

DOI 10.5817/MUJLT2021-2-3

## ONLINE PLATFORMS AND "DEPENDENT WORK" AFTER UBER<sup>1</sup>

by

SILVIA LATTOVÁ\*

*Digitalization is bringing new challenges, including changing the way how people work, which create uncertainty. Technology driven innovations are changing the way of work, while society react to such development by creating different types of jobs and workplaces. What is important today can be redundant tomorrow. Labour and civil laws will need to react to keep up with such changes. The main aim of this paper is to focus on the specific types of activities – such as virtual work or crowd work and the relationships between digital platforms, workers, employers, and clients while offering and providing services via online platforms. Further the paper will outline the responsibility of online platforms if considered to be in a position of an employer. Due to the lack of compliance with labour laws and related duties, online platforms can gain an unfair competition advantage compared to "traditional" employer. Virtual workers can potentially suffer from inadequate or limited access to the certain kind of protection (when compared to the "traditional" employees). Further the paper will consider the responsibility of online platforms if they are in fact to be considered an employer.*

### KEY WORDS

*Virtual Work, Crowd Work, Online Platforms, Dependent Work, Uber*

---

<sup>1</sup> The author would like to express her gratitude to doc. JUDr. Marianna Novotná, PhD. from Trnava University, Trnava, Slovakia for her valuable comments on the working version of this paper.

\* E-mail: [sisalattova@gmail.com](mailto:sisalattova@gmail.com), PhD candidate at Trnava University, Trnava, Slovakia.

## 1. INTRODUCTION

Online platforms are an important part of the digital economy. The growth of online platforms in the last decade is visible and well known. Platforms connect different subjects, providers/workers are offering services and customers are looking for such services via internet. Nowadays, it is easy to book an urban transport, find graphic designers, or people who will walk your dog. Some online platforms, such as Uber or Upwork, constantly promise freedom, flexibility and earning opportunity for those who choose to provide their "services" through such online platforms. Uber, for example, is offering a platform to connect the drivers and customers looking for transport, while promising flexibility for the drivers when earning money. These services can be described also as a "crowdsourcing", "virtual work" or "crowd working". The term "crowdsourcing", as defined by Howe, is "the act of taking a job traditionally performed by a designated agent (usually an employee) and outsourcing it to an undefined, generally large group of people in the form of an open call."<sup>2</sup> Taking such a definition into consideration and looking at the services provided by Uber, it is possible to see some similarities – as per the definition of crowd work, this is provided online, in cyberspace and so are the services offered by Uber. Felstiner<sup>3</sup> argued that crowd work is performed often anonymously and governed – to the extent that it is governed at all – by compulsory clickwrap participation agreements. Could this potentially be the condition applicable as per the definition of crowd work or virtual work? The term "virtual work" (as introduced by Cherry) could be understood as "an umbrella term to encompass work in virtual worlds, crowdsourcing, click working, and even sweeping in, to some degree, the commonplace telecommuting and "mobile executives" that have become ubiquitous over time".<sup>4</sup> Again, while looking at the Uber use case, we can most probably talk also about the virtual work as Ubers' services are performed by an anonymous driver (anonymous to the customers) and are provided online.

<sup>2</sup> Howe, J. (2016) *Crowdsourcing: A Definition*. Available from: <https://crowdsourcing.typepad.com/cs>. [Accessed 14 December 2020].

<sup>3</sup> Felstiner, A. (2011) Working the Crowd: Employment and Labor Law in the Crowdsourcing Industry. *Berkeley Journal of Employment and Labor Law*, Vol. 32. No. 1. p. 145. Available from: <https://ssrn.com/abstract=1593853> [Accessed 18 June 2021].

<sup>4</sup> Cherry, M. (2009) Working for (Virtually) Minimum Wage: Applying the Fair Labor Standards Act in Cyberspace. *Alabama Law Review*, Volume 60. N. 5. p. 1078. Available from: (PDF) Working for (Virtually) Minimum Wage: Applying the Fair Labor Standards Act in Cyberspace (researchgate.net). [Accessed 17 May 2021].

The rise of online platforms has not gone unnoticed by the regulatory bodies. The European Commission identified key areas of the online platforms on the market, interaction between the subjects, etc.<sup>5</sup> These online platforms share certain important characteristics:

- They can create and shape new markets, to challenge traditional ones, and to organise new form of participation or conducting business based on collecting, processing, and editing large amounts of data.
- They operate in multisided markets but with varying degrees of control over direct interactions between groups of users.
- They benefit from "network effect", where, broadly speaking, the value of the service increases with the number of users.
- *They play a key role in digital value creation, notably by capturing significant value (including through data accumulatio), facilitating new business ventures, and creating new strategic dependencies.*<sup>6</sup>

Online platforms are capable of bringing significant benefits to the whole of society; one can learn new skills, someone's business might reach larger audience, people can get real-time news from all over the world within a second. New job opportunities are another important benefit worth mentioning. However, the growing importance of the digital economy, linked with the diversity and fast-changing nature of platform ecosystems, also raises new policy and regulatory challenges. The platform economy presents major innovation opportunities for European start-ups, as well as for established market operators to develop new business models, products, and services.<sup>7</sup>

Platform capitalism is another term used when describing online platforms like Uber or Airbnb promoting their services to be able to provide competition to the "traditional" services offering transport services or accommodation services.

The idea of collaborative economy is not new. People are sharing goods, services, space and money with each other and the peer-to-peer commerce economy is enabling the crowd to become like a company, disrupting

---

<sup>5</sup> European Commission (2016) *Online Platforms and the Digital Single Market Opportunities and Challenges for Europe*. COM/2016/0288 final. p. 2. [online]. Available from: EUR-Lex - 52016DC0288 - EN - EUR-Lex (europa.eu). [Accessed 14 May 2021].

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

traditional business models.<sup>8</sup> But while in the past it was more related to the sharing of information and assets<sup>9</sup>, these days it is more about saving time and money, which potentially is also having impact when it comes to the virtual workers.

The online platforms are also changing the view of the traditional labour law and employment relationship. People working for online platforms do not always have a clear position when it comes to the employment relationship. But such uncertainty results not only from the length of the working time as the "traditional" labour law is also offering the possibility to work part-time.

The main issue is related to the fact that online platforms usually argue that they are in the neutral position while offering the services, i.e., that they are only intermediaries.

If we take Uber as an example, drivers who work on the Uber platform do not pursue an independent activity that exists independently of the platform. On the contrary, the activity exists solely because of the platform, without which it would have no sense. Therefore, it is wrong to compare Uber to intermediation platforms such as those used to make hotel bookings or purchase flights. Similarities clearly exist (such as the mechanism for booking or purchasing directly on the platform, the payment facilities or even the ratings system). However, in a contrast to the situation of Uber's drivers, both hotels and airlines are undertakings which operate completely independently of any intermediary platform and for which such platforms are simply one of a number of ways of marketing their services. Furthermore, it is the hotels and airlines – not the booking platforms – that determine the conditions under which their services are provided, starting with the prices.<sup>10</sup>

The following paper assesses the different types of relationship that could be applied when talking about the work for the online platform. When

---

<sup>8</sup> "Graphic: A Timeline of Corporations in the Collaborative Economy". Catalyst Companies. Available from: <http://www.catalystcompanies.co/graphic-a-timeline-of-corporations-in-the-collaborative-economy/>. [Accessed 05 June 2021].

<sup>9</sup> For example, Kimpton Hotels launches a "Forgot it? We've got it!" list of travel essentials for travellers in 2004, Radiohead asks consumers to pay what they want for "In Rainbows" album in 2007 or Daimler launches car2to car-sharing service in 2009. See: *Graphic: A Timeline of Corporations in the Collaborative Economy*. Catalyst Companies. Available from: <http://www.catalystcompanies.co/graphic-a-timeline-of-corporations-in-the-collaborative-economy/>. [Accessed 05 June 2021].

