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

DESPOINA GEORGIOU

Faculty of Law, University of Cambridge, United Kingdom
dg542@cam.ac.uk

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Abstract

The COVID-19 pandemic has had a significant impact on the EU labour market. The global lockdowns and the consequent increases in unemployment have boosted demand for platform services, leading to more people taking on platform work. These labour market shifts have reignited the debate over the classification status and rights of platform workers. As shadow-economies have emerged, online platforms that arguably exercise labour-brokering functions have become outlaws in a high-tech Wild West, circumventing EU labour and social protection legislation and shifting the risk of running a business to workers. In fact, one of the main problems with our current employment practices (that has been precipitated by the pandemic) is the one-sided shifting of risks from employers to workers in a way that the 'level-of-risk-undertaken' criterion has been rendered futile. In the European legal order, the criterion of 'business risk-assumption' is increasingly being used by the European Court of Justice as an element that would point to the existence of an independent working relationship. To what type of risks is the Court referring to? What are the normative underpinnings of this criterion and is it still effective in classifying modern-day workers? This paper responds to these questions by analysing and critically evaluating the use of 'business risk-assumption' as a criterion for the determination of EU employment status. After revisiting the classical paradigm that led to the adoption of this criterion, I demonstrate how it has been superseded by recent changes in market structures. I then advocate for the use of an alternative risk-based criterion that mitigates some of the

deficiencies of the current framework, leading to the fairer mutualisation of risks between the parties. More particularly, I argue in favour of a classification criterion based on the 'involuntary assumption of business risks' measured by the 'inability of a person to spread his risks'. If adopted, the proffered approach would lead to the expansion of the EU concept of 'worker', allowing for the protection of vulnerable *quasi*-subordinate persons that are excluded from the current EU 'worker' definition. Finally, I discuss recent regulatory developments in the labour field (i.e., public consultation on Improving the Working Conditions in Platform Work) and propose ways forward.

Keywords: business risks, classification criteria, platform economy, redistribution, worker status

I. Introduction

The European labour market is undergoing a process of radical change. While the standard contract of employment still remains the predominant form of work organization, its social importance has been declining. In addition to part-time, fixed-term and agency work, new casual forms of employment have emerged such as zero-hours contracts, ICT-based mobile work, portfolio, crowd, and platform work (Eurofound, 2015). The phenomenon of the casualization of work has been largely precipitated by technological advancements that have disrupted the traditional paradigm of work organization. The automation and digitalization of work, the emergence of innovative new business models that rely on Artificial Intelligence and algorithmic management, the growing importance of the service sector, and the proliferation of large platforms that perform labour-brokering functions have transformed the world of work as we know it. Research conducted, for instance, in 2017 by COLLEEM shows that more than 10% of the adult population in the EU has provided services through platforms (Pesole et al., 2018). Of those, more than 5% earned at least one quarter of their income by working for and through an app, while 2.3% earned *the majority* of their income this way. Similar numbers have also been reported in other studies (Forde et al., 2017; Huws et al., 2017). While it is difficult to know the exact number of people actively engaged in platform work today, it is widely accepted that the platform economy is on the rise. As De Stefano and Aloisi note, the collaborative economy is "growing by 25% a year" (De Stefano and Aloisi, 2018: 8). In 2015, for instance, the gross revenue in the EU from collaborative platforms was estimated to be €28 billion – a number that would be much

higher today, especially given that the COVID-19 pandemic forced many people to use online platforms for the execution of various tasks (Eurofound, 2020).

Indeed, the lengthy global lockdowns and the consequent increases in unemployment boosted demand for platform services, leading to more people taking on platform work (ILO, 2021; OECD, 2020a; OECD, 2020b). Delivery services, for instance, were declared 'essential' in most countries and expanded at an exponential rate. In Spain, for example, 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). A sharper increase in demand for platform delivery services since the outbreak of the pandemic was observed in Latin America. There, 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 (ILO, 2021). Apart from delivery services, a 'distancing bonus effect' (Stephany et al., 2020) was detected in online platform work, such as freelancing and software programming. As Stephany et al. (2020) observed, since the start of the pandemic, there were 6 times more people bidding for online job tasks than before. 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. As several authors point out, platforms, nowadays, are able to circumvent EU labour and social protection legislation by shifting the risk of running a business to workers (ILO, 2021; Prassl, 2018; De Stefano and Aloisi, 2018). In fact, 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'.

