

Ensuring the Rights of the Digital Workforce

Responding to the Labour Law Aspects

of the European Commission's public consultation on the "Regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy"

Background

The President of the European Commission, Jean Claude Juncker, in his opening statement to the European Parliament (15th July 2014) outlined that *'by creating a connected single digital market, we can generate up to €250 bn of additional growth in Europe in the course of the mandate of the next Commission, thereby creating hundreds of thousands of new jobs for younger job seekers, and a vibrant knowledge bases society'*.

Without doubt novel phenomena like cloud working and crowd sourcing are gaining ground and digitisation is revolutionising some aspects of work. Much of the vocabulary used is designed to give a positive image of these new working arrangements, for example 'community', 'exchange', 'sharing', 'neighbourhood', it is nonetheless important to distinguish the activities and in particular to recognise that employment relationships can and do exist in the various different platforms.

In some circumstances, online platforms, crowd working and the sharing economy might promise to bring much needed job opportunities and flexibility but the Commission can't ignore workers concerns about 'always switch on' work, the growth of the 'gig economy' the 'uberisation' of work and the emergence of a new precariat of digital workers mediated by hundreds of online platforms such as Amazon's Mechanical Turk, Clickworker, Upwork etc.

It is timely that the European Commission establish a consultation on the proper regulation of online intermediaries, data and cloud computing and the collaborative economy.

From a labour law perspective the main opportunities of the Consultation are to ensure that the Commission understands the need to bring forward proposals that will ensure that workers on the various online platforms, cloud and crowd working have their rights properly recognised and protected.

The risks associated with this consultation surround the attempts by the owners of online platforms or employers using them to deny the existence of employment relationships and to deny that freelance digital workers are in need of protection. For example, Upwork,

offers the services of more than 10 million workers but refuses to regard itself as an employer.

Old Problems in New Bottles

To some extent the problems thrown up are not new, there is nothing novel for example about workers performing 'piece work' it is actually a very old idea. In effect, on-demand work is a reversion to the piece work, the day labourers of the nineteenth century – when workers had no power and no legal rights, took all the risks, and worked all hours for almost nothing and were prevented from organising in a trade union.

What is new is the way in which technologies and software allow many jobs to be divided up into discrete tasks that can be parceled out to workers via online platforms, essentially internet job boards, with pay determined by demand for that particular job at that particular moment. Computers can't do the job because it requires some human judgment - say, writing a product description, for €1 or choosing the best of several images for 10 cents or audio transcriptions. The big money goes to the company who owns the online platform as they take a % cut from the pay of the workers. These processes create are throwing up new challenges for workers, their unions and for the European Union. They are shifting the risks and uncertainties onto the workers, circumventing employment and labour laws as well as social security and taxation rules.

For example, Amazon's Mechanical Turk¹ is an app designed to offer all sorts of jobs that cannot (yet) be correctly performed by software: moderation of images in forums, classification of sound or video files, dealing with requests submitted on search engines, surveys, etc. All over the world AMT (Amazon Mechanical Turk) workers wait at their computers for job requests to come through, for which they are then – insofar as the employer is satisfied with their work – paid on a piece-work basis. Because the workers have been (mis)classified as contractors, AMT workers find it difficult to enforce rights such as protection of minimum-wage laws. Amazon also allows employers to decide whether or not they want to pay. The intention is to let employers set standards. The effect is that unscrupulous AMT employers start a race to the bottom in terms of working conditions, pay etc.

While it is arguable that employment rights are easier to enforce in workplaces where the employer and employee are both physically present, there is no reason why employment and labour rules cannot be made to apply to online platforms, cloud computing simply because the arrangement is made online.

Depending on the facts of the situation, online platforms, cloud working and collaborative working may give rise to an employment relationship. In other circumstances it may give rise to a situation of economically dependent self-employment. Economically dependent self-employed in the digital workplace are in need of many of the same protections as employees.