<sup>10</sup> Opinion of Advocate General Szpunar delivered on 11 May 2017 in C-434/15, paragraphs 58-59.

looking at the specific set up of the online platforms, those who are providing services or are collaborating with the online platform (for the purpose of this paper they will be called "workers" or "virtual workers") could be in an unclear situation. The question is do we consider them to be in a proper employer/employee relationship, or are these self-employed, independent contractors? And in addition, what criteria will help to distinguish if we are talking about dependent worker or independent contractor? And what should such criteria look like? Would it be possible to set up a definition of "dependent work" applicable for online platforms and say that such a definition should serve as grounds for an employment relationship within the online platform? And do virtual workers deserve a legal protection, ranging from a minimum wage and working time regulation to collective rights?

## 2.CROWD (VIRTUAL) WORK: RISKS AND ADVANTAGES

Crowd employment is an employment form that uses an online platform to enable organisations or individuals to access an indefinite and unknown group of other organisations or individuals to solve specific problems or to provide specific services or products in exchange for payment.<sup>11</sup> Also known as crowd sourcing<sup>12</sup>, crowd work or virtual work, it is a new form of organising the outsourcing of tasks, and what would normally be delegated to a single employee, is now delegated to a large pool of "virtual employees".<sup>13</sup> It is based on individual tasks or projects rather than on a continuous employment relationship. A larger task is usually divided up into smaller subtasks that are independent, homogenous and produce a specific output. Stable workforces are being replaced by networked "crowds". New platforms for online work allow firms to connect with

<sup>11</sup> Green, A., de Hoyos, M., Barnes, S. (2013) *Exploratory research on Internet-enabled work exchanges and employability: Analysis and synthesis of qualitative evidence on crowdsourcing for work, funding and volunteers*. JRC Scientific and Policy Report. European Commission. p. 5. Available from: <https://publications.jrc.ec.europa.eu/repository/bitstream/JRC85646/jrc85646.pdf>. [Accessed 04 May 2021].

<sup>12</sup> Crowdsourcing is also sometimes understood to include volunteer-based, non-paid work such as editing material for Wikipedia or involvement in an open-source innovation movement developing community-based software such as Linux (Wexler, 2011).

<sup>13</sup> Saxton, G., Oh, O., Kishore, R. (2013) Rules of Crowdsourcing: Models, Issues, and System of Control, *Information System Management*, p. 3. Available from: [file:///C:/Users/S7FX6B/OneDrive%20-%20Swiss%20Reinsurance%20Company%20Ltd/TU/DIZER%20MATERIAL/Saxton\\_Rules%20of%20crowdsourcing.pdf](file:///C:/Users/S7FX6B/OneDrive%20-%20Swiss%20Reinsurance%20Company%20Ltd/TU/DIZER%20MATERIAL/Saxton_Rules%20of%20crowdsourcing.pdf). [Accessed 03 June 2021]. See also: Eurofound (2015) *New forms of employment*. Publications Office of the European Union. Available from: [https://www.eurofound.europa.eu/sites/default/files/ef\\_publication/field\\_ef\\_document/ef1461en.pdf](https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1461en.pdf). [Accessed 03 June 2021].

enormous numbers of prospective labourers and to distribute tasks to an amorphous collection of individuals, all sitting in front of computer screens or their mobile phones.<sup>14</sup>

Unlike traditional employment, which involves a one-to-many relationship between employer and employees, crowd work is characterized by many-to-many connections, with some connections lasting as little as a minute or two.<sup>15</sup>

There are several questions when it comes to the virtual or crowd work; what constitutes an employment relationship in such an environment? Can a worker genuinely operate as an independent contractor? What responsibilities, if any, are attached to the companies that develop, promote, and run crowdsourcing platforms?<sup>16</sup>

To the first question, companies and workers select each other in a global or local open space for sourcing contract work. The online platforms challenge traditional business models and undermine the common structure of the "employer-employee" scheme.<sup>17</sup>

For the second questions, i.e., if a worker can actually operate as an independent contractor, it could be argued that the level of flexibility, which is usually given to the virtual workers, is more significant for independent contractors than for traditional employees. But could this freedom of choice be the main condition? As described by Todolí-Signes a self-employed worker is a person who works directly for the market, i.e., someone who offers his/her services to one or more companies without becoming part of them. Self-employed people are owners of their own organisation and have the independence needed to choose whether to accept the risk.<sup>18</sup> In many cases (or maybe in most of the cases) the virtual

---

<sup>14</sup> Felstiner, A. (2011) Working the Crowd: Employment and Labor Law in the Crowdsourcing Industry. *Berkeley Journal of Employment and Labor Law*, Vol. 32, No. 1, p. 145. Available from: <https://ssrn.com/abstract=1593853>. [Accessed 06 May 2021].

<sup>15</sup> *Ibidem*.

<sup>16</sup> Cherry, M. (2009) Working for (Virtually) Minimum Wage: Applying the Fair Labor Standards Act in Cyberspace. *Alabama Law Review*, Volume 60, N. 5. Available from: [https://www.researchgate.net/publication/228136183\\_Working\\_for\\_Virtually\\_Minimum\\_Wage\\_Applying\\_the\\_Fair\\_Labor\\_Standards\\_Act\\_in\\_Cyberspace](https://www.researchgate.net/publication/228136183_Working_for_Virtually_Minimum_Wage_Applying_the_Fair_Labor_Standards_Act_in_Cyberspace), [Accessed 13 April 2021] and Cherry, M. (2010) A Taxonomy of Virtual Work. *Georgia Law Review, Forthcoming*. Available online: <https://ssrn.com/abstract=1649055>. [Accessed 13 April 2021].

<sup>17</sup> Aloisi, A. (2016) Commoditized Workers. Case Study Research on Labor Law Issues Arising from a Set of "On-Demand/Gig/ Economy" Platforms. In *Comparative Labor Law & Policy Journal*, Vol. 37, No. 3., p. 655. Available from: <https://ssrn.com/abstract=2637485>. [Accessed 13 April 2021].

<sup>18</sup> Todolí-Signes, A. (2017) The "gig economy": employee, self-employed or the need for a special employment regulation? *European Review of Labour and Research*, p. 5. Available from: <https://ssrn.com/abstract=2900483>. [Accessed 11 May 2021].

workers will not be in a position to own the online platform they are working for or in a position to decide whether some risk will be accepted or not. Todolí-Signes argues that the new types of workers – working through an online platform, owning the tools and materials needed for the work, choosing when (schedule freedom), for how long (freedom of working hours) and whether to perform the work – would therefore seem to fit more into the self-employed category and less into a traditional employment relationship.<sup>19</sup>

The last question is related to the responsibility of the online platforms if in the position of the employer. While offering different services, the platform will accumulate large number of virtual workers, usually without giving specific instruction related to the working hours, but still having control over the working conditions and over the services provided (as Uber does). It is crucial to determine whether staff of the online platform somehow remain within the organisational field of a company and under its control. In the US and the UK, where the first conflicts have arisen, the literature and judicial rulings (Employment Tribunals case *Mr. Y Aslam vs Uber* case No. 22025502/2015) argue that these new companies are misclassifying their workers as self-employed.<sup>20</sup> Interestingly, in this case the court ruled that the drivers are classified as "workers" and not as "employees".<sup>21</sup>

When it comes to the structure of such relationship, we are talking about the tripartite structure consisting of vendors, firms (or companies) and workers. Vendors develop a platform upon which firms can broadcast their tasks, and workers can accept, perform and/or submit the work. As a condition of access to the platform and providing of the services, workers and firms usually must assent to an agreement, usually written and designed by the vendor. These agreements often bind participants to other terms of use separate from those governing the platform, including privacy policies and conduct requirements. The vendor generally serves as an intermediary, the worker hands over the work done and the firm pays the worker.<sup>22</sup> Although a huge number of workers are usually involved

<sup>19</sup> *Ibidem.*

<sup>20</sup> *Ibidem.*

<sup>21</sup> Davidov, G. (2005) Who is a worker? *Industrial Law Journal* 34(1). p. 8. Available from: <https://ssrn.com/abstract=783465>. [Accessed 13 April 2021].