More precisely, in the European legal order, the assumption of business risks is increasingly being used by the European Court of Justice (CJEU or 'the Court') as a criterion that would point to the existence of an independent working relationship. In *Agegate* (C-3/87), for instance, the CJEU relied on the 'business risk-assumption' criterion to classify fishermen on British vessels whose salary was calculated on the basis of a share from the proceeds of their catches. The Court held that attention should be paid to whether the fishermen were "sharing the commercial risks of the business" (para

36). Similar pronouncements were later made in *Becu* (C-22/98). This was a competition law case concerning, *inter alia*, the classification status of dockers at the Port of Ghent as 'workers' or 'self-employed persons- undertakings'. In his Opinion, Advocate General Colomer argued that "[i]t is [the] ability to take on financial risks which gives an operator sufficient significance to be capable of being regarded as an entity genuinely engaged in trade" (para 53). As he said, "although [both 'workers' and the 'self-employed'] offer their services to various customers, […] [they] perform a functionally different activity, […] from a social point of view; […] [workers] receive orders and *do not bear any commercial risk*" (para 56). The CJEU agreed with the Advocate General. Taking into account that the dockers in question were not under the control of their principal and did not take on any business risks, it classified them as 'workers'. The same criterion ('business risk-assumption') has since been used in a number of cases concerning the classification status of customs agents (C-35/96), doctors (C-180 to 184/98), lawyers (C-309/99), opera singers (IV/29.559), and chartered accountants (C-1/12). In all these instances, the CJEU found that the persons in question were not 'subordinate' to their principal because they "assumed the financial risks involved in the exercise of [their] activity […]" (C-35/96: para 37).

Finally, the criterion of 'business risk-assumption' has more recently been used in cases concerning bogus self-employment. In *FNV Kunsten* (C-413/13), an Article 101 case concerning, *inter alia*, the status of substitute orchestra musicians as 'workers' or 'self-employed persons – undertakings', the Court held that "a service provider can lose his status of an independent trader, and hence of an undertaking, if he does not determine independently his own conduct on the market, but is entirely dependent on his principal, because he *does not bear any of the financial or commercial risks arising out of the latter's activity*" (para 33). This position was later repeated in *B v Yodel* (C-692/19). The case concerned the employment status of B, a parcel delivery courier for Yodel, under the Working Time Directive (2003/88/EC). Relying on its previous jurisprudence in the Competition Law field, the CJEU held that a person will lose his status as an independent trader "if his independence is merely notional" (para 30). This would be the case, in particular, if the person "acts under the direction of his employer as regards, in particular, his freedom to choose the time, place and content of his work [and] *does not share in the employer's commercial risks*" (para 31).

From the above, it becomes clear that the assumption of business risks is increasingly been used by the CJEU as a criterion that would point to the existence of an independent working relationship. Since more and more persons are, nowadays, called to shoulder business risks, a closer examination of this criterion is needed to establish its normative underpinnings and its effectiveness in classifying modern-day workers. Why has the assumption of business risks been used by the CJEU as a criterion that would point to the existence of an independent working relationship? To what type

of risks is the Court referring to? And, is this criterion still effective and efficient in classifying modern-day casual workers?

This paper responds to these questions by analysing and critically evaluating the use of 'business risk-assumption' as a criterion for the determination of EU employment status. After revisiting the classical paradigm that led to the adoption of this criterion (section II), I demonstrate how it has been superseded by recent changes in market structures (section III). Having analysed the deficiencies of the current framework, I propose an alternative risk-based criterion that would lead to the fairer re-distribution of risks between the parties. More precisely, in section IV, I argue in favour of a classification criterion based on the 'involuntary assumption of business risks' measured by the 'inability of a person to spread his risks'. Finally, in section V, I discuss recent regulatory developments in the labour field and propose ways forward.

II. The classical paradigm

In order to establish whether the criterion of 'business risk-assumption' is effective in distinguishing between 'workers' and 'independent contractors', its normative underpinnings need to be clarified. Why has the 'assumption of business risks' been adopted by the CJEU as an element that would point to the existence of an independent working relationship? What types of risks do workers and the self-employed persons undertake and how are they mitigated?

