploiting the legal arsenal to the maximum is the correct route to ensure the most convenient imbalance between the promotion of innovation and decency of work.

On top of this, having extensive opportunities to design and shape the concrete functioning of their platform, operators must be sensitive to the needs and demands of workers and users, by implementing new features and renovating their embryonic business model (Aloisi et al. 2017).

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