<sup>22</sup> Felstiner, A. (2011) Working the Crowd: Employment and Labor Law in the Crowdsourcing Industry. *Berkeley Journal of Employment and Labor Law*. Vol. 32, No. 1., p. 148. Available from: <https://ssrn.com/abstract=1593853>. [Accessed 06 May 2021].

in the services provided through online platforms, most of the online platforms will introduce certain types of terms of use (or other types of the agreements) to specify, that such virtual workers are in the position of the independent contractors<sup>23</sup>. Under such conditions workers explicitly agree to perform tasks in their personal capacity as an independent contractor and not as an employee.<sup>24</sup> However, in most cases (Uber as an example) the reality might be different. The workers need to agree with the terms if they would like to provide services on the online platform. An independent contractor will usually have the power to decide over the work or services he/she is providing, will have direct contact with the market and will offer the services without being a part of a company. However, drivers working for Uber must meet and comply with various requirements set out in the terms, i.e., drivers are not allowed to share accounts (personal performance is requested), must provide services at a specific location, and must present various types of documents (e.g. driving license, insurance certificate, etc.). The ownership of the tools needed to provide the service is significant for the independent contractor. The drivers providing transportation services are owners of the cars used for the services offered through Uber, but Uber has the right to decide the makes and models of vehicles that are accepted based on a published list. Again, to follow such rule is not typical for the independent contractor. Therefore, in our view it will be not possible to agree with the argument that the terms and conditions of use of the online platform will be in a position to determine whether a worker is in the position of an employee or should be considered an independent worker.

The virtual work or crowdsourced work is dependent on the online environment and it seems to be particularly prevalent in industries or sectors related to cyberspace, such as web content, social media, software development or online advertising.<sup>25</sup> Anyway, this may not always be the case, as Uber, for example, provides transport services that are usually typical for the "offline" world.

---

<sup>23</sup> Amazon.com, Amazon Mechanical Turk Participation Agreement § 3a–e, Available from: <https://www.mturk.com/mturk/conditionsofuse>. [Accessed 06 May 2021].

<sup>24</sup> *Ibidem*.

<sup>25</sup> Felistiner, A. (2011) Working the Crowd: Employment and Labor Law in the Crowdsourcing Industry. *Berkeley Journal of Employment and Labor Law*, Vol. 32, No. 1. p. 150. Available from: <https://ssrn.com/abstract=1593853>. [Accessed 06 May 2021].



What are the benefits (for the employer and for the online platforms) when we talk about virtual work? One could potentially be the ability to pick and choose from the "crowd", meaning that there are number of potential workers ready to perform the task according to the customer's (or potentially the online platform's) requirements, rather than hiring an employee. While using a freelancer instead of an employee, an online platform can benefit from the additional costs of creating a permanent position or meeting all the conditions under the employment law – virtual working can bring significant flexibility and lower costs. Further, virtual workers will be not able to claim additional benefits, paid leave, or guaranteed pay. On the other hand, the virtual employer does not need to worry about safe and secure workspace, people's management or procurement of working equipment.

Felstiner also highlights that employers can enter and exit crowdsourcing venues at their whim, without any significant transaction costs or logistical hurdles. They can also use the constant availability of global labour pool to avoid the delays commonly associated with identifying and vetting outside contractors.<sup>26</sup>

When we talk about employment and the relationship between employee and employer, one of the terms describing such a relationship is one of dependency. Dependent employment can be defined as superiority of the employer and subordination of the employee, in the employee's personal capacity, whereby the employee follows employer's instruction and at time and in the manner as determined by the employer.

Poor quality of work can be a problem due to the specifics of virtual work – for example, an anonymous pool, unexpected results, lack of control or insufficient qualification constraints in defining tasks.<sup>27</sup>

From the worker's perspective, working as a crowd worker could bring different opportunities; a worker could easily decide to start (and in turn quit) different types of tasks for different online platforms. With this in mind, the freedom of choice will be one of the main advantages of working as a crowd worker; freedom to decide when, for how long and what kind of tasks one chooses to perform. In terms of equipment, usually not much is needed – a headset, computer or phone and internet connection

<sup>26</sup> Felstiner, A. (2011) Working the Crowd: Employment and Labor Law in the Crowdsourcing Industry. In *Berkeley Journal of Employment and Labor Law*, Vol. 32, No. 1. p. 152. Available from: <https://ssrn.com/abstract=1593853>. [Accessed 06 May 2021].

<sup>27</sup> *Ibidem*.

can be quite sufficient. Of course, if we are talking about Uber as an example, there will be other requirements in scope – e.g., driving license and own car will be a must in this case.

Interesting findings were noted by Felstiner and Howe, with one of these findings being the benefits of crowdsourcing on personal productivity. Crowdsourcing<sup>28</sup> promises to turn our "spare cycles"<sup>29</sup> (periods when the brain is working but not producing anything of value – into productive time, instead of wasting time on social media, playing online games, or surfing the internet, AMT engages you in work tagging photos. Without such platforms, how would a person be able to monetize the stray ten-minute intervals that pop up throughout the day? A single employer would not hire an hourly employee for these time periods. But thanks to crowdsourcing, every waiting room and bus stop becomes a temporary workspace.<sup>30</sup>

Zittrain argued, that because working assignments can change from minute to minute, the workers do not develop any particular sense of belonging to an employer, and do not gain a sense of the larger enterprise for which they have been asked to take just one small step.<sup>31</sup> We agree with these arguments as we conclude that there is a relationship between employer and employee built on tasks and goals that are established by employer and fulfilled by the employee. In many cases, employees are proud to work for particular employer or feel part of the company, being involved in major projects or strategic decisions. Sometimes, even when individuals within the same team are located in different geographic locations with a clear goal, there can be a strong team spirit and a satisfied sense of the employee being part of a team. It is important for the well-

---

<sup>28</sup> One of the definitions of the Crowdsourcing (as defined by Hargrave) is that "Crowdsourcing involves obtaining work, information, or options from a large group of people who submit their data via the Internet, social media, and smartphone apps. People involved in crowdsourcing sometimes work as paid freelancers, while others perform small tasks on a voluntary basis. For example, traffic apps encourage drivers to report accidents and other roadway incidents to provide real-time updated information to app users". See also Hargrave, M. (2019) *Crowdsourcing*. Available from: <https://www.investopedia.com/terms/c/crowdsourcing.asp>. [Accessed 07 May 2021].

<sup>29</sup> "Spare cycles" means unused or unclaimed human capacity. Originally unused computer capacity made available for collaborative projects. Available from: <http://onlineslangdictionary.com/meaning-definition-of/spare-cycles>.

<sup>30</sup> Felstiner, A. (2011) Working the Crowd: Employment and Labor Law in the Crowdsourcing Industry. In *Berkeley Journal of Employment and Labor Law*, Vol. 32, No. 1. p. 155. Available from: <https://ssrn.com/abstract=159385>. [Accessed 06 May 2021].

<sup>31</sup> Zittrain, J. (2008) Ubiquitous Human Computing, In *Legal Research Paper Series No. 32/2008*, Oxford: University of Oxford, p. 5. Available from: <http://ssrn.com/abstract=1140445>. [Accessed 08 May 2021].

being of employees that they are motivated, engaged and rewarded. Lack of these factors leads to high turnover and negative feelings. When delivering services through online platforms, virtual workers might not feel engaged because they are working on a few and quite specific issues. Working with a mass of people, who don't know each other and have no real colleagues could make you feel like you don't belong somewhere as an employee.

