



DIGITAL PLATFORMS AND THE WORLD OF WORK: TOWARDS A FAIRER RE- DISTRIBUTION OF RISKS

Despoina Georgiou

dg542@cam.ac.uk

University of Cambridge



Coronavirus

FUELS

the Gig Economy

Skills with the Largest Hourly Pay Rate Increases During COVID



COVID-19:

How the pandemic is changing
the economy and the world

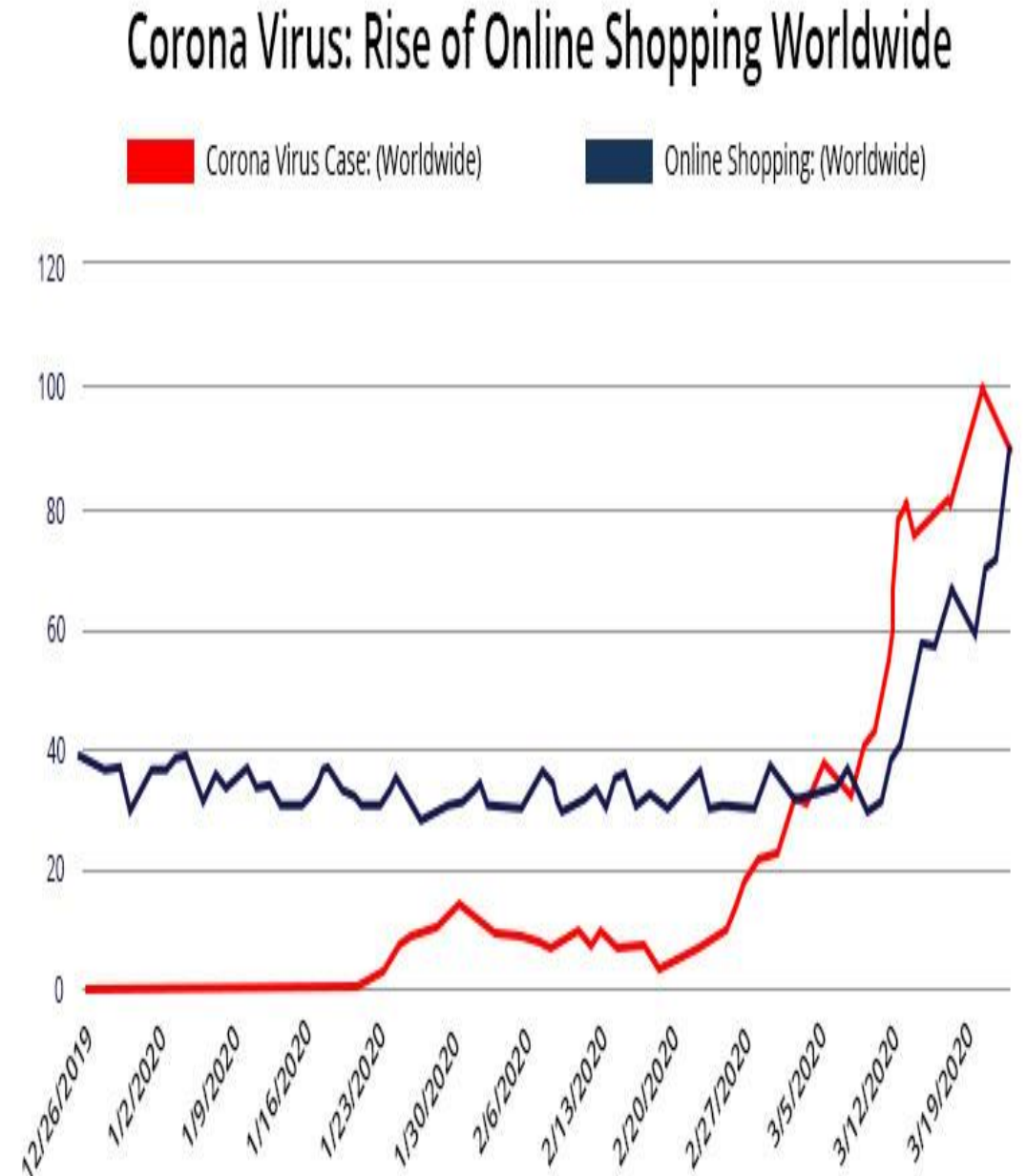


- Delivery services were declared **'essential'** in most countries and expanded at an exponential rate.
- In Spain, supermarket delivery orders rose by approximately 103%, home food delivery increased by 28% and courier and parcel delivery went up by 78%. (Digital Future Society and Inter-American Development Bank, 2021)
- In Latin America, supermarket delivery services rose by 259%, while home food delivery and courier delivery services increased by 209% and 141% respectively (Digital Future Society and Inter-American Development Bank, 2021).

Upward trends in the supply and demand for platform delivery services were also noted in other countries such as:

- India (Rani and Dhir 2020)
- Poland (Polkowska 2021)
- Brazil (Corrêa and Fontes, 2020)
- The US (Raj et al., 2020)

and others (see ILO, 2021, Eurofound 2020, OECD 2020a, OECD 2020b)





A **‘distancing bonus effect’** was also detected in online platform work, such as freelancing and software programming.

Since the start of the pandemic, there were 6 times more people bidding for online job tasks than before (Stephany et al. 2020).

The increase in the number of platform workers is also evident from ILO research that shows that more than 90% of workers on some platforms were unable to find projects to work on due to the excess in the supply of labour (ILO, 2021).



The recent rise in the number of platform workers has reignited the debate over the **classification status** and working conditions of the persons engaged in platform work.

Platforms, nowadays, are able to circumvent labour and social protection legislation by **shifting the risk of running a business to workers** (ILO, 2021; Prassl, 2018; De Stefano and Aloisi, 2018).



The one-sided shifting of risks from employers to workers constitutes one of the main problems with our current employment practices as it, *inter alia*, leads to their classification as ‘self-employed’.

