

The Collaborative Economy and EU Law

Vassilis Hatzopoulos



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Labour Relations in the Collaborative Economy

I. Introduction

Unbeknown to her, Jennifer Guidry has become the symbol of the dark face of the collaborative economy. Her story of working for four different collaborative platforms, seven days a week, twenty (four) hours a day, after being published in the *New York Times*,¹ has been the red flag for several authors writing on employment in the collaborative economy.² Mother of three, suffering from a back and hip condition from her previous employment in the US Navy, Jennifer cobbles together a living which is neither pleasant nor sustainable; more importantly she lacks any benefits of a traditional full-time employee such as health insurance, paid holidays, training, retirement saving plans and tax withholding. She had to take up this kind of living upon losing her proper job during the recession of 2009—birthday of many important platforms such as *Uber*, *RideCell* and others.

If Jennifer is an extreme and clearly negative case of a collaborative worker, her case is nonetheless interesting, as it may be pointing to the shape of things to come in the field of employment. In the first chapter of this book the positive effects that the collaborative economy can deliver to individuals have been discussed: the use of idle capacity, spare time and skills; the topping up of revenues; flexibility; the joy of participating in socially and environmentally friendly activities and so on.³ In this chapter the question is: has the collaborative economy actually delivered upon its promises? If not, what has gone wrong? And how could it be made better?

The chapter has both a positivist and a normative ambition. In order to fulfil this ambition and to answer the above questions, three issues will be discussed in turn: how does the collaborative economy transform employment conditions

¹ N Singer, 'In the Sharing Economy Workers Find Both Freedom and Uncertainty' *NY Times* (16 August 2014).

² See, inter alia, M Carboni, 'A New Class of Worker for the Sharing Economy' (2016) 22(4) *Richmond Journal of Law and Technology* 1; see also D Das Acevedo, 'Regulating Employment Relations in the Sharing Economy' (2016) 20 *Employee Rights and Employment Policy Journal* 1, 17 and 35.

³ See Ch 1 above.

(section II); is such transformation aptly captured by existing legal categories (section III); and what could be done in order for this new form of economic activity to deliver the promised advantages (section IV)?

II. The Transformative Effect of the Collaborative Economy on Employment

A. Employment in the Collaborative Economy—Basic Characteristics

An examination of the transformative effects of the collaborative model on the economy in general and on employment conditions in particular, needs to start with an important disclaimer: while it is possible to gather evidence through qualitative methods, case studies and content gathered from the internet,

the important data that would show economic effects are those gathered by the platforms, which so far have been made available only to selected researchers ... It would provide evidence on costs and benefits for different categories of stakeholders, from which aggregate net effects could be estimated.⁴

Further, for the purposes of the present chapter a distinction so far implicit needs to be made out.⁵ On the one hand, there are activities which are offered and performed electronically, at a distance, also called Online Labour Markets (OLMs) and which are potentially global: high-skilled ones, such as legal advice, business consulting, design, coding and translation; and lower-skilled ones, such as administrative support, data entry, tagging, or indeed any other task of ‘artificial intelligence’ as *Amazon* brands the human micro-tasks performed eg in *Amazon Mechanical Turk (MTurk)*.⁶ The two large platforms in this area are *Upwork* and *Freelancer*, with over 35 million registered users (in 2015).⁷ On the other hand, there are activities which are based on electronic matching but the performance of which is physical and requires direct interaction, also called Mobile Labour

⁴ C Codagnone, F Abadie and F Biagi, ‘The Future of Work in the “Sharing Economy”: Market Efficiency and Equitable Opportunities or Unfair Precarisation?’ (2016) EU Commission JRC Science for Policy Report No 27913, 4, available at <http://publications.jrc.ec.europa.eu/repository/bitstream/JRC101280/jrc101280.pdf>.

⁵ This is a standard distinction made by the Organisation for Economic Co-operation and Development (OECD), ‘New Forms of Work in the Digital Economy’ (2016) OECD Digital Economy Papers, No 260, 9–10, available at www.oecd-ilibrary.org/science-and-technology/new-forms-of-work-in-the-digital-economy_5jlwnklt820x-en; and by the EU Commission JRC, see Codagnone, Abadie and Biagi, ‘The Future of Work in the “Sharing Economy”: Market Efficiency and Equitable Opportunities or Unfair Precarisation?’ (2016).

⁶ OECD, ‘New Forms of Work in the Digital Economy’ (2016) 22.