A. Labour

Traditionally, employees do not have to bear business risks such as commercial and financial risks relating to the exercise of their economic activity. First, they do not have to make material and human capital investments. Instead, the employer is responsible for providing them with the essential means necessary for completing their job tasks (i.e., machines, tools etc.) and for giving them training. Furthermore, employees do not have to bear redeployment costs. Since their material needs are covered by their standard nine-to-five job, they do not have to constantly invest in the finding and negotiating of new business deals.

While employees are (relatively) immune from residual business risks, they *prima facie* bear psychosocial and labour market risks. More particularly, their over-reliance on a single employer puts employees at risk of not having their social and psychological needs fulfilled (Davidov, 2002). More importantly, employees bear social and labour market risks related to bad health (work-related

injuries and illnesses), unemployment, and old age (retirement). All these scenarios can cause a serious disruption to earnings, posing a threat to employees' livelihood which is largely dependent on monthly wages for subsistence (Deakin, 2005, 2001).

The psychosocial and labour market risks employees undertake are mitigated by the contract of employment. While some of these risks are absorbed by the concept of 'wage' (which smooths income), others are transferred back to the employer. The employer, classically a business firm, is viewed as the party best situated to deal with the costs of regulatory compliance. He is, for instance, responsible for making the workplace safe, for collecting revenue, and for providing protection to employees against disruptions to earnings (Deakin and Wilkinson, 2005). In that sense, the employing firm becomes the medium through which economic, social, and labour market risks are pooled, managed, and (re-)distributed in the society. The remaining social risks are shared collectively by all employers and employees through the mechanism of social insurance. Overall, it could be argued that, by entering into an employment contract, employees relinquish control over their working activities in exchange for immunity from residual business risks as well as protection against social and labour market risks. This trade-off between security and protection from risks of various kinds constitutes one of the main characteristics of the contract of employment.

B. Capital

As shown above, employers shoulder the social and labour market risks that have been passed onto them through the contract of employment. Apart from those risks, however, employers and the self-employed persons without staff shoulder business risks in the trading sense of the word. First, the entrepreneur must invest in material capital such as land, buildings, equipment, IT, intellectual property rights etc. The investment in assets will constitute "the glue that holds the firm together" (Hart, 2017: 1739) and will help define the boundaries of the firm. In a world of incomplete contracts and transaction costs, property rights over assets will determine which party has residual rights of control over the assets and hence, can exclude others from using them. The ownership and control over the physical assets of the firm will also lead to control over human assets and will determine the incentives to invest in the establishment of a hierarchical structure with democratic deficits (Hart, 1989). This way, the owner will avoid hold-up situations that might arise from the *ex-post* opportunistic behaviour of the parties (Hart and Moore, 1990).

Apart from the initial investment costs, the employer/entrepreneur will also have to bear all concomitant maintenance and devaluation costs in relation to his capital; always taking into account

that some of his investments might be sunk, meaning that they will not be able to be recovered without incurring significant loss. Apart from material capital investments, the entrepreneur will also have to invest in the hiring and training of employees and will have to put in place an administrative structure that would allow for the optimal allocation and utilization of resources. Furthermore, the entrepreneur will have to shoulder redeployment costs. In order for the business to be able to survive market shocks and to flourish, the entrepreneur will have to build and maintain a well-diversified clientele. This will require the devotion of time, efforts, and capital to seeking new clients, negotiating new deals, and adapting to the diverse requirements of each customer. Finally, the entrepreneur will have to absorb intermittent external risks such as market fluctuations and failures, regulatory changes, and environmental disasters.