¹ According to Wikipedia, the name Mechanical Turk comes from 'The Turk', a chess-playing automaton of the 18th century. It was later revealed that this 'machine' was not an automaton at all, but consisted in fact of a chess master (a dwarf) hidden in a special compartment from where he controlled the operations. The AMT workers are, likewise, dwarfs concealed behind Amazon.

The fact that the work is carried out online or that the employment relationship is formed online does not mean that the employee, or indeed the economically dependent worker is without rights or that the employer is free from all responsibilities.

- **online platforms:** in some circumstances the platform is clearly the employer, in other circumstances they are operating an employment agency, matching employers and workers, sometimes the work is carried out in the 'real world' for example Uber or the work may be carried out online for example Amazons Mechanical Turk. In both instances the online platform takes a cut of the worker's pay. There is almost no respect for minimum wage or other employment rights or labour laws. Work can be offered without pay (workers need to build a 'reputation' to be selected for work and often feel obliged to work for nothing to maintain a good reputation)
- **Crowd working** refers to work that is carried out online, often with tasks being split up and divided among a 'virtual cloud' of workers;
- **Collaborative working** is where workers (often freelancers, self-employed, economically dependent workers) cooperate online to overcome limitations of size and professional isolation, in this case the worker may have a share in the final pay.

Digital platforms are more than just facilitators: they determine the rules of the game in the market and alter the pay of the worker. They may, depending on the facts of the situation be employers or employment agencies.

What Europe needs is mandatory operating rules for online platforms, crowd working and cloud working including:

- 1. Measures to ensure the correct recognition of an employment relationship in the context of the various online platforms including in the context of cloud working and collaborative working;**
- 2. Measures to protect freelance digital workers such as economically dependent self-employed workers, these workers share many of the same risks that face employees are in need of similar protections;**
- 3. Introducing EU regulation of online platforms aimed at enabling the enforcement of employment rights of 'employees', for example by making it an offence for an on-line platform to offer or advertise work at rates less than minimum wage, or the relevant collective agreement. Also the right to training must guaranteed to the digital workforce.**
- 4. Explicitly outlaw online platforms from taking a % of the workers' pay. This type of practice is grossly unfair and contrary to 'decent work' principles.**

- 5. Introduce a requirement for online platforms to have in place fair terms for crowd working and collaborative working; otherwise, incentives are created for companies to outsource in-house services to these platforms with tremendous spill-over effects in terms of deteriorating working conditions etc.**
- 6. Ensure that online platforms acting as an employment agency are subject to the same rules as employment and temporary-work agencies' when they are operating as such in practice;**
- 7. Ensure that the health and safety of workers (employees and digital freelancers and other independent contractors) is properly protected;**
- 8. ensure that online intermediaries, data and cloud computing and the collaborative economy platforms do not facilitate a return to unfair discrimination in employment for example on the basis of gender, age, sexual orientation, religion etc.(for example make it an offence for a platform to operate a discriminatory worker reputation system)**
- 9. ensure that operators of various online platforms are required to put in place measures to ensure that workers' right to bargain collectively for decent pay, terms and conditions is not undermined but rather can be effectively exercised;**
- 10. ensure that the various online platforms, cloud working and collaborative working does not become a vehicle for tax avoidance and the non-payment of social security.**

It is worth recalling that the Commission has an obligation to ensure that the regulatory framework for online intermediaries, data and cloud computing and the collaborative economy platforms in Europe is consistent with respect for the EU social acquis, in particular the EU employment and labour rights and the EU Charter for Fundamental Rights.

Understanding the Labour Law Issues at Stake

Case Study Example of Issues Relating to Labour Rights UBER

The ITF have provided a good example of the “sharing economy” and the impact this can have on the on the employment and social rights of employees and workers in this case: UBER.

Lack of job security

Uber drivers can be banned or suspended from using the service if they receive unfavorable customer reviews or if they decline ride requests. The job security of traditional taxi drivers is also threatened due to the lowering of the entry cost for casual drivers who take market share during peak hours.