Cases in which the European Court of Justice has used the criterion of 'business risk-assumption':

- C- 693/19, **Yodel** (delivery couriers)
- C-413/13, **FNV Kunsten** (orchestra musicians)
- C-1/12, **Ordem dos Técnicos Oficiais de Contas** (chartered accountants)
- C-309/99, **Wouters** (lawyers)
- C-180 to 184/98, **Pavlov** (doctors)
- C-35/96, **Commission v Italy** (customs agents)
- **RAI/UNITEL** (CASE IV/29.559) (opera singers)
- C-179/90, **Becu** (dockers)
- C-3/87, **Agegate** (fishermen)



The classical view: quality & division of risks between the parties

	Business Risks	Social & Labour Market Risks
<p data-bbox="173 592 428 664">Labour</p> <p data-bbox="12 785 573 1335">(Hart 2017, Hart and Moore 1990, Hodgson 2015, Robe 2011, Cueto and Mato 2006, Deakin and Wilkinson 2005, Deakin 2003, Davidov 2001, Beck 1992, Horvart 1982, Jonsson 1978, Coase 1937)</p>	<p data-bbox="937 511 1049 606"></p> <p data-bbox="616 749 1533 871">Do not bear commercial & financial risks such as:</p> <ul data-bbox="616 899 1401 1406" style="list-style-type: none">• material and human capital investment costs• redeployment costs• administrative costs• costs relating to market fluctuations of demand and supply	<p data-bbox="1992 496 2119 621"></p> <p data-bbox="1625 749 1763 792">Bear:</p> <ul data-bbox="1625 821 2527 1328" style="list-style-type: none">• Risk of bad health (work-related injuries and illnesses)• Risk of unemployment• Risk of old age (retirement)• Risk of not having their social and psychological needs fulfilled

Business Risks

Social & Labour Market Risks

Capital



Bear commercial & financial risks:

- Material and human capital investment costs
- Maintenance and devaluation costs
- Administrative costs
- Redeployment costs
- Costs relating to market fluctuations and failures
- Costs relating to regulatory changes
- Costs relating to extraneous risks such as environmental disasters



Bear:

- The social & labour market risks that have been passed onto them through the contract of employment
- Risk of bad health (work-related injuries and illnesses)
- Risk of unemployment/lack of work
- Risk of old age (retirement)
- Risk of not having their social and psychological needs fulfilled



While employees bear *primarily* psychosocial and labour market risks, the self-employed bear *principally* commercial and financial risks.