The plethora of risks (social/labour market risks as well as business risks) the entrepreneur undertakes are alleviated by a number of favourable provisions dedicated to the self-employment status. First, the entrepreneur's risks are mitigated by his role as the residual firm controller. The entrepreneur has the managerial prerogative to dictate and supervise how work is being done. Hence, he can control not just his employees' activities (by issuing orders they have to obey), but also his own (by deciding when, where, how, and how much he will work). He is in charge of mapping the firm's business strategy and mode of operation and can direct its risk-appetite. This way the entrepreneur can control the quality and quantity of risks the business undertakes and can implement strategies that would allow him to minimize his cost of production. Not only can the entrepreneur control his risks, but he also has the ability to shift them by spreading them further. By having a large and well-diversified clientele, the entrepreneur can spread his risks amongst various clients and hence, does not have to over-rely on a specific relationship for the fulfilment of his psychological and financial needs. Risk-spreading can also be achieved by other means, such as the provision of insurance or through the mechanism of 'price' (Deakin, 2003). Moreover, the entrepreneur can take advantage of beneficial corporate and fiscal legislation. Provided the conditions are met, the entrepreneur can benefit from the corporate form which facilitates entity shielding and asset partitioning, and provides for the limited liability of investors (Robe, 2011). He can also benefit from subsidies provided to start-ups (Cueto and Mato, 2006) and take advantage of favourable tax and social insurance provisions. Finally, the entrepreneur can enjoy the upside payoffs of his risk-bearing activity, meaning that, if the business cycle is profitable, he is the sole claimant to the earnings of the firm. In all these ways, it could be argued that capital is legally supported and, indeed, 'constructed'.

Overall, it becomes clear that the concept of 'risk' plays an important role in the identification of the boundaries of the business enterprise; it helps determine whether the individual is integrated into a business structure acting as a subordinate and auxiliary organ to it or whether it operates as an

independent economic actor in the market. While employees bear *primarily* psychosocial and labour market risks (risks of old age, unemployment, and bad health); the self-employed bear *principally* commercial and financial risks (business risks in the trading sense, i.e., material and human capital investment costs, maintenance and devaluation costs, administrative costs, redeployment costs, costs relating to market fluctuations and failures, regulatory changes, and environmental disasters). To some extent, the risks borne by each party can be transmitted to the other, given that the employment contract is one of mutual dependence (up to a point). Thus, for instance, if a firm declares bankruptcy, employees are at a greater risk of suffering disruptions to earnings, assuming that they cannot easily get another job elsewhere. Conversely, employers are called upon to shoulder social and labour market risks that have been transferred to them through the contract of employment and face the risk of suffering losses if a worker that cannot easily be replaced becomes ill or quits his job. However, the overall point here is that the risks born by each party are *qualitatively distinct* and are mitigated in different ways. Since the main characteristic of the self-employed/employers is that they assume business risks from which the employees are insulated; it makes sense why the CJEU used the 'assumption of commercial and financial risks' as a criterion for the determination of EU employment status.

III. Changes in market structures

The classical paradigm was a product of its time. It was established in an era where most persons satisfied the archetypical model of an employee who works under an open-ended contract of employment for one principal throughout his life. Under these market conditions, employees did not assume commercial and financial risks and hence, the criterion of 'business risks-assumption' was fit for and efficient in distinguishing between 'workers' and 'independent contractors'.

In recent times, however, the world of work has changed. New casual forms of employment have emerged or have become more prevalent, such as employee sharing, ICT-based mobile work, voucher-based work, interim management, portfolio, zero-hours, platform, and crowd work. It is not an uncommon phenomenon, for instance, for previously standard workers to be asked to set up a limited company as the legal vehicle for the supply of their services in order not to lose their jobs completely (Davies, 2010). The data is revealing: half of all the new jobs created in the last 10 years have been non-standard, leaving over 25% of the EU-28 workforce engaged in casual and atypical forms of work (European Commission, 2017). The number of workers on contracts lasting less than a month, for instance, increased from 373,000 in 2002 to 1.3 million in 2016 with a large number of people (3.8 million) working less than 8 hours per week (European Commission, 2017).

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. More particularly, working individuals are now called upon to shoulder a number of financial and commercial business risks. First, under many of these new casual work contracts, persons are required to bear human and material capital investment and maintenance costs. Research shows that casual workers are 47% less likely to receive training from their employers than their permanently-employed counterparts (Eurofound, 2015). Hence, if they want to remain competitive in this volatile labour market, these individuals have to invest in their own training in order not to see their skills become obsolete. Furthermore, many of these workers are currently required to provide their own equipment in order to perform the tasks assigned. Gig workers, for instance, engaged in transportation services, have to supply and maintain their own vehicle at a certain standard set by the platform and to pay for their own petrol, insurance, tax, and potential leasing costs (Aloisi, 2016).