### 3. CAN UBER BE AN EMPLOYER?

While trying to answer the question how dependent work should be defined in the online world, we've chosen Uber as an example to help with such a definition.

Uber is the name of an electronic platform developed by Uber Technologies, with its principal place of business in San Francisco. In the EU Uber is managed by Uber BV, company governed by Netherlands law.

Uber allows the users to order the transport within the city. The app recognises the user's location and finds available drivers who are nearby. When a driver accepts a ride, the application notifies the user and displays the driver's profile along with an estimated price for the trip to the destination specified by the user. Once the trip is completed, the fare is automatically withdrawn from the bank card that the user must enter when registering with the app. The app also includes a rating feature that allows drivers to rate passengers and passengers to rate drivers. The transportation services offered by the Uber platform are divided into different categories depending on the quality of the drivers and the type of vehicle.<sup>32</sup> Uber represent a specific offline crowd sourcing work where Uber owns a virtual platform on which the user can get urban transportation.

Uber's activities bring new challenges and questions. On the one hand, it brings the new activities and opportunities to travel within the city, on the other hand, it brings concerns in terms of labour law and unfair competition.

Uber's operation is simple. Users download the Uber app for free. When user wants to use the transport service, they can use the app to find the closest driver. Uber does not employ drivers or own any vehicles – Uber

---

<sup>32</sup> Opinion of Advocate General Szpunar delivered on 11 May 2017, C-434/15 *Asociación Profesional Elite Taxi vs. Uber System Spain SL*.

expects its participating drivers to own the vehicles. Depending on the city, drivers may be tested on their geographic knowledge of the city and may be interviewed by an Uber employee. A driver's vehicle must be no more than 10 years old. The price of the service is not negotiable but is set by Uber. Tipping is prohibited and Uber takes 10 to 20 % of the price. The driver must pay all costs – taxes, insurance, petrol, vignette, etc. Further, drivers can refuse rides, but Uber expect the driver to accept all assignment.<sup>33</sup> It follows that, although drivers are given a great deal of freedom, Uber has considerable control over the terms and conditions of the services provided through Uber platform. It tells drivers what to do and how to provide the service. Such behaviour (i.e., setting the rules and control) is more characteristic for the employee-employer relationship.

Uber can deactivate the drivers account<sup>34</sup>, which shows that Uber has control over the services it provides, as it is not possible to offer and provide the driving activities without an account.

If we look at the online platforms, can we say that they actually offer additional job markets and easy entry for service providers (such as drivers "working" for Uber)? Or, on the contrary, are large online platforms reducing job stability and undermining worker's rights?

As Pasquale argues<sup>35</sup> the "peer economy" of platform-ordered production will break down old hierarchies. Gig workers will be able to knit Etsy scarves in the morning, drive Uber cars in the afternoon, and write Facebook comments at nights, flexibly moving between work and leisure at will.

One digital job placement platform, Amazon's Mechanical Turk (MTurk)<sup>36</sup>, allowed buyers of "human intelligence tasks" to pay next to nothing for the work – resulting in effective remuneration well below the minimum wages.<sup>37</sup>

---

<sup>33</sup> Todoli-Signes, A. (2017) The "gig economy": employee, self-employed or the need for a special employment regulation? *European Review of Labour and Research*, p. 3. Available from: <https://ssrn.com/abstract=2900483>. [Accessed 06 May 2021].

<sup>34</sup> Huet, E. (2014) *Uber Deactivated A Driver For Tweeting A Negative Story About Uber*, Forbes, Available from: <http://www.forbes.com/sites/ellenhuet/2014/10/16/uber-driver-deactivated-over-tweet/#545e7b8a36c8>. [Accessed 06 May 2021]. See also Uber. (2020) *Uber Terms and Conditions*. Available from: [www.uber.com/legal/usa/terms](http://www.uber.com/legal/usa/terms). [Accessed 06 May 2021].

<sup>35</sup> Pasquale, F. (2016) Two Narratives of Platform Capitalism. *35 Yale Law & Policy Review* 309. University of Maryland, Francis King Carey School of Law, p. 313. Available from: Two Narratives of Platform Capitalism by Frank A. Pasquale :: SSRN. [Accessed 08 May 2021].

<sup>36</sup> Amazon Mechanical Turk. Available from: <https://perma.cc/FFU8-7VAR>. [Accessed 08 May 2021].

Crawford<sup>36</sup> places similar emphasis on new digital platforms as it does on large telecommunication firms failing to meet their social obligations as utilities. Crawford fears that Uber will quickly monopolize urban transport services while avoiding regulation and taxes. While it may offer a good term to many drivers and passengers now, there is no guarantee that it will continue to do so in the future. Crawford goes on to argue that when it comes to the urban transport and communication networks, it is more important to serve everyone fairly at a high level – including drivers – than to allow one company to make huge profits from a substitute basic private service.<sup>38</sup>

#### 4. COURT DECISIONS

Recently, the Swiss court upheld Uber's status as employer when the court in the canton Vaud upheld a previous ruling that a former Uber driver was an employee of the ridesharing company, not an independent contractor, and that the man had lost his job unfairly. In a verdict published in October 2020, the judges of the cantonal Court of Appeal said the man had been dismissed "unjustly" and that he should have the same right as a taxi driver who has a contract with a cab company. The driver worked for a subsidiary of Uber, and his account was deactivated in late 2016 due to complaints against him as a driver, prompting him to take legal action.<sup>39</sup>

According to the driver's lawyer, this is the first time in Switzerland that a cantonal court, ruling as an appellate authority, has ruled that the Uber Group must behave like an employer.<sup>40</sup>

This decision follows a June court ruling in neighbouring canton Geneva, when judges ruled that the food delivery service Uber Eats is an employer and has a duty to employ its drivers, classifying Uber Eats as a staffing agency. Like Uber offering transportation services, Uber Eats employees can choose when to work and are paid a delivery wage.<sup>41</sup> Uber

<sup>37</sup> Pasquale, F. (2016) Two Narratives of Platform Capitalism. In *35 Yale Law & Policy Review* 309. University of Maryland, Francis King Carey School of Law, p. 313. Available from: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3002529](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3002529). [Accessed 06 May 2021].

<sup>38</sup> Crawford, S. (2015) *Getting over Uber*, Backchannel. Available online: <https://perma.cc/VV7A-KZYA>. [Accessed 22 December 2020].

<sup>39</sup> *SWI Workplace Switzerland*. (2020) Swiss court confirms Uber status as "employer". 16 September 2020. Available from: <https://www.swissinfo.ch/eng/business/swiss-court-confirms-uber-status-as--employer-/46036976>. [Accessed 13 May 2021].

<sup>40</sup> *Ibidem*.

<sup>41</sup> *SWI Workplace Switzerland*. (2020) Uber Eats suffers setback in Geneva court ruling. 11 June 2020, Available online: [https://www.swissinfo.ch/eng/business/legal-responsibilities\\_uber-eats-suffers-setback-in-geneva-court-ruling/45828814](https://www.swissinfo.ch/eng/business/legal-responsibilities_uber-eats-suffers-setback-in-geneva-court-ruling/45828814). [Accessed 13 May 2021].

Eats, on the other hand, claims that it does not consider itself an employer, as couriers are completely free to decide when, how often and for how long to use Uber Eats app, and whether they want to perform other activities.<sup>42</sup>

Similar cases have been referred to the European Court of Justice. In one of them (Uber Spain C-434/15) the question was raised whether Uber's activities violated the law and could be considered as "unfair practice". As regards the regulatory acts (following questions referred to the ECJ concerning the qualification of the services provided by Uber) that could potentially apply to Uber's services, the court was considering if the Directive 2000/31/ES and Directive 2006/123/ES could apply in this case.<sup>43</sup>

However, as far as the status of the drivers is concerned, in Uber's view, they are seen more as independent contractors who own their own car to provide the transport services, as Uber likes to claim. Or is it Uber's employees who are entitled to benefits, overtime pay and collective bargaining?<sup>44</sup>

In its contract, Uber defines drivers as "partners", not employees. Uber claims to provide "business opportunities" to drivers and refers to itself as a "technology company" or a "platform", not a transportation company.<sup>45</sup> Uber views its business as a "service" (referring to the Directive 2015/1535) i.e., any Information Society service, provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of service.