Since the main characteristic of the self-employed is that they assume business risks from which the employees are insulated, it makes sense why the European Court of Justice used the ‘assumption of business risks’ as a criterion for the determination of EU employment status.



Over 25% of the EU-28 workforce is engaged in short and casual forms of work

(Impact Assessment for DTPWC 2017)

New forms of work:

- ✓ ICT-based mobile work
- ✓ Crowd employment
- ✓ Gig work
- ✓ Zero-hours contracts
- ✓ Temporary agency work
- ✓ Voucher-based work
- ✓ Portfolio work

(Eurofound 2015, Perulli 2003, Supiot 2001, Sciarra 2004)

Employers often prefer these contracts because they allow them to retain numerical flexibility while passing down many of the costs of doing business to workers.

Under many of these new casual work contracts, individuals have to shoulder:

Human and material capital investment and maintenance costs



- ❖ Workers have to invest in their own training
Casual workers are 47% less likely to receive training than their permanently-employed counterparts (Eurofound 2015).
- ❖ Workers have to invest in their own tools, equipment etc.
Uber drivers have to supply their own vehicle, pay for their own petrol, insurance, tax, and potential leasing costs (Prassl 2018, Aloisi 2016)

Payment-Related Costs

- ❖ Under certain arrangements, principals not only determine the price of the provided services but they also retain the right to unilaterally alter the workers' expected rate of return (Prassl 2018, Sanders and Pattison 2016)
- ❖ Establishment of productivity-related models of compensation under which the worker is paid according to his output (Davies 2017, Milgrom and Roberts 1992).
- ❖ Launch of online competitions in which only the winner gets paid. These type of arrangements raise serious concerns not only because they force individuals to yield unpaid labour, but also because they leave them exposed to intellectual property rights theft (Irani 2015).





Casual work arrangements are used to elicit workers' undue time and effort

- ❖ Almost 50% of on-demand workers report that they always have to be on-call in case a work possibility arises (CIPD 2013).
- ❖ Persons have to accept most job assignments in order not to be penalized by the platform. Algorithmic management can push individuals who decline task offers at the bottom of the option list, meaning that they get less work and get paid less for it (Prassl 2018, Impact Assessment for the DTPWC 2017).
- ❖ Platforms such as MTurk and Uber suspend workers who do not maintain a high acceptance rate (De Stefano 2016).

Casual work-arrangements worsen the individuals market position by hampering their ability to diversify their capital

Hold-up situations can be precipitated by:

- The introduction of exclusivity or non-competition clauses (Akman 2019, Impact Assessment for the DTPWC 2017)
- The absence of transferrable ratings between platforms (Prassl 2018)
- The assumption of 'predatory' loans which individuals have to repay by working for the app that facilitated the lending (Prassl 2018)





Health and Safety Risks

- ❖ Poor work-life balance and long and irregular working hours have been associated with high levels of stress, anxiety, and depression (Caroli and Godard 2016, Kleppa, Sanne and Tell 2008).
- ❖ ICT-based mobile workers are responsible for the health and safety conditions of the environment they work in (Eurofound 2015)
- ❖ Gig workers are responsible not only for their own health and safety, but also for that of their 'customers' (Todolí-Signes 2017, Kuhn 2016, Uber UK T&C 2020).