Furthermore, many workers, nowadays, are called upon to shoulder payment-related risks. 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. This is particularly the case with online platforms who retain the right to adjust the giggers' method and level of remuneration. By changing ex post their price-surging algorithm and level of commission retained, platforms can increase their revenue while reducing ad hoc the taskers' level of income (Sanders and Pattison, 2016). The most common way, however, firms pass down payment-related costs to workers is through the establishment of productivity-related models of compensation. In these systems of payment, the worker is not compensated for his time and effort but instead is paid according to his output. If he works slowly or does a poor job, he might not get compensated at all (Davies, 2017). Many crowd work platforms, for instance, operate by launching online competitions for the advertised tasks. While several people will take the time to submit their idea to the assignment, only the winner will get compensated for his work. Other platforms allow the client to withhold payment altogether if he thinks that the product of work is unsatisfactory. These types 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). Albeit not paying the tasker, the client retains the right to use the content of the submission without suffering any adverse consequences.

Apart from transferring payment-related costs to workers, casual work arrangements are also used to elicit workers' undue time and effort. Individuals often note that they often have to work extra-long hours to keep up with the intensified pace of work. 70% of German companies admit to expecting employees to remain available outside working hours, even if that is not stipulated in their contract (Maschke et al., 2014). Undoubtedly, the requirement to remain constantly available is most

pressing in zero-hour contracts. Almost 50% of on-demand workers report that they always have to be on-call in case a work possibility arises (CIPD, 2013). Most of them do not receive advance notice for upcoming job offerings and often show up for an assignment only to find out that it has been cancelled. The option to decline a job offer, albeit available in theory, is not viable in practice. If workers turn down assignments, they might not get called back for work. The fear of being sanctioned for not taking on a job offering is also present in gig-work contracts. Platforms such as MTurk and Uber, for instance, are known to suspend workers who do not maintain a high acceptance rate (De Stefano, 2016). Even if one's account is not deactivated, however, there are other ways in which platforms can penalize workers. Algorithmic management can push an individual who declines task offers at the bottom of the option list, meaning that he gets less work and gets paid less for it.

Furthermore, by being so work-intensive, these casual work arrangements worsen the individuals' market position by hampering their ability to diversify their capital. Since much of the persons' free time is spent working or waiting to be summoned to work, these individuals lack the time to search and pursue new job opportunities. They thus find themselves in a hold-up situation where their employer or main client can monopolistically extract rent from their availability to work without them being able to take advantage of the flexibility their work arrangement offers. Hold-up situations are further precipitated by the introduction of cumbersome incompatibility clauses. Many platforms, for instance, require individuals to sign non-circumvention agreements under which they are prohibited from contacting and taking on work with clients identified through the app (Akman, 2019); while others introduce exclusivity clauses which restrict individuals from searching for alternative work with a competitor (European Commission, 2017). Other reasons that would increase the individuals' cost of switching, locking them in an app, include the absence of transferrable ratings between platforms and the assumption of 'predatory' loans which individuals have to repay by working for the app that facilitated the lending (Prassl, 2018).

Finally, under some of these 'new' casual work contracts, individuals are called to shoulder 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 (Kleppa et al., 2008). These psychological health conditions place extra strain on workers, often leading to physical health problems and hence, heightened health and safety expenses (Caroli and Godard, 2016). ICT-based mobile workers, for instance, are often responsible for the health and safety conditions of the environment they work in (Eurofound, 2015), while gig workers are responsible not only for their own health and safety (Kuhn, 2016), but also for that of their 'customers'. Some contracts for gig work, for instance, include clauses under which the platform absolves itself from any liability for damages incurred to third parties and to the gigger in the course of the performance of his tasks (Todolí-Signes, 2017).

Under the current classification test, the mere fact that individuals assume financial and commercial risks of this sort would render them 'self-employed persons–undertakings'. A paradox, however, occurs: 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. More particularly, they have little control over their own business strategy and are often required to operate under the decisive influence of their principals/clients who provide strict instructions in regards to how to perform their work (Prassl, 2018). Furthermore, they are hampered in their ability to spread their risks because they often do not determine the price of their services (Sanders and Pattison, 2016) and have to over-rely on a specific platform/relationship for income (due to burdensome exclusivity and non-circumvention clauses, non-transferable ratings, and predatory loans). Finally, since they have little access to capital, they cannot benefit from the corporate form and are often excluded from other benefits offered to start-ups/entrepreneurs such as subsidies and other fiscal benefits.