⁷ *ibid.*

Markets (MLMs); these are by definition local and include low-skilled services such as driving, cleaning, baby/dog-sitting and other errands, as well as higher-level interactive services, such as the delivery of lessons; home-sharing is also in this category. OLMs tend to be more P2B while MLMs more P2P.⁸

The above distinction is crucial, firstly because OLMs are subject to fiercer, more globalised, competition—although the ‘flat world’ axiom is still far from being confirmed:⁹ ‘different prices, currencies, languages, time zones, and other factors such as cultures, create barriers for the theoretically global reach of such platforms’.¹⁰ Secondly, MLMs are by definition easier to capture by locally applicable regulation, which OLMs may evade altogether. The distinction between low and high skill activities is also important, since the former are more likely to be performed by an employee while the latter by an independent contractor.

Micro-entrepreneurs, on-demand workers, freelancers, contractors, etc, as those working in the collaborative economy are called, are typically self-employed and under-employed, while a smaller number is altogether unemployed.¹¹ The way they perform their duties clearly enters—and considerably broadens—the category of Non-Standard Work (NSW), consisting of: (a) the self-employed, as well as by employees who are (b) temporary full-time, (c) permanent part-time, and (d) temporary part-time.¹²

It is very difficult to know the exact number of people working in the collaborative economy as estimates in the US vary from 600,000 or just 0.3 per cent,¹³ to 14 million or 9 per cent of the working population.¹⁴ According to the same ‘conservative’ survey, above, (of 0.3 per cent) the number of collaborative workers in the EU would be estimated at 100,000 (0.05 per cent of all EU employees).¹⁵ A total of 52.6 million contractors worldwide is estimated to exist, with few European platforms having more than 100,000 contractors.¹⁶ Still, in 2015 gross revenue from collaborative platforms was estimated at €28 billion, almost doubling from 2014.¹⁷

⁸ Codagnone, Abadie and Biagi (n 4) 5.

⁹ *ibid* 7 and, more extensively, 40–42.

¹⁰ OECD (n 5) 17. It is interesting to note however that the top 10 countries using *Upwork* are, on the employer side exclusively developed countries, while on the provider side essentially low-cost countries such as the Philippines, Bangladesh, India, Pakistan; the US, the UK and Canada also figure on the provider side; see OECD (n 5) 19.

¹¹ *ibid* 6.

¹² NSW accounts for 33% of total employment in OECD countries, ranging from as low as 17% in Eastern Europe, up to 58% in the Netherlands; see OECD (n 5) 22–28.

¹³ WP De Groen and I Maseli, ‘The Impact of the Collaborative Economy on the Labour market’ (2016) Centre for European Policy Studies (CEPS) Special Report, 20 available at <http://ec.europa.eu/DocsRoom/documents/16953/attachments/1/translations>.

¹⁴ Codagnone Abadie and Biagi (n 4) 22, with further references to the original sources.

¹⁵ De Groen and Maseli, ‘The Impact of the Collaborative Economy on the Labour Market’ (2016) 20.

¹⁶ *ibid* 22.

¹⁷ M Schmid-Drüner, ‘The situation of workers in the collaborative economy’ (2016) Employment and Social Affairs, European Parliament, available at [http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/587316/IPOL_IDA\(2016\)587316_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/587316/IPOL_IDA(2016)587316_EN.pdf).

Earnings of collaborative workers may vary from a mean of US\$3,380 per year for the average *Airbnb* host,¹⁸ to US\$475 per year for the average tasker working (four to five times a year) for the French *YoupiJob* platform.¹⁹ People working for *MTurk* can hardly make more than US\$5 per hour (against the US\$7.25 minimum wage)²⁰ while *Uber* drivers, after allowing for idle times and running costs make around US\$7.20 per hour.²¹ Typically suppliers of MLMs receive more per hour for their activities than the average ‘offline’ worker,²² but work less and, overall, make less money; suppliers of OLMs, who are in competition with those from developing countries, receive clearly less per hour than ‘offline’ workers in their (developed) country.²³ Overall, therefore, suppliers in the collaborative economy earn less than they would have earned if they performed the same work under proper employment conditions.