In Uber Spain C-434/15 the Court addressed the question whether Uber should be considered as an intermediary or rather a provider of transport services. Although Uber is an online platform, the actual service it offers to customers is a transport service. The main conclusion is that Uber is a transport service (like a taxi service) and not just an online platform that offers the possibility to find, book and pay for the transport service. Uber controls the essential parts of the transport service; it connects non-

---

<sup>42</sup> *SWI Workplace Switzerland*. (2020) Uber Eats suffers setback in Geneva court ruling. 11 June 2020, Available online: [https://www.swissinfo.ch/eng/business/legal-responsibilities\\_uber-eats-suffers-setback-in-geneva-court-ruling/45828814](https://www.swissinfo.ch/eng/business/legal-responsibilities_uber-eats-suffers-setback-in-geneva-court-ruling/45828814). [Accessed 13 May 2021].

<sup>43</sup> Križan, V. (2017) Uber v rozhodovacej činnosti orgánov aplikácie práva. *Pracovné právo v digitálnej dobe*. Praha: Leges, p. 114.

<sup>44</sup> *Forbes*. (2017) Are Uber Drivers Employees? The Answer Will Shape The Sharing Economy. 15 November 2017. Available from: <https://www.forbes.com/sites/omribenshahar/2017/11/15/are-uber-drivers-employees-the-answer-will-shape-the-sharing-economy/#39cedc815e55>. [13 May 2021].

<sup>45</sup> *Ibidem*.

-professional drivers with passengers, sets the rules applicable to drivers and passengers, limits on the types of vehicles used for the transport service etc.<sup>46</sup>

To provide transportation services through the Uber app, the driver must have a vehicle suitable for the services and meet the conditions required by Uber (vehicle age or recommended colour).

Uber does not set fixed working hours. On the other hand, Uber provides financial rewards to those who have a high number of city trips and informs drivers of times and locations where drivers can count on a higher number of city trips and/or preferential fares.<sup>47</sup>

As mentioned earlier, the Uber app includes a rating feature, that allows drivers to rate passengers and vice versa. Uber thus exercises control, albeit indirect, over the quality of the services provided by drivers. In addition, Uber sets the price of the service provided. Although Uber's representatives have argued that drivers are in principle free to ask for a lower price than that quoted by the app, such an option does not appear to be feasible.<sup>48</sup>

Uber thus exercises control over all relevant aspects of an urban transport service: over the price, but also over the minimum safety conditions through up-front requirements for drivers and vehicles, over the availability of transport, over the offer to encourage drivers to work when and where demand is high, over the behaviour of drivers through a ratings system and, finally, over possible exclusion from the platform.<sup>49</sup>

Indirect management such as that practiced by Uber, based on financial incentives, and decentralised evaluation by drivers with economic scale, allows for management that is as effective, if not more effective, than management based on formal orders issued by the employer to its employees and on direct control of compliance with those order.<sup>50</sup>

Uber's core business involves the single provision of transport in a vehicle that is located and booked through smartphone app and that this service is provided (the classification of the relationship between Uber and its drivers being a matter of national law), by Uber or on its behalf.

<sup>46</sup> Barancová, H. (2017). *Nové technológie v pracovnoprávných vzťahoch*. Praha: Leges, p. 29.

<sup>47</sup> Barancová, H. (2017). *Nové technológie v pracovnoprávných vzťahoch*. Praha: Leges, p. 30.

<sup>48</sup> Opinion of Advocate General Szpunar delivered on 11 May 2017 in C-434/15. paragraphs 49-50.

<sup>49</sup> Opinion of Advocate General Szpunar delivered on 11 May 2017 in C-434/15. paragraph 51.

<sup>50</sup> Opinion of Advocate General Szpunar delivered on 11 May 2017 in C-434/15. Paragraphs 53-54.

The quality of the transport shall be ensured by Uber. However, such a finding does not necessarily mean that Uber's drivers are to be regarded as Uber's employees, as the company may provide its services through independent traders acting on its behalf as subcontractors.<sup>51</sup>

Taking all the already mentioned points into account, Uber is not just an intermediary between drivers and passengers. On the contrary, Uber is a true organiser and operator of urban transport services. Within this service, Uber drivers can only find passengers through the Uber app, and the app only allows you to find drivers working on the platform. One service is therefore inseparable from the other and together they form one service.<sup>52</sup>

Based on the abovementioned ruling of the Case C-434/15 we believe that Uber should be considered an employer as it has overall control over the transportation services offered through Uber app.

As regards the status quo of drivers, these issues have been raised in United States of America, in Great Britain and Northern Ireland.

The London Employment Tribunal ruling in relation to Uber concerns drivers working for the Uber taxi platform. The Employment Tribunal ruled that the drivers are entitled to the most basic worker's rights, including the right to the national minimum wage and paid holiday, which were previously denied to them.<sup>53</sup> This ground-breaking decision will affect not only thousands of Uber drivers working in this country, but also all workers in the so-called gig economy who are misclassified by their employers as self-employed and denied the rights to which they are entitled.<sup>54</sup>

In another legal case, in June 2015, the Labour Inspectorate of Catalonia ruled that Uber's drivers were employees. The Inspectorate gave several reasons for this, including:

The company provided drivers with smartphones so that they could carry out their professional activity.

An "incentives system" offered by Uber was based on drivers' productivity.

---

<sup>51</sup> Opinion of Advocate General Szpunar delivered on 11 May 2017 in C-434/15. paragraph 52.

<sup>52</sup> Opinion of Advocate General Szpunar delivered on 11 May 2017 in C-434/15. paragraph 63.

<sup>53</sup> This decision of the Employment Tribunal was later affirmed by the Court of Appeal, as we will show later.

<sup>54</sup> Labour Market Notes. (2017) *Irish Congress of Trade Unions*. Issue 7, Spring 2017. Available from: [https://www.ictu.ie/download/pdf/lmn\\_issue\\_7.pdf](https://www.ictu.ie/download/pdf/lmn_issue_7.pdf). [Accessed 13 May 2021].



*It gave assurances to drivers that it would intervene if they experience any issues with courts or police.*<sup>55</sup>

Returning to the UK legal case<sup>56</sup> – *Employment Tribunals case Mr. Y. Aslam vs Uber, No. 2202550/2015*, the tribunal argued that there is no prohibition on "inactive" drivers, i.e., the drivers are under no obligation to turn on the Uber app. However, if the app is turned on, the court concluded that any driver who (a) has the application turned on, (b) is in the territory in which he or she is authorised to work, and (c) is able and willing to accept assignments, so long as those conditions are met, is working for Uber under a "worker" contract. As the decision further notes, in promotional materials and correspondence, individuals speaking on behalf of Uber frequently used language that included terms like "Uber drivers" or "our drivers".<sup>57</sup>

The UK Supreme Court recently dismissed an appeal by Uber BV following an earlier Employment Tribunal decision. The Court again addressed an issue relating to the legal status of the drivers, i.e. whether they should be considered as workers (entitled to the special rights) or rather as self-employed.

As stated in the UK Supreme Court decision, there are three employment categories under UK law: employees who are guaranteed employment rights and benefits, workers, who enjoy some of these rights, and the self-employed workers who have very little protection. The Supreme Court has moved the Uber's drivers from self-employed to the second category.<sup>58</sup>

In comparison with the Slovak legal acts<sup>59</sup>, we can only speak of two categories: employees with the guaranteed rights and self-employed persons.