At the same time, the opposite is true for employers. Modern casual work arrangements have allowed employers to retain the advantages associated with the standard contract of employment (i.e., ability to control the firm's activities, appropriation of residual business profits, subsidies, advantageous fiscal and social security legislation etc.), while shaking off its disadvantages (assumption of residual business and social/labour market risks). As Prassl notes "classifying workers as independent contractors allows platforms to offer services without having to pay for their cost. Responsibility for assets, remuneration, insurance, and tax, as well as the risks of fluctuating demand, are devolved to individual micro-entrepreneurs" (Prassl, 2018: 21).

Since the current test of 'business risk-assumption' would render 'self-employed' many persons who do not have the ability to benefit from the upside payoffs of their risk-taking activity, the need arises to alter our classification criterion. If business risk assumption is no longer to be used as a determinative element for the assessment, which criterion could take its place?

IV. Proposal for an alternative risk-related criterion

Undoubtedly, '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 (section II). Hence, its complete expulsion from the EU 'worker' test would not be sensible. Furthermore, as shown in section I, this criterion has already been jurisprudentially

consolidated and it is not likely that the CJEU will abandon 'risk' considerations altogether. Therefore, it is worth examining whether the EU could adopt a slightly alternate criterion that is centered on the concept of 'risk' albeit with a different focus.

My proposal is that the EU would benefit from a risk-related 'worker' criterion that is based on the 'involuntary assumption of business risks' measured by the 'inability of a person to spread his risks'. The rationale behind this conceptualization is the following: 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. In other words, 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. In this case, the parties to the agreement, as two independent and autonomous persons, have balanced the advantages and disadvantages of the relationship and have concluded that they would benefit most from the vertical integration of the one into the other's business entity.

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. It is the vulnerability of the person's position, in these instances, that 'taints' his risk-taking choices and justifies a level of labour protection. 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'.

By suggesting that the 'voluntariness in the assumption of business risks' can be measured by 'the person's ability to spread his risks'; this theorization provides guidance to EU and national judges and legislators on how to spot bogus self-employment. 'Voluntariness', in this context, is not an abstract notion that can be ascertained with great difficulty, but there is a factual criterion upon which it can be measured. Furthermore, by making the 'voluntariness in the assumption of risks' the main

criterion in the characterization of genuine self-employment status (instead of the 'ability to spread risks'), the proposed approach avoids the risks of having to re-classify formal employees who are engaged under more than one contract of employment. Those who can make free choices (because they have the ability to spread their risks) will continue to be able to choose their status as a 'self-employed' person or a subordinate 'worker', making, in each case, the trade-offs they deem desirable and necessary. By contrast, those who do not have the ability to choose 'freely' their employment status (because they are constrained in their choices by their inability to spread their risks), will be provided protection under EU labour and social legislation.

Overall, the proffered approach would provide for a more holistic conceptualization of the EU notion of 'worker'. Acting alongside the criterion of 'control', this 'risk'-based criterion would allow for the expansion of the personal scope of the EU labour and social law provisions to include casual types of workers that have, up until-recently, been excluded. National legislators would have to provide explicit reasons for depriving certain categories of the working population of labour protections when the latter have been proven to share the same characteristics as archetypical workers. Furthermore, the new test would permit a greater number of casual workers (and their unions) to engage in collective bargaining without the fear of being found liable of breaching Competition Law provisions. Finally, even though definitions may differ for the purposes of tax law, undoubtedly a robust labour-law 'worker' test that takes into account economic considerations could have cross-field implications for both the individuals and the State itself.

V. Concluding remarks: Recent developments in the labour field and ways forward

In its 2021 Work Programme, the Commission recognized that "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". It, therefore, committed itself to propose ways to improve the labour conditions for platform workers. On 24 February 2021, the Commission launched a first-stage consultation of the social partners on how to improve the working conditions for people working through digital labour platforms. Article 154(2) TFEU provides for a second-stage consultation of the social partners for proposals in the social policy field based on Article 153 TFEU. As the Commission announced, unless social partners decide to enter into negotiations among themselves following the first or the second stage of the consultation, it intends to put forward a legislative initiative by the end of 2021.