The above finding should be combined with the cost, in terms of time, effort and money, of constantly looking up for jobs and submitting offers, often in the form of tenders (such as in *CoContest*, where the projects not selected are not being paid for),²⁴ in different platforms and of communicating with different tentative clients (directly or through the platform). Indeed, according to an ILO study,²⁵ OLM workers spend an average of 18 minutes of unpaid work for every hour of paid work. As a supplier has put it ‘I’m essentially competing for every hour of my employment’.²⁶ Things may be even worse for workers offering MLMs, who physically need to commute between platform allocated jobs.

If the above data is correct, then all the flexibility-and-autonomy fuss of the collaborative economy is a big fail: not only would crowdworkers have to work more than 12 hours a day to cobble together a decent income, but also these hours would be neither fixed nor conveniently spread within the day, as they are strictly demand-dependent.²⁷ This means that any other job, or other occupation and family engagement would suffer accordingly.

¹⁸ OECD (n 5) 13.

¹⁹ *ibid* 15.

²⁰ Which corresponds, however, to 14 times the minimum wage in India; see De Groen and Maselli (n 13) 10.

²¹ Codagnone, Abadie and Biagi (n 4) 36.

²² See the figures reported in Schmid-Drüner, ‘The situation of workers in the collaborative economy’ (2016) 10.

²³ OECD (n 5) 12–14; see also Schmid-Drüner (n 17) 10, where it is explained that designers from Italy (with a monthly average of €1,477) are unlikely to participate in the *CoContest* platform, which pays €5 per hour, while designers from Serbia (with a monthly average of €334) are more than happy, since they can make 7.6 times the minimum wage and 3.2 times the average wage; see also De Groen and Maselli (n 13) 11.

²⁴ In fact the three best projects get 70%, 20% and 10% respectively and all the rest get nothing.

²⁵ The results of which are reproduced in Schmid-Drüner (n 17) 11.

²⁶ Quote taken by S Kessler, as reproduced by MA Cherry, ‘Beyond Misclassification: The Digital Transformation of Work’ (2016) 37(3) *Comparative Labor Law and Policy Journal* 544; *Saint Louis University Legal Studies* Research Paper No 2016-2; available at <https://ssrn.com/abstract=2734288>, 26, with reference to S Kessler, ‘Pixel and Dimed: On (Not) Getting By in the Gig Economy’ *Fast Company* (18 March 2014) available at www.fastcompany.com/3027355/pixel-and-dimed-on-not-getting-by-in-the-gig-economy.

²⁷ Codagnone, Abadie and Biagi (n 4) 37.

The firms that do have recourse to such services gain in many ways. While some of the gains follow a win-win logic, some others are part of a zero-sum game, in the sense that gains for the one side are losses for the other. In the former category one can put down the possibility of finding talented people, unrestricted by geography, within a very short period of time, chosen upon merit from a large pool of candidates, allowing the searcher to face temporary demand surges. In the latter category (of zero-sum gains), firms may be said to draw advantages in at least four ways. Firstly, they are able to break down complex tasks into several simpler ones and allocate each one of these to different, lower-skilled people; in this way, objectively, firms lower their costs. Secondly, many of these tasks may be performed at a distance by lower-wage workers; therefore, firms gain from the legitimate-but-controversial wage differential, with all the social dumping and race to the bottom that this may entail. Thirdly, they gain because they replace proper employees, for whom they pay social security charges, health insurance, holidays, training etc, with individual ‘micro-entrepreneurs’ who shoulder all the above on their own—or not.²⁸ By the same token, fourthly, they break any collective bargaining framework.

B. From Micro-entrepreneur to ‘*Lumpen-cognitariat et Salarariat Algorithmique*’?²⁹

As stated in the previous section, employment in the collaborative economy has all the characteristics of NSW (non-standard work) and beyond. Similarly, it raises all the well-documented problems of NSW (see section i below), and many more, more (or not so) original ones. The latter revolve around the way that work is broken down and awarded to crowdworkers (see section ii below), the role of algorithms and ratings (see section iii below), the general insecurity and uncertainty surrounding work (see section iv below), health safety and security (see section v below) and, even, fundamental rights (see section vi below).

i. Non-standard Work (NSW) Issues—Made Worse

Since the adoption of the Lisbon strategy back in 2000, and the introduction of the concept of ‘flexicurity’, the problems ensuing from NSW have been discussed at length both in academia and by political institutions at the national, EU and OECD level.³⁰ In the latest OECD report discussing NSW matters, specifically in

²⁸ According to data reported in Codagnone, Abadie and Biagi (n 4) 36, from US taskers having *MTurk* and *CrowdFlower* as their primary source of income, only 8.1% make regular payments into private pensions and only 9.4% contribute to social security.