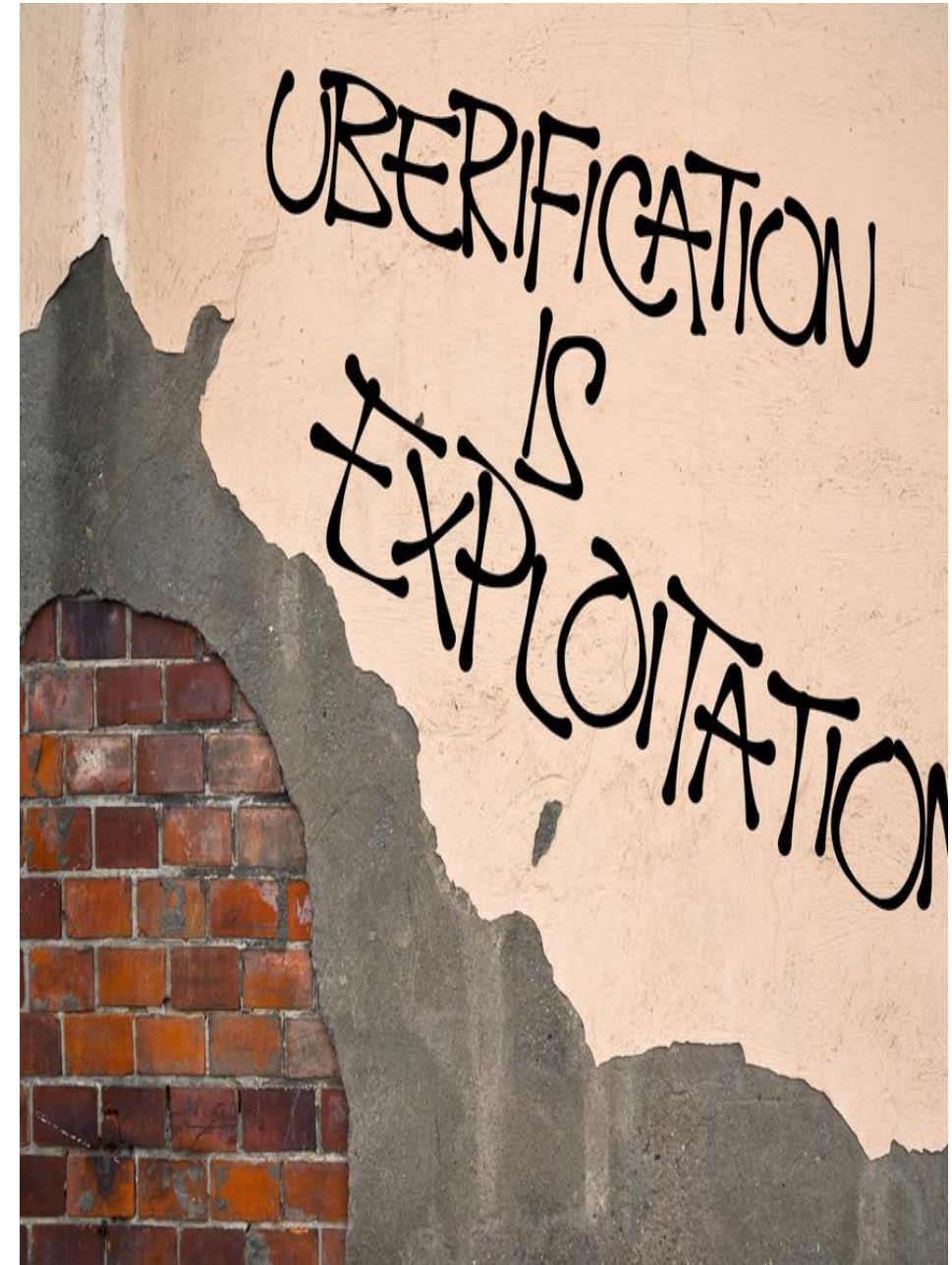
The Gig Economy Paradox:



Even though the ‘new self-employed’ assume many business risks that are characteristic to the self-employed status (i.e., payment-related risks, material and human capital investment and maintenance costs, redeployment costs, health and safety insurance, and third party liability costs), they are, in many ways, unable to enjoy the advantages this status offers (i.e., flexibility, control over the business strategy, fiscal benefits, corporate form etc.).

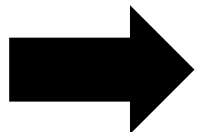
Modern casual work arrangements have allowed employers to retain the advantages associated with the standard contract of employment (i.e., the ability to control the firm's activities, the appropriation of residual business profits, subsidies, advantageous fiscal and social security legislation) while shaking off its disadvantages (assumption of residual business and social/labour market risks).

By classifying workers as independent contractors, platforms offer services without having to pay for their cost.



If the 'business risk-assumption' criterion is inefficient in classifying modern-day workers, which criterion can take its place?