This can take one (or more) of the following approaches:

a) it 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. This way, the question of whether platform workers are 'workers' or 'self-employed' is avoided altogether and instead, attention is paid to the rights of the persons who provide services through platforms (Prassl and Risak, 2016).
b) it 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. Essentially, the 'ABC test' would reverse the onus of proof by establishing a rebuttable presumption of employment status for all platform workers.
c) it could clarify the legal status and rights of platform workers. This could be done in two ways. First, the Commission could 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. This is, for instance, the approach adopted by the ILO in Recommendation 198. Second, the Commission could 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.

As it was suggested in this paper, 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'. It remains to be seen whether the EU will succeed in introducing more worker-protective legislation or whether any such attempts will prove to be nothing more than a Sisyphean task.

References:

Akman P. (2019) 'Online Platforms, Agency, and Competition Law: Mind the Gap', *Fordham International Law Journal*, 43(2), pp. 209-319.

Aloisi A. (2016) 'Commoditized Workers. Case Study Research on Labour Law Issues Arising from a Set of "On-Demand/Gig Economy" Platforms', *CLLPJ*, 37(3), pp. 653-690.

Bezos J. (2006) 'Opening Keynote Speech at MIT Technology Conference', *MIT TechTV* (27.09.2006) <http://techtv.mit.edu/videos/16180-opening-keynote-and-keynote-interview-with-jeff-bezos> (accessed 01.09.2017).

Caroli E. and Godard M. (2016) 'Does Job Insecurity Deteriorate Health?', *Health Economics*, 25(2), pp. 131-147.

CIPD, (2013) *Zero-hour Contracts: Myth and Reality.* London: CIPD.

Corrêa L.R. and Fontes P. (2020) 'Maids in Brazil: Domestic and Platform Workers During the COVID-19 Pandemic', in Eckert A. and Hentschke F. (eds.) *Corona and Work around the Globe*. Boston: De Gruyter, pp. 37-42.

Cueto B. and Mato J. (2006) 'An Analysis of Self-employment Subsidies with Duration Models', *Applied Economics*, 38, pp. 23-32.

Davidov G. (2002) 'The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection', *The University of Toronto Law Journal*, 52(4), pp. 357-418.

Davies A. (2017) 'Getting More Than You Bargained for? Rethinking the Meaning of "Work" in Employment Law', *ILJ*, pp. 477-507.

Davies A. (2010), 'The Implementation of the Directive on Temporary Agency Work in the UK: A Missed Opportunity', *ELLJ*, 1(1), pp. 307-331.

De Stefano V. and Aloisi A. (2018) *European Legal Framework for Digital Labour Platforms.* Brussels: European Commission.

De Stefano V. (2016) *The Rise of the 'Just-in-time' Workforce: On-demand Work, Crowdwork and Labour Protection in the 'Gig-economy'.* Geneva: ILO.

Deakin S. and Wilkinson F. (2005) *The Law of the Labour Market: Industrialization, Employment, and Legal Evolution.* Oxford: OUP.

Deakin S. (2005) 'The Comparative Evolution of the Employment Relationship' *Centre for Business Research Working Paper 317*.

Deakin S. (2003) '"Enterprise-Risk": The Juridical Nature of the Firm Revisited', *ILJ*, 32(2), pp. 97-114.

Deakin S. (2001) 'The Changing Concept of the "Employer" in Labour Law', *ILJ*, 30(1), pp. 72-84.

Digital Future Society and Inter-American Development Bank (2021) *Platform Economy and COVID-19*: *A Look at Delivery, Home Care, and Online Freelance Work in Spain and Latin America*. Barcelona. Available at: <https://publications.iadb.org/publications/english/document/Platform-Economy-and-COVID-19-A-Look-at-Delivery-Home-Care-and-Online-Freelance-Work-in-Spain-and-Latin-America.pdf>.