The "transfer" of drivers into the category of workers (in UK), or the introduction such a category in other countries (e.g. Slovakia) will

<sup>55</sup> Labour Market Notes. (2017) *Irish Congress of Trade Unions*. Issue 7, Spring 2017. Available online: [https://www.ictu.ie/download/pdf/lmn\\_issue\\_7.pdf](https://www.ictu.ie/download/pdf/lmn_issue_7.pdf). [Accessed 13 May 2021].

<sup>56</sup> Mr. Y. Aslam vs Uber (2015) No. 2202550/2015, Available from: <https://www.judiciary.uk/wp-content/uploads/2016/10/aslam-and-farrar-v-uber-reasons-20161028.pdf>. [Accessed 13 May 2021].

<sup>57</sup> *Ibidem*.

<sup>58</sup> Naughton, J. (2021) Uber's UK supreme court defeat should mean big changes to the gig economy. *The Guardian*. 27 February 2021. Available from: <https://www.theguardian.com/commentisfree/2021/feb/27/ubers-uk-supreme-court-defeat-should-mean-big-changes-to-the-gig-economy>. [Accessed 13 May 2021].

<sup>59</sup> Act No. 311/2001 Slovak Labour Law Coll. (Zákonník práce) Articles 11 – 14, and Act No. 455/1991 Coll. On small business activity (Trade Licensing Act) (Živnostenský zákon).

certainly have an impact on Uber's future business; possibly Uber will try to compensate for higher cost with the higher prices.

In the meantime, Uber has decided to introduce "Proposition 22" in California; Uber paid \$200 million to successfully support Proposition 22<sup>60</sup>, a measure that allows it to continue classify its drivers as "independent contractor" rather than "employees" with mandatory benefits.

As Uber has stated, it is difficult to both offer flexible work opportunities and provide benefits as "regular" employer. Based on a recent UK Supreme Court decision, it appears that, in the UK at least, this question has been answered<sup>61</sup>.

The principal issue on appeal to the UK Supreme Court is whether an Employment Tribunal was entitled to find that drivers whose work is brokered through Uber smartphone app are working for Uber under worker's contract and are therefore entitled to the national minimum wage, paid annual leave and other employee rights or whether, as Uber contends, the drivers do not have those rights because they work for themselves as independent contractors who perform services under the contracts with passengers through Uber as their booking agent.<sup>62</sup>

Where drivers work for Uber under an employment contract, a further question arises as to whether the Employment Tribunal was entitled to find that the drivers who brought these claims were working under such contracts whenever they were logged into the Uber app in the territory in which they were licensed to operate and were prepared to accept journeys, or whether, as Uber contends, they were only working when they were taking passengers to their destinations.<sup>63</sup> The UK Supreme Court upheld the conclusion of the Employment Appeal Tribunal and the majority of the Court of Appeal that the Employment Tribunal was entitled to decide both issues in favour of the claimants.

As described earlier in this article, Uber's service delivery model is simple; potential customers download the Uber app, create an account, and

---

<sup>60</sup> Wikipedia. (2020) *California Proposition 22*. 3 November 2020. Available online: [https://en.wikipedia.org/wiki/2020\\_California\\_Proposition\\_22](https://en.wikipedia.org/wiki/2020_California_Proposition_22). [Accessed 13 May 2021].

<sup>61</sup> Naughton, J. (2021) Uber's UK supreme court defeat should mean big changes to the gig economy. *The Guardian*. 27 February 2021. p. 4. Available from: <https://www.theguardian.com/commentisfree/2021/feb/27/ubers-uk-supreme-court-defeat-should-mean-big-changes-to-the-gig-economy>. [Accessed 13 May 2021].

<sup>62</sup> *Uber BV and others v. Aslam and others* (2018). No. EWCA Civ 2748, paragraph 1. Available from: <https://www.supremecourt.uk/cases/uksc-2019-0029.html>. [Accessed 13 May 2021].

<sup>63</sup> *Ibidem*.

add their credit card payment details. When they request a ride, the Uber app identifies the passenger's location and pair them with the nearest driver.

At this stage, the driver learns the passenger's name and Uber's rating and has to decide whether to accept the request. When the driver accepts the request, the ride is assigned and the booking is confirmed to the passenger.<sup>64</sup>

It is important to note (and it was also highlighted in the European Court of Justice decision C-434/15), that the Uber app is the only communication channel used by the driver and the passenger to arrange the journey. We consider that Uber (and Uber app) plays an essential role in the transport services provided by the drivers through such application.

The payment is made by withdrawing funds from passenger's credit or debit card registered in the Uber app. Drivers can accept payment in a lower but not a higher amount calculated by the app. Further, drivers may accept tips, but Uber does not recommend asking them.<sup>65</sup>

Such a condition for the provision of transport services demonstrates Uber's control over the transport provided, as well as the power to decide on the price of the services.

Uber pays the driver on a weekly basis the amounts paid by passengers for rides taken by the driver, less a "service fee" retained by Uber.<sup>66</sup>

To become an Uber driver, you need to follow certain procedure; you need to provide documents such as a driver's license, insurance certificate, logbook etc. In addition, the applicant must attend an interview, which the Employment Tribunal described as "an interview, albeit not a search interview" and watch a video presentation about the Uber app and a procedure.<sup>67</sup> Such a procedure could easily remind us of a job interview when an applicant is applying for a job.

In terms of working conditions, drivers who choose to provide transport services sign up the Uber app; needless to say, signing up to the app is

<sup>64</sup> Uber BV and others v. Aslam and others (2018). No. EWCA Civ 2748, paragraph 6 Available from: <https://www.supremecourt.uk/cases/uksc-2019-0029.html>. [Accessed 13 May 2021].

<sup>65</sup> Uber BV and others v. Aslam and others (2018). No. EWCA Civ 2748, paragraph 9. Available from: <https://www.supremecourt.uk/cases/uksc-2019-0029.html>. [Accessed 13 May 2021].

<sup>66</sup> *Ibidem*.

<sup>67</sup> Uber BV and others v. Aslam and others (2018). No. EWCA Civ 2748, paragraph 14. Available from: <https://www.supremecourt.uk/cases/uksc-2019-0029.html>. [Accessed 13 May 2021].

essential to provide the service. Access to the app is free for the drivers, but they must have a smartphone or rent one from Uber for a small fee. Drivers pay for their own vehicles (including fuel, insurance, and road tax), while such vehicles must be no older than a certain age and preferably silver or black.<sup>68</sup>

Although such an arrangement is not typical for the employee-employer relationship (where the employer is usually obliged to provide all the equipment necessary for the employee's work), it does not prove that the ride should be considered as an independent service provided; we believe that an independent service provider will have much more discretion as to the selection of the vehicle, including the type and colour.

As mentioned by the Employment Tribunal<sup>69</sup>, there are many given standards of performance which drivers are expected to fulfil. Uber's "Welcome Packet" contains a numerous of guidelines for new drivers, such as courteous conversation, professional behaviour, etc.<sup>70</sup>

In addition, drivers whose acceptance rate for ride requests falls below a certain level – 80% according to evidence before tribunal – receive warning messages reminding them that signing up to the Uber app is an indication that the driver is willing and able to accept ride requests. If the number of requests accepted does not improve, the warnings escalate, culminating in the driver being automatically logged out of the Uber app for ten minutes if the driver refuses three trips in a row. Further, the driver ratings from passengers are also monitored, and the employment tribunal found that drivers who have made 200 or more trips and whose average rating is below 4.4 are subject to a graduated series of "quality interventions" designated to help them improve. If their rating does not improve to an average of 4.4 or better, they are "removed from the platform" and their accounts are "deactivated".<sup>71</sup>

---

<sup>68</sup> Uber BV and others v. Aslam and others (2018). No. EWCA Civ 2748, paragraph 15. Available from: <https://www.supremecourt.uk/cases/uksc-2019-0029.html>. [Accessed 13 May 2021].

<sup>69</sup> Mr. Y. Aslam vs Uber (2015). No. 2202550/2015, Available from: <https://www.judiciary.uk/wp-content/uploads/2016/10/aslam-and-farrar-v-uber-reasons-20161028.pdf>. [Accessed 13 May 2021].

<sup>70</sup> For example, the "Welcome Packet" under heading "What Uber looks for" stated: High Acceptance Rate: *"Going on duty means you are willing and able to accept trip requests. Rejecting too many requests leads to rider confusion about availability. You should be off duty if no table to take requests."*

<sup>71</sup> Uber BV and others v. Aslam and others (2018). No. EWCA Civ 2748, paragraph 18. Available from: <https://www.supremecourt.uk/cases/uksc-2019-0029.html>. [Accessed 13 May 2021].

Such activities do not demonstrate Uber's position as an "independent platform acting as an intermediary"; we believe it demonstrates Uber's control and the power to make decisions about the activities of drivers in urban transport.

In addition, we need to consider the contractual relationships between Uber, drivers, and customers. Before drivers begin providing transportation services, they must sign a "partner registration form" stating that they agree to be bound by and abide by the terms and conditions described as "Partner Terms" (date 1 July 2013). Later (in October 2015), a new "Service Agreement" was introduced to which drivers had to electronically agree before they could again log into the Uber app and accept trip requests.<sup>72</sup>

This Service Agreement is formulated as a legal agreement between Uber and "an independent company in the business of providing transportation services", referred to as "Customer". Later on, it is expected, that "Customer" will enter into a contract with each driver in the form of an accompanying "Driver Addendum". Such a condition will be inappropriate for most drivers operating as private individuals.<sup>73</sup>

There is an additional relationship between Uber and passengers (the "Rider Terms") that passengers must accept in order to use the Uber app. Under the Rider Terms, Uber claims to act only as an intermediary between passengers and drivers (it calls them "Transportation Provider").<sup>74</sup>

Depending on the jurisdiction, employees' rights are regulated in different laws; for example, in Slovakia, the Labour Law Act includes basic rights relating to payment of the basic wages, health and safety at work, the right to rest as well as the right to fair working conditions.

In Uber, the claimants sought the following rights: rights under the National Minimum Wage Act 1998 and related regulations to be paid at least the minimum wage for work performed; right under the Working Time Regulation 1998, which include the right to paid annual leave; and in the case of two claimants, one of whom is Mr Aslam, the right under

---

<sup>72</sup> *Ibidem*.

<sup>73</sup> Uber BV and others v. Aslam and others (2018). No. EWCA Civ 2748, paragraph 23. Available from: <https://www.supremecourt.uk/cases/uksc-2019-0029.html>. [Accessed 13 May 2021].

<sup>74</sup> Uber BV and others v. Aslam and others (2018). No. EWCA Civ 2748, paragraph 27. Available from: <https://www.supremecourt.uk/cases/uksc-2019-0029.html>. [Accessed 13 May 2021].

the Employment Rights Act 1996 not to be treated unfavourably on the basis that they had made a protected disclosure ("whistleblowing").<sup>75</sup>

When considering the rights of the Ubers drivers (or any other virtual workers providing their work through an online platform), one of the questions was about the status of "worker", i.e., who should be considered a worker.

The term "worker" is defined in section 230(3) of the Employment Rights Act 1996.<sup>76</sup> In a previous case (decided by the Employment Tribunal), it was held that the claimants (Uber drivers) were workers, although not employed under a contract of employment, but working for Uber London under a "workers' contract" within the meaning of paragraph (b) of the statutory definition<sup>77</sup>. The Tribunal further decided that for the purposes of the relevant legislation, the claimants were working for Uber London during any period when a claimant (a) had the Uber app switched on, (b) was in the territory in which he was authorised to work, and (c) was able and willing to accept assignments.

Subparagraph (b)<sup>78</sup> of the statutory definition of a "worker's contract" has three elements: (1) a contract by which an individual agrees to perform work or render services for the other party; (2) a commitment to perform or render the services personally; and (3) a requirement that the other party to the contract not be a client or customer of any occupation or business enterprise carried on by the individual.<sup>79</sup>

The crucial question is whether the drivers are to be regarded as working under contracts with Uber London under which they undertook

---

<sup>75</sup> Uber BV and others v. Aslam and others (2018). No. EWCA Civ 2748, paragraph 71. Available from: <https://www.supremecourt.uk/cases/uksc-2019-0029.html>. [Accessed 13 May 2021].

<sup>76</sup> Worker under Employment Rights Act 1996 is defined as: "*an individual who has entered into or works under (or, where the employment has ceased, worked under); a) a contract of employment, or b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker's contract shall be construed accordingly.*"

<sup>77</sup> Uber BV and others v. Aslam and others (2018). No. EWCA Civ 2748, paragraph 112. Available from: <https://www.supremecourt.uk/cases/uksc-2019-0029.html>. [Accessed 13 May 2021].

<sup>78</sup> Uber BV and others v. Aslam and others (2018). No. EWCA Civ 2748, paragraph 41. Available from: <https://www.supremecourt.uk/cases/uksc-2019-0029.html>. [Accessed 13 May 2021].

<sup>79</sup> Uber BV and others v. Aslam and others (2018). No. EWCA Civ 2748, paragraph 41. Available from: <https://www.supremecourt.uk/cases/uksc-2019-0029.html>. [Accessed 13 May 2021].

to perform services for Uber London; or whether, as Uber submits, they are to be regarded as providing services solely for and on the basis of contracts entered into with passengers through Uber London.<sup>80</sup>

Following the decision of Employment Tribunal and UK Supreme Court, this question seems to have been answered, at least as far as the UK is concerned. Although the UK Supreme Court did not "classify" the Uber drivers as employees, it did move them into the category of workers with certain guaranteed rights. The UK Supreme Court also nicely described the subordination and dependency of drivers on Uber (particularly in relation to pricing, non-negotiable contracts, penalties for cancelled ride requests, control over how drivers provide their services, limited communication between passenger and driver etc.). On these facts, UK Supreme Court seen that the transport services performed by drivers and offered to passengers through the Uber app is very narrowly defined and controlled by Uber.<sup>81</sup>

Uber provides its activities in many jurisdictions. It will be interesting to see whether (and how) the UK Supreme Court decision will change Uber's business in UK and potentially in EU (it is worth mentioning that Uber is already attempting a Proposition 22 approach in Brussels<sup>82</sup> where it has published a white paper<sup>83</sup> explaining the importance of flexible working opportunities for 600 000 European workers).

## 5. CONCLUSION

Based on the recent legal actions and rulings of various courts (European Court of Justice and UK Supreme Court) we have concluded that there is a discrepancy between the legal terms as presented by Uber and the reality of the provision of its services. Uber claims that it is the free will of drivers to accept or refuse a customer's request for a ride. Uber therefore consider itself to be only an intermediary in this process. On the other hand, Uber

<sup>80</sup> Uber BV and others v. Aslam and others (2018). No. EWCA Civ 2748, paragraph 71. Available from: <https://www.supremecourt.uk/cases/uksc-2019-0029.html>. [Accessed 13 May 2021].

<sup>81</sup> Uber BV and others v. Aslam and others (2018). No. EWCA Civ 2748, paragraph 75. Available from: <https://www.supremecourt.uk/cases/uksc-2019-0029.html>. [Accessed 13 May 2021].

<sup>82</sup> Lomas, N. (2021) Uber lobbies for "Prop 22" – style gig work standards in the EU. Available from: Uber lobbies for 'Prop 22'-style gig work standards in the EU | TechCrunch. [Accessed 13 May 2021].

<sup>83</sup> Uber: "A better deal: partnering to improve platform work for all", Available from: <https://www.uber.com/global/en/about/reports/a-better-deal/>.

punishes drivers who refuse a request for a ride and, moreover, the driver is not really free to decide the route he/she would like to take, while Uber has control over it (including the knowledge of the customer's identification data without sharing it with the driver). Following this argument (and the decisions of various courts) we do not see Uber as a neutral provider of the underlying platform, but rather as someone who has influence when it comes to the transport services.

As stated above, dependent work can be defined as employer's superiority over and the employee's subordination to the employee, in the employee's personal capacity, while following the employer's instruction, on behalf of the employer and at times and in manner determined by the employer. If Uber drivers rely on the ratings in the platform, their relationship will be closer to employer-employee than to independent contractor relationship.

In addition, Uber also acts as an employer in deciding who (as a driver) can provide services to customers. Applicants are interviewed, drivers have to comply with various rules (e.g. only drive certain types of vehicles "approved" by Uber), meet and comply with Uber's requirements regarding the transport service itself, etc. Again, such activities are more reminiscent of an employer-employee relationship than of a neutral information society service provider offering an online platform for the transport services. Taking into account the (possible) employer-employee relationship, this is also reflected in the fact that Uber assumes the liability for damage in the event of fraud or vehicle pollution, which (assuming the drivers act as independent service providers) will be borne by the drivers.<sup>84</sup>

Uber also has the upper hand in negotiating the price of a ride; the driver does not have the right to negotiate potentially higher price based on the agreement with the customer. Furthermore, as far as discounts are concerned, these are also fully within Uber's control.<sup>85</sup> Such activities, or rather, such a relationship is quite similar to dependent work, which is one of the main principles applicable in the employment law and in the relationship between employee and employer. Uber assesses drivers in deciding their remuneration in similar way to an employer (based on the assessment, the driver may be penalised to a certain extent). Our

---

<sup>84</sup> Križan, V. (2017) Uber v rozhodovacej činnosti orgánov aplikácie práva. In *Pracovné právo v digitálnej dobe*. Praha: Leges, p. 125.

<sup>85</sup> *Ibidem*.



view of the relationship between Uber and the drivers is that such relationship can be described as *sham contract* rather than the way Uber describes it (i.e., that drivers are independent contractors).

Based on all of these arguments, we conclude that there is a room for consideration regarding Uber's status as an employer and that the drivers have a sham contract with Uber. Another topic for discussion is whether a similar conclusion may apply to different online platforms offering a different type of service. We can try to list some of the conditions applicable for online platforms to be considered an employer: control, financial incentive, and time management. On the other hand, it is clear that even if these conditions will be considered as prerequisite for defining the dependent work, there is still room for further specification of the individual condition.

## LIST OF REFERENCES

- [1] Aloisi, A. (2016) Commoditized Workers. Case Study Research on Labor Law Issues Arising from a Set of "On-Demand/Gig/ Economy" Platforms. In *Comparative Labor Law & Policy Journal*, Vol. 37, No. 3. Available from: <https://ssrn.com/abstract=2637485>. [Accessed 13 April 2021].
- [2] Barancová, H. (2017). *Nové technológie v pracovnoprávných vzťahoch*. Praha: Leges.
- [3] Crawford, S. (2015) *Getting over Uber*, Backchannel. Available online: <https://perma.cc/VV7A-KZYA>. [Accessed 22 December 2020].
- [4] Davidov, G.: Who is a worker? *Industrial Law Journal* 34(1). 2005. Available from: <https://ssrn.com/abstract=783465>. [Accessed 13 April 2021].
- [5] European Commission (2016) *Online Platforms and the Digital Single Market Opportunities and Challenges for Europe*. COM/2016/0288 final, [online]. Available from: EUR-Lex - 52016DC0288 - EN - EUR-Lex (europa.eu). [Accessed 14 May 2021].
- [6] Felstiner, A. (2011) Working the Crowd: Employment and Labor Law in the Crowdsourcing Industry. *Berkeley Journal of Employment and Labor Law*, Vol. 32, No. 1. Available from: <https://ssrn.com/abstract=1593853> [Access on 18 June 2021].
- [7] Green, A., de Hoyos, M., Barnes, S. (2013) *Exploratory research on Internet-enabled work exchanges and employability: Analysis and synthesis of qualitative evidence on crowdsourcing for work, funding and volunteers*, Luxembourg: Publications Office of the European Union. Available from: <https://publications.jrc.ec.europa.eu/repository/bitstream/JRC85646/jrc85646.pdf>. [Accessed 04 May 2021].

- [8] Howe, J. (2016) *Crowdsourcing: A Definition*, CROWDSOURCING. [online]. Available from: [http://www.crowdsourcing.com/cs/2006/06/crowdsourcing\\_a.html](http://www.crowdsourcing.com/cs/2006/06/crowdsourcing_a.html) [Access on 16 June 2021].
- [9] Huet, E. (2014) *Uber Deactivated A Driver For Tweeting A Negative Story About Uber*, Forbes, Available from: <http://www.forbes.com/sites/ellenhuet/2014/10/16/uber-driver-deactivated-over-tweet/#545e7b8a36c8>. [Accessed 06 May 2021].
- [10] Cherry, M. (2009) Working for (Virtually) Minimum Wage: Applying the Fair Labor Standards Act in Cyberspace. *Alabama Law Review*, Volume 60, N. 5. Available from: (PDF) Working for (Virtually) Minimum Wage: Applying the Fair Labor Standards Act in Cyberspace (researchgate.net) [Access 17 May 2021].
- [11] Križan, V. (2017) Uber v rozhodovacej činnosti orgánov aplikácie práva. *Pracovné právo v digitálnej dobe*. Praha: Leges.
- [12] Lomas, N. (2021) *Uber lobbies for "Prop 22" – style gig work standards in the EU*. Available from: Uber lobbies for 'Prop 22'-style gig work standards in the EU | TechCrunch. [Accessed 13 May 2021].
- [13] Naughton, J. (2021) Uber's UK supreme court defeat should mean big changes to the gig economy. *The Guardian*. 27 February 2021. Available from: <https://www.theguardian.com/commentisfree/2021/feb/27/ubers-uk-supreme-court-defeat-should-mean-big-changes-to-the-gig-economy>. [Accessed 13 May 2021].
- [14] Pasquale, F. (2016) Two Narratives of Platform Capitalism. *35 Yale Law & Policy Review* 309. University of Maryland, Francis King Carey School of Law. Available from: Two Narratives of Platform Capitalism by Frank A. Pasquale :: SSRN. [Accessed 08 May 2021].
- [15] Saxton, G., Oh, O., Kishore, R. (2013) Rules of Crowdsourcing: Models, Issues, and System of Control, In *Information System Management*. Available from: [file:///C:/Users/S7FX6B/OneDrive%20-%20Swiss%20Reinsurance%20Company%20Ltd/TU/DIZER%20MATERIAL/Saxton\\_Rules%20of%20crowdsourcing.pdf](file:///C:/Users/S7FX6B/OneDrive%20-%20Swiss%20Reinsurance%20Company%20Ltd/TU/DIZER%20MATERIAL/Saxton_Rules%20of%20crowdsourcing.pdf). See also: New forms of employment. *Eurofound*. Available from: [https://www.eurofound.europa.eu/sites/default/files/ef\\_publication/field\\_ef\\_document/ef1461en.pdf](https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1461en.pdf). [Accessed 03 June 2021].
- [16] Todolí-Signes, A. (2017) The "gig economy": employee, self-employed or the need for a special employment regulation? *European Review of Labour and Research*. Available from: <https://ssrn.com/abstract=2900483>. [Accessed 11 May 2021].

- [17] Zittrain, J. (2008) Ubiquitous Human Computing, In *Legal Research Paper Series No. 32/2008*, Oxford: University of Oxford. Available from:  
<http://ssrn.com/abstract=1140445>. [Accessed 08 May 2021].