- ❖ 'Risk' constitutes an important element for the delineation of the boundaries of the firm and plays an important role in the determination of the obligations of the parties in the contract of employment.
- ❖ The 'risk-assumption' criterion has already been jurisprudentially consolidated and it is not likely that the ECJ would abandon 'risk' considerations altogether.



We should examine whether the EU could adopt a slightly alternate criterion that is centered on the concept of 'risk' albeit with a different focus.



My proposal for a new criterion based on:

the ‘involuntary assumption of business risks’ measured by the ‘inability of a person to spread his risks’

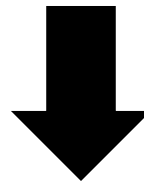


When an individual has the ability to spread his financial and commercial risks (i.e., because he can pass them on to consumers/clients through the mechanism of price, has significant capital, has employees of his own, and/or has multiple sources of income), he comes to the negotiating table as an unconstrained and fully autonomous adult. In this instance, the person can decide what kind, quality, and amount of risks he wants to undertake - if any.

When the person has the ability to spread his business risks, the assumption of such risks on his part is presumed to constitute a 'genuine' choice; an expression of the person's free will that should be respected.

- ❖ If the person has decided to take on business risks, it means that he has accepted the concomitant 'risk' of being classified as a 'self-employed person'.
- ❖ Conversely, if he has decided that, albeit being able to spread his risks, he wants to be engaged under a contract of employment, the state has no reason to interfere with his choice.

By contrast, when a person does not have the ability to spread his risks (i.e., because he has little or no capital, has made sunk or job-specific investments, has no employees, has no alternative sources of income, and/or has little or no control over the business strategy), he is not in a position to make truly free choices. Under these circumstances, the person finds his back against the wall; he really has no other option but to accept whatever terms are being offered.



Since the person cannot be said to have assumed these business risks 'voluntarily', the state has legitimate reason to interfere with the person's 'will' as that is expressed in the contract and re-classify him as a *de facto* subordinate 'worker'.

Do you have the ability to spread your business risks?

Yes

Your choice to assume business risks is considered to be 'genuine' (voluntary). You can choose to be engaged under a contract of employment or a contract for services.

- significant capital
- own employees
- multiple sources of income
- sunk or job specific investments
- control over prices
- control over business strategy

No

Your choice to assume business risks is not considered to be 'genuine' (involuntary). The state has legitimate reason to intervene and re-classify you as a *de facto* subordinate 'worker'.



European
Commission

New Directive on Platform Work?

“[...] there is a growing uncertainty on a number of issues [concerning] platform-based work, [...] including employment status, working conditions, access to social protection, and access to representation and collective bargaining”.

- European Commission, 2021 Work Programme

- ❖ 24 February 2021: Launch of first stage consultation of the social partners on how to improve the working conditions for people working through digital labour platforms.

Option 1:



The Commission could propose the adoption of a Directive that focuses **solely on the responsibilities of platforms** towards the persons who provide services through their site or app, regardless of their employment status.



Option 2:

The Commission could introduce a classification test similar to the '**ABC test**' adopted by the Californian Supreme Court in *Dynamex*.

Under the ABC test, a person would be classified as a 'worker' unless the putative employer can prove (cumulatively) that: (a) the person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract and in fact; (b) the person performs work that is outside the usual course of the hiring entity's business and; (c) that the person is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.



Option 3:

The Commission could clarify the legal status and rights of platform workers. This could be done in two ways:

- ❖ provide a list of indicia national and European judges and regulators have to take into account when classifying persons who provide services through digital labour platforms (ILO Recommendation 198).
- ❖ propose the adoption of a broader EU ‘worker’ definition that would cover platform workers as well as other persons engaged in casual forms of work.





My suggestion is that the EU would benefit from the adoption of an alternative ‘risk’ criterion that is based on the **‘involuntary assumption of business risks’** measured by the **‘inability of a person to spread his risks’**. Acting alongside the criterion of ‘control’, this alternative ‘risk’-based criterion would allow for a broader conceptualization of the EU notion of ‘worker’.

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Despoina Georgiou

dg542@cam.ac.uk

University of Cambridge