Eurofound (2020) 'Platform Economy: Developments in the COVID-19 Crisis' *Eurofound* (03.07.2020) <https://www.eurofound.europa.eu/data/platform-economy/dossiers/developments-in-the-covid-19-crisis> (accessed 29.04.2021).

Eurofound (2015) *New Forms of Employment*. Brussels: Publications Office of the EU.

European Commission (2017) Impact Assessment Accompanying the Proposal for a Directive of the European Parliament and of the Council on Transparent and Predictable Working Conditions, SWD (2017) 478 final.

Forde C., Stuart M., Joyce S., Oliver L., Valizade D., Alberti G., Hardy K., Trappmann V., Umney C., and Carson C. (2017) *The Social Protection of Workers in the Platform Economy*. Brussels: European Parliament.

Hart O. and Moore J. (1990) 'Property Rights and the Nature of the Firm', *Journal of Political Economy*, 98(6), pp. 1119-1158.

Hart O. (2017) 'Incomplete Contracts and Control', *American Economic Review*, 107(7), pp. 1731–1752.

Hart O. (1998) 'An Economist's Perspective on the Theory of the Firm', *Columbia Law Review*, 89(7), pp. 1757-1774.

Huws U., Spencer N.H., Syrdal D.S., and Holts K. (2017) *Work in the European Gig Economy: Research Results from the UK, Sweden, Germany, Austria, The Netherlands, Switzerland and Italy*. Brussels: FEPS.

ILO (2021) *World Employment Social Outlook 2021: The Role of Digital Labour Platforms in Transforming the World of Work*. Geneva: ILO.

Irani L. (2015) 'Difference and Dependence Among Digital Workers: The Case of Amazon Mechanical Turk', *South Atlantic Quarterly*, 114(1), 225-234.

Kleppa E., Sanne B., and Tell G.S. (2008) 'Working Overtime is Associated with Anxiety and Depression: The Hordaland Health Study', *Journal of Occupational and Environmental Medicine*, 50(6), pp. 658-666.

Kuhn K.M. (2016) 'The Rise of the "Gig Economy" and Implications for Understanding Work and Workers', *Industrial and Organizational Psychology*, 9(1), pp. 157-162.

Maschke M., Nies G., and Vogl G. (2014) 'Mobile Arbeit: Zwischen Autonomie und Fremdbestimmung' (Translation: Mobile work: Between autonomy and heteronomy), *WSI-Mitteilungen*, 2.

OECD (2020a) 'What Have Platforms Done to Protect Workers During the Coronavirus (Covid-19) Crisis?' *OECD* (21.09.2020a) <https://www.oecd.org/coronavirus/policy-responses/what-have-platforms-done-to-protect-workers-during-the-coronavirus-covid-19-crisis-9d1c7aa2/> (accessed 26.06.2021).

OECD (2020b). *Employment Outlook 2020: Worker Security and the Covid-19 Crisis.* OECD.

Pesole A., Urzi Brancati M.C., Fernandez Macias E., Biagi F., and Gonzalez Vasquez I. (2018) *Platform Workers in Europe: Evidence from the COLLEEM Survey*. Brussels: Publications Office of the EU.

Polkowska D. (2021) 'Platform Work During the Covid-19 Pandemic: A Case Study of Glovo Couriers in Poland', *European Societies*, 23(1), pp. 321-331.

Prassl J. and Risak M. (2016) 'Uber, TaskRabbit, and Co.: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork', *CLLPJ*, 37(3), pp. 619–651.

Prassl J. (2018) *Humans as a Service: The Promise and Perils of Work in the Gig Economy*. Oxford: OUP.

Rani U. and Dhir R.K. (2020) 'Platform Work and the COVID-19 Pandemic', *The Indian Journal of Labour Economics*, 63(1), pp. 163-171.

Robe J-P. (2011) 'The Legal Structure of the Firm', *Accounting, Economics and Law*, 1(1), Article 5.

Sanders D.E. and Pattison P. (2016) 'Worker Characterization in a Gig Economy Viewed Through an Uber Centric Lens', *Southern Law Journal*, 26(2), pp. 297-320.

Todolí-Signes A. (2017) 'The 'Gig Economy: Employee, Self-employed or the Need for Special Employment Regulation?', *Transfer*, 23(2), pp. 193-205.