²⁹ Expression borrowed by O Ertsscheid, ‘Du digital labor à l’uberisation du travail’ *Numerique* (25 January 2016), available at www.inaglobal.fr/numerique/article/du-digital-labor-l-uberisation-du-travail-8747#intertitre-5.

³⁰ In the EU context see S Peers, ‘Equal Treatment of Atypical Workers: A New Frontier of EU Law?’ (2013) 32(1) *Yearbook of European Law* 30.

relation to ‘New Forms of Work in the Digital Economy’,³¹ its authors make the following points. Firstly, they emphasise that temporary or else NSW is often not entered into voluntarily, but as a substitute to, or as a waiting-room for, more permanent employment.³² The effects of NSW include, according to this report: (a) the fact that NSW workers earn less than full-time employees; (b) that NSW workers are less likely to receive employer-sponsored training; (c) that NSW workers are likely to receive less work-related benefits in the form of unemployment benefits, eligibility for work-injury, sickness and maternity benefits. The authors conclude by finding that NSW is more of a ‘trap’ into precarity than a ‘bridge’ towards standard work. This, in turn, tends to aggravate rather than limit inequalities.³³

Crowdworking simply exacerbates all the above: workers, often completely unknown to the platform, receive nothing by way of health insurance coverage, social security pay, or, indeed, any other kind of employment-related benefit.

ii. Breaking Down of Work—Taylorism³⁴ Revamped

All the above effects are made worse in the context of the collaborative economy because of the breaking down of bigger projects and working activities to smaller, often mindless, tasks. Cherry, based on previous literature, puts forward the idea that the passage from an industrial, manufacturing-based economy to a knowledge-based one, in the late twentieth century, is now taking a further step towards platform-based crowdwork.³⁵ And while at first sight it would seem that this third phase is a normal evolution from the second digital-based one, in actual fact several ‘aspects of crowdworking look more like a throwback to the earlier industrial model’.³⁶

According to this view, in the industrial model workers typically had a life-long job, were specialised in the specific tasks allocated to them, and expected to evolve within the strict hierarchy of the firm, which granted them corresponding benefits (in terms of training, bonuses etc); in the knowledge-based economy workers navigate their professional life by moving horizontally between different firms, in which they are typically hired on project/s basis, thus acquiring different and wider skills, which they use to ascend professionally and claim better positions and better pay in every subsequent firm; the crowdworking economy, on the other hand, is based on micro-labour which ‘is identified for its small scope, short duration, tiny output, and limited remuneration’³⁷ and by its massive scale, in the sense that it is performed by huge numbers of micro-labourers. Or to put it in Cherry’s words:

if the digital era broke schedules down into part-time or project-based shifts, crowdwork breaks those schedules down even further into the micro-level. It moves from ‘project’

³¹ OECD (n 5).

³² OECD (n 5) 25.

³³ See also Schmid-Drüner (n 17) 9.

³⁴ See Frederick Winslow Taylor, *The Principles of Scientific Management* (Harper & Brothers, 1911).

³⁵ Cherry (n 26).

³⁶ *ibid* 20.

³⁷ *ibid* 22.

based work (with coherent aims and stages) occurring over a duration of weeks, months or years, into ‘task’ based work (the purpose of which may not ever be explained to workers) occurring in just hours, minutes or seconds. Micro labor is described as ‘taking the division of labor to once unthinkable extremes’,³⁸

in a way Taylor would envy.

Therefore, not only the firm has no reason whatsoever to invest into the micro-workers, but the workers are completely cut off from the purpose of their work and, of course, from any guidance, team-working, or else human interaction; they are even more alienated than Ford’s chain workers, who at least could physically communicate and professionally unionise. Add to this the possibilities of automatic, impersonal and often ruthless management, through algorithms or otherwise (discussed in the following paragraphs), the low levels of pay (already discussed) and the complete absence of social or other benefits, and you have a nightmarish pre-industrial setup. Indeed ‘the crowdwork model may be more of a throwback to the industrial model, incorporating the efficiency and control of automatic management, without the industrial model job security or stability’.³⁹

iii. Algocracy

Taylorism is being pushed to unprecedented lengths by the use of technology and algorithms, which operate as substitutes to direct managerial control and create power asymmetries between the platform and the worker. Such—typically opaque—algorithms may be used, as is the case with *Uber*,⁴⁰ in order to assign work (as they perform the matching), in order to fix prices (eg in case of surge) and in order to evaluate the worker in a semi-automated manner, on the basis of users’ ratings, acceptance/cancellation rate,⁴¹ and other, more opaque criteria. Other platforms, such as *Upwork*, are able to control their on-demand workers by measuring their productivity in terms of keystrokes, while other platforms use even more intrusive virtual office applications, such as regular screen shots and activity logs.⁴² Algorithms may be further used in order to perform a series of managerial and/or supervisory tasks such as speeding up the work process, determining the timing and length of breaks, monitoring quality, ranking employees and more. ‘Code makes crucial on-the-spot decisions about individualized employees and what they need to be doing in real time’.⁴³ Such algorithm-based governance, alternative to both markets and hierarchy, has been dubbed as ‘algocracy’.⁴⁴

³⁸ *ibid* 24–25.

³⁹ *ibid* 26.

⁴⁰ Codagnore, Abadie and Biagi (n 4) 40.

⁴¹ It has been documented eg that *Uber* in San Francisco requires drivers to have cancellation rates below 5% and an acceptance rate of 90%, see Codagnore, Abadie and Biagi (n 4) 39.

⁴² Codagnore, Abadie and Biagi (n 4) 39.

⁴³ Cherry (n 26) 21.

⁴⁴ A Aneesh, ‘Global Labour: Algocratic Modes of Organization’ (2009) 27(4) *Sociological Theory* 347; it is interesting to note, from an etymological point of view, that although the term algorithm sounds as if it is of Greek origin, in fact it comes from the medieval Latin word ‘algorismus’, itself inspired from the name of the Persian mathematician Al-Khwārizmī; in Greek, the word ‘algos’, stands for ‘pain’, ‘sufferance’ or ‘evil’.

The automatic ‘termination’⁴⁵ of workers when their ratings fall below a certain level (4.6 out of 5 stars in the case of *Uber*, with small variants across cities), or else ‘firing by algorithm’,⁴⁶ is the most extreme manifestation of algocracy; and one that has been explicitly abandoned in the settlements reached in cases *O’Connor v Uber* and *Cotter v Lyft*, whereby an arbitration procedure, at the charge of the platform, has been instituted.⁴⁷

There is, however, more evil into algocracy. Ratings, posted by the platform, do play a very important role in the professional life of collaborative workers; having high ratings is their way to out-perform one another. This pushes workers to be constantly alert, and is a means of permanent, omni-present, surveillance. To the extent that ratings also take into account the response rate and speed, ie activities which do not necessarily occur during working hours—but supposedly during rest or family time—such surveillance runs around the clock and also covers private life.

Such surveillance is occasionally made worse by the workers themselves, in their efforts to counter the platform’s surveillance methods. *Uber* drivers, for instance, in order to be able to prove that complaints by customers are unfounded, have started to install dash-cams in their cars,⁴⁸ thus further jeopardising both their own and their customers’ privacy.

iv. Uncertainty, Insecurity, Isolation and Precarity

Algocracy has a further, but not less important, consequence in the area of pay. *Uber* and *Lyft* drivers do not know in advance either the destination they will be going to, or the fee they are going to get for it; on top of surge pricing, *Lyft* also practises a ‘happy hour’ when traffic is low. Drivers often go to a ‘surge’ area, only to find out that the offer there has been increased and that surge prices no longer apply. *CoContest* participants know that if they are not chosen through their project, they will receive no payment—but do not know exactly on what basis their project is being evaluated. Moreover, many collaborative workers complain that it is not always clear what commissions, charges etc apply to their fees.⁴⁹

All the above make for a toxic working environment, whereby uncertainty as to the kind of work and the level of pay is common, there is insecurity as to the next micro-task to be performed, or more generally the existence of employment and isolation reign: we have the expansion of precarious labour, with all the social risks and downturns that this entails.⁵⁰

⁴⁵ As the word is appropriately used in the contract signed between *Uber* and its drivers; a brush of humour from *Uber*’s lawyers, a tribute to the ex-governor of California, or a truthful expression of the platform’s attitude towards its workers?

⁴⁶ Cherry (n 26) 22.

⁴⁷ For a brief discussion of these cases see section III below.

⁴⁸ Schmid-Drüner (n 17) 14.

⁴⁹ De Groen and Maselli (n 13) 11.

⁵⁰ A Kalleberg, ‘Precarious Work: Insecure Workers: Employment Relations in Transition’ (2009) 74 *American Sociological Review* 1; see also Cherry (n 26) 22; see also Schmid-Drüner (n 17) 15.

v. Health and Safety Issues

The toxic working environment described above cannot possibly leave workers' health unaffected. On top of health risks connected with online work, such as stress, visual fatigue, musculoskeletal problems, and the risks connected with the specific physical activity performed (in case of MLMs), collaborative workers run a host of psychosocial risks unknown to date, connected to the factors already discussed: precariousness of work, continuous real time evaluation and impact of ratings, around-the-clock short notice work, mixing up of work and non-work activities, rapid pace of work without breaks, isolation.⁵¹

Moreover, especially for OLMs, offered at a distance, firms can afford to be completely agnostic as to the safety and security norms under which micro-workers perform their duties: ergonomic seating, protection from radiation and the like are all 'externalised' to the individual worker. Similarly, for the risks associated to the provision of MLMs, platforms typically require the workers to be individually insured and rarely do they offer some supplementary insurance:⁵² while *Uber* has taken an insurance policy up to a US\$ million for its customers, its drivers need to be individually insured against work accidents, assault etc.⁵³

vi. Discrimination, Child Labour, Forced Labour: The Issue of Fundamental Rights

Discrimination in the 'workplace' has been documented in the form of clear statements posted on platforms, directly based on nationality (eg 'this job is not for people from Bangladesh or Pakistan') or indirectly based on language and accent (eg 'female caller with a British, or Australian or New Zealand accent').⁵⁴ Gender discrimination also occurs, since many employers due to information overload, choose to ignore the data concerning skills, merit and value for money and fall back on stereotypes: for instance they tend to choose men for programming and women for customer service.⁵⁵ Further, racial discrimination has been documented on the basis of the users' profiles, photos etc.⁵⁶ *Airbnb's* initiative to introduce a strict anti-discrimination policy⁵⁷ is welcome, but so far it is rather the exception than the rule. Indeed, authors comment that discrimination thrives in the collaborative economy because of the regulatory vacuum in which it operates.⁵⁸

⁵¹ See Schmid-Drüner (n 17) 15.

⁵² See also Das Acevedo, 'Regulating Employment Relations in the Sharing Economy' (2016) 30.

⁵³ *Airbnb*, on the other hand, has initiated an insurance scheme covering damage to both guests' and to hosts' property.

⁵⁴ Schmid-Drüner (n 17) 16.

⁵⁵ *ibid.*

⁵⁶ *ibid.*

⁵⁷ *Airbnb*, 'Airbnb's Nondiscrimination Policy: Our Commitment to Inclusion and Respect', available at www.airbnb.com/help/article/1405/airbnb-s-nondiscrimination-policy--our-commitment-to-inclusion-and-respect.

⁵⁸ Codagnone, Abadie and Biagi (n 4) 42.

There are issues, however, that even a strict regulatory regime would have difficulties facing. Child labour and forced labour, both prohibited, inter alia, by the 1998 ILO Declaration on Fundamental Principles and Rights at Work, supposedly monitored in physical form, may easily reappear in the context of micro-work. Already documented virtual ‘sweatshops’ for ‘gold-farming’ in online games (ie advancing quickly in order to build a high-level character),⁵⁹ leave little doubt that basic micro-work may be performed in ‘click factories’ under similar circumstances.⁶⁰

C. Room for Optimism?

The ‘e-topia’, apparently driven by an altruistic spirit (as the *Wikipedia* example seemingly suggests), could eventually become a social ‘downward spiral’ when risks traditionally borne by firms are being ‘pushed back’ to individuals—shifting costs to workers [and, in Europe, ultimately the welfare state, which offers health-coverage, unemployment benefits and the like]. Hence, the rise of the sharing economy can also act as a midwife for further growth of ‘precarious employment’. The boundary between ‘micro-entrepreneur’ and ‘precariat’ (or rather ‘cybertariat’) has never been so blurred.⁶¹

In view of the above developments, the gloomy vision set out above seems to be fully justified. It should be kept in mind, however, that the collaborative economy is still in its early infancy, that current participants are exploring new ground and that pioneers are likely to suffer. Some steps in the right direction, by means of self-regulation, are already being made: *Lyft* and *Uber* have set aside the automatic ‘termination’ clause; *TaskRabbit*, in 2015, set a wage floor of US\$12.80 per hour; platforms such as *Munchery* (food preