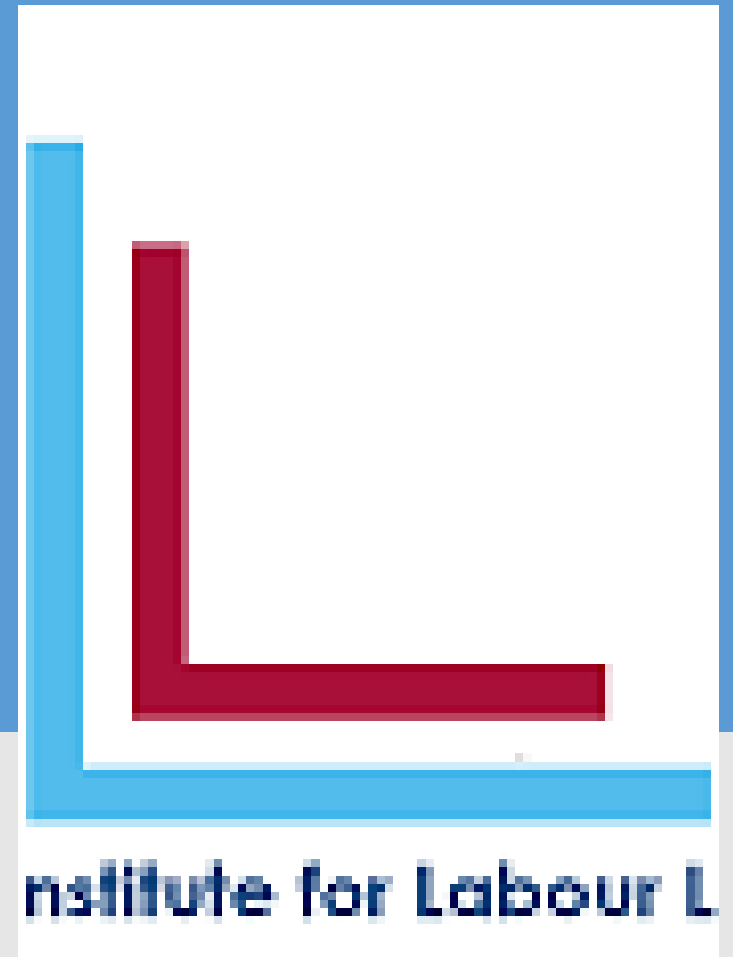


# Labor Protection in the Platform Economy

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# The «on-demand/platform economy»: what are we talking about ?

- **Crowdemployment** (Amazon Turk, Clickworker, Crowdfunder, Microtask)
- **Work on-demand via apps** (Uber, Deliveroo, TaskRabbit, Handy, Wonolo)
  - Profound differences:
    - Virtual/ non-virtual work
    - Global/ local execution of work
  - Enormous differences also among crowdwork and on-demand platforms, e.g.
    - Methods of adjudication
    - Payment (bid/defined rate)
    - Complexity of task and control over performance
    - Specialised vs. general platforms

# Crowdwork and work on-demand: are they more similar than we know?

## **Opportunities:**

- Enhanced way of matching supply and demand of labour using online technologies
- Reduce transactions costs and market frictions by facilitating outsourcing to individuals
- Customer-oriented
- Create job opportunities with some flexible schedule
- Increase flexibility based on a “pay-as-you-go” workforce

# “Humans-as-a-service”

- *Before the Internet, it would be really difficult to **find someone**, sit them down for ten minutes and **get them to work for you**, and then fire them after those ten minutes. But with technology, you can actually find them, **pay them the tiny amount of money**, and then **get rid of them when you don't need them anymore** (L. Biewald, Crowdfunder)*
- Access to “Humans-as-a-service” (J. Bezos, Amazon)

# What are the common risks?

- “Humans-as-a-service” and commodification of labour; risks of:
  - Dehumanized perception of workers with both theoretical and practical risks:
    - Devaluation and disguising of work (“gigs”, “tasks”, “services”, “favours” or “**microbusinesses**”)
    - New forms of invisible labour
    - Adverse impact on rates and ratings
- Demutualisation of risk
- Mostly unilateral flexibility: no free schedules
- Increase the trend towards casualization of work and informalization of the formal economy

# What are the risks for workers' rights?

- Elusion of minimum wages
- Wage-theft via refusal of work done
- Unilateral change of terms and conditions and pay, e.g.:
  - waivers of cancellation fees
  - application of discounts
  - changes of platforms' fees
- Enhanced possibility for monitoring working activities
- Abusive termination or “deactivation” whilst subject to lock-in effects

# What are the risks for workers' fundamental rights?

- Reported risks and cases of abuse on Fundamental Principles and Rights at Work of the ILO:
  - Freedom of association and collective bargaining
    - Problems in online activism – Easy monitoring of workers via GPS and IT-devices – Reputation and ratings
  - Forced labour
    - *Game-farming* and... what else?
  - Child labour
  - Discrimination (including indirect discrimination)
    - Implicit and explicit bias in rating – Exclusion of workers
- Exclusion from, and elusion of, existing mechanisms of combating violations of fundamental rights
- Risks enhanced by lack of clarity on employment status and regulation loopholes

Not a separate dimension: platform work, management by algorithms and non-standard employment

- Platform work is a typical example of “***management-by- algorithm***” practices that are also spreading in other sectors
- Platform workers shares several dimensions with other forms of **non-standard work** (ILO):
  - temporary and casual work
  - marginal part-time work
  - temporary agency work and other contractual arrangements involving multiple parties,
  - disguised employment relationships and dependent self-employment



# Samples of clauses: “enhanced” independent-contractor clauses

- ***Amazon Mechanical Turk and its Affiliates are not involved in the transactions between Requesters and Providers(...). As a Provider you are performing Services for a Requester in your personal capacity as an independent contractor and not as an employee of the Requester(...) this Agreement does not create an association, joint venture, partnership or franchise, employer/employee relationship between Providers and Requesters, or Providers and Amazon Mechanical Turk (Amazon Mechanical Turk)***
- ***Nothing in this Agreement is intended or should be construed to create a partnership, joint venture, or employer-employee relationship between Wonolo and you or between the Customer and you (Wonolo)***

# Samples of clauses: *representation and warranties*

- Sweeps **will not be liable for any tax or withholding, including but not limited to unemployment insurance, employer's liability, social security or payroll withholding tax** in connection with your use of Users' services. **You understand and agree that if Sweeps is found to be liable for any tax or withholding tax** in connection with your use of Users' services, then **you will immediately reimburse** and pay to Sweeps an equivalent amount, including any interest or penalties thereon (**Sweeps**)
- ***You agree to indemnify, hold harmless and defend Company from any and all claims that a Tasker was misclassified as an independent contractor, any liabilities arising from a determination by a court, arbitrator, government agency or other body that a Tasker was misclassified as an employee (Taskrabbitt)***
- ***You acknowledge that, while Providers are agreeing to perform Services for you as independent contractors and not employees, repeated and frequent performance of Services by the same Provider on your behalf could result in reclassification of that employment status (AMT)***

# Samples of clauses: “availability” or “shifts”?

- 3.2 [...] when applying to join Deliveroo’s supplier pool and at regular intervals thereafter **you will provide an indication of the time periods during the week in which you typically expect to be available to work. Deliveroo places reliance on such indications provided by suppliers in planning to meet customer demand. We accordingly expect you to inform a member of the Operations Team if this changes materially, and reserve the right to terminate this Agreement if you are no longer able to work at time periods which meet Deliveroo’s needs.**
- 3.4 **During your onboarding process, you will have discussed with a member of the Operations Team the level of demand for suppliers within your zone and consequently the level of availability to perform Services which Deliveroo expects you to provide. You are expected to be as flexible as you can to meet Deliveroo’s needs.**
- 3.5 **When you have confirmed your availability to perform Services during a particular time period, it is your responsibility to log on to the app during this period and to accept actively any orders in your zone which you are able to accept.**
- 3.7 **You must immediately notify a member of the Operations Team if you become unable to work during a time period that you have previously agreed to work in accordance with clause 3.4, and explain the reasons for this. (Deliveroo)**

# Samples of clauses: “light” exclusivity clauses

- “Light” exclusivity clauses
  - *You will **only accept work product from Providers that has been submitted through the Site (AMT)***
  - *You may not solicit, advertise for, or contact in any form Users for employment, contracting, or any other purpose not related to Professional Services facilitated through the Handy Platform **without express written permission from us (Handy)***
  - *You will not provide your topcoder information including, but not limited to, your topcoder handle and rating, to any third party for the purpose of pursuing employment opportunities without the written consent of topcoder. **If you are contacted by a third-party regarding employment opportunities and/or media interest as a result in your participation in topcoder Competitions, you agree to promptly notify topcoder of such contact” (Topcoder)***

# Samples of clauses: waivers and no litigation

- 2.2 You further warrant that **neither you nor anyone** acting on your behalf **will present any claim in the Employment Tribunal** or any civil court in which it is contended **that you are either an employee or a worker.**
- 2.3 If, despite clause 2.2 above, either you or anyone acting on your behalf [...] presents any claim in the Employment Tribunal or any civil court which would not be able to proceed unless it was successfully contended that you [...] are an employee or a worker within the meaning of any employment rights legislation, **you undertake to indemnify and keep indemnified Deliveroo against costs (including legal costs) and expenses that it incurs in connection with those proceedings, and you agree that Deliveroo may set off any sum owed to you against any damages, compensation, costs or other sum that may be awarded to you in those proceedings.**  
(Deliveroo)

# The “doublespeak” of the gig-economy, according to Deliveroo

## Not to USE

- Working *for* Deliveroo
- Equipment
- Shifts/sessions/hours
- Absence/time-off request
- Wage/salary/pay
- Disciplinary meeting and firing

## To Use

- Working *with* Deliveroo
- Branded clothing
- Availability
- Unavailability notification
- Fees
- Supplier agreement review and termination

# The Uber (and Lyft) litigation (1/5)

- In the United States: before administrative bodies and the US District Court, North. California
  - **Uber and Lyft are not mere technological companies: they provide transport services!**
    - No viable business without drivers
    - Do not sell software, they sell rides
  - **Control on drivers:**
    - Guidelines:
      - *“be the only non-passenger in the car”, “keep [the] car clean on the inside and outside”, “go above and beyond good service such as helping passengers with luggage or holding an umbrella for passengers when it is raining”, “greet every passenger with a big smile and a fist bump” (Lyft)*
    - Background checks and city knowledge test
    - Expectation that jobs will be accepted
    - Reviews, rates and consequent termination

# The Uber litigation (2/5)

- **According to the Court of Justice of the EU, Uber is not a mere digital provider. It provides transportation services:**
  - *“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 Uber litigation (3/5)

- The **Advocate General of the CJEU** warned against being “**fooled by appearances**”
  - *“Indirect control such as that exercised by Uber, based on financial incentives and decentralised passenger-led ratings, with a scale effect, makes it possible to manage in a way that is just as — if not more — effective than management based on formal orders given by an employer to his employees and direct control over the carrying out of such orders.*”

# The Uber litigation (4/5)

- In **France**, a 2018 judgement held that an Uber driver was not to be reclassified as an employee based on the lack of subordination according to the French case law based on the Code du Travail
  - Flexibility in logging on and off the Uber app and to chose own working hours
  - Possibility to turn down rides (?)

# The Uber litigation (5/5)

- The **London Employment Tribunal** held two Uber drivers to be “workers” under UK law:
  - Uber fixes the fares and drivers cannot agree higher one
  - Uber imposes numerous conditions and instruct drivers and sets (default) route
  - Rating system amounts to performance management and disciplinary power
- Uber is “in business as a **supplier of transportation services**” and **drivers are not “small businesses”**: they cannot grow their businesses unless this “simply means spending more hours at the wheel”

# Flexibility in working time: the central issue (?)

- Courts in the United States, Italy and France rejected reclassification claims of platform workers because they have flexible working time: *“they can decide if and when to work”*
- Other bodies in Belgium and Spain pointed out that working time is not always flexible and **work is not independent**
- Is flexibility in working time enough to exclude labour protection?
- Can we take flexibility for granted, in algorithm-based management?

# Some questions and answers for discussion

- Do we need new categories in labour and employment law or we need to better apply the existing categories:
  - Great differences among platforms – no autonomous and well defined sector
    - problems in defining scope of application
    - no “one-size-fits-all” solutions
    - possibility to review some traditional tests such as “continuity”
  - Creating new categories may complicate matters and “backfire”
    - Italian “parasubordinati”
    - UK “workers” and pressure towards intermediate category (Sachs)

# Some ideas for the way forward

- Some possible ways of tackling platform work without altering the existing categories:
  - Caution about creating “safe harbour” thresholds
  - Extend fundamental workers right to all workers
  - **Flexibility in logging on and off platforms does not exclude control and subordination** when workers are logged in
  - Contrast abusive clauses and termination policies
  - Ensure portability of ratings

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