Lack of employment benefits/race to the bottom

Uber can provide a cheaper service as it has moved all of the cost of providing the service to the driver. For other services to compete, they would have to reduce prices which may put employee benefits (such as pensions and health care plans) at risk. Drivers fall outside existing employment law coverage. The ITF considers that the classification of drivers as “contractors” or “partners” is inaccurate and disingenuous. The classification is made in order to shift compliance costs to drivers and increase profits for the platform.

Reduced “safety net” as benefits tied to employers rather than individuals

There is a further risk to social rights as “safety net” benefits such as sick pay are tied to employers rather than individuals and are not available to independent contractors (or they must fund it themselves). There is also the risk of Uber drivers not carrying adequate insurance to cover them in instances of damage to persons or property.

Reduced ability for collective action

Uber drivers do not have any collective power. As “independent contractors”, they are separated and do not have a central meeting point. This reduces the likelihood of and the ability to engage in collective action.

Non-compliance with health and safety standards and regulations

Uber has made a habit of sidestepping regulations wherever it operates. The vetting process for drivers are often much less stringent than those applied to traditional cab drivers. This includes inadequate background checks and drivers license checks.

The ITF has compiled a list of incidents involving Uber drivers including insufficient checks on drivers’ insurance, leaving both passengers and other road users at risk.

Uncertainty related to the protection of personal data

As Uber operates on a computerised system, they store huge amounts of personal information about both drivers and passengers. There have been incidents in which Uber drivers appear to have accessed personal details of passengers. There are also concerns

over passengers obtaining drivers details. In one incident, Uber tracked people travelling home early in the morning, likening the trips to a “walk of shame”.

Answering the Questionnaire:

The deadline for replies is 30th December 2015. The Commission has stated that they will only accept replies made according to their format set out in the Questionnaire.

From a labour law point of view, the questions set by the Commission are somewhat opaque and the meaning and implications are not immediately obvious, in particular definitions, such as:

“Online platform” refers to an undertaking operating in two (or multi)-sided markets, which uses the Internet to enable interactions between two or more distinct but interdependent groups of users so as to generate value for at least one of the groups. Certain platforms also qualify as Intermediary service providers.

Typical examples include general internet search engines (e.g. Google, Bing), specialised search tools (e.g. Google Shopping, Kelkoo, Twenga, Google Local, TripAdvisor, Yelp), location-based business directories or some maps (e.g. Google or Bing Maps), news aggregators (e.g. Google News), online market places (e.g. Amazon, eBay, Allegro, Booking.com), audio-visual and music platforms (e.g. Deezer, Spotify, Netflix, Canal play, Apple TV), video sharing platforms (e.g. YouTube, Dailymotion), payment systems (e.g. PayPal, Apple Pay), social networks (e.g. Facebook, LinkedIn, Twitter, Tuenti), app stores (e.g. Apple App Store, Google Play) or collaborative economy platforms (e.g. AirBnB, Uber, Taskrabbit, Bla-bla car). Internet access providers fall outside the scope of this definition.

The ETUC considers the definition proposed by the Commission needs to be amended to recognise that in some cases, depending on the set of circumstances, an online platform may constitute an employment relationship involving an employee or an economically dependent self-employed worker or in other circumstances a labour market intermediary (employment agency).

Therefore, we recommend the following:

‘Online platform’ refers to an undertaking operating in two (or multi)-sided markets, which uses the Internet to enable interactions between two or more distinct but interdependent groups of users so as to generate value for at least one of the groups. Certain platforms also qualify as intermediary service providers and in other cases the platform may constitute a direct employment relationship, involving an employee or an economically dependant self-employed worker or it may be operating as an employment agency.

Further examples, the questionnaire, talks about, customers and suppliers and traders who must in some circumstances be more properly referred to as employees and employers. Some activity is without doubt nonprofit, for example ‘Zememain’ and other activity is for profit but does not give rise to any employment relationship e.g. Airbnb (which however might have negative impact in terms of unfair competition with traditional hotel service providers respecting specific standards).

The comments in this submission are focused on ensuring that the employment and labour aspects are included and not swept aside by inappropriate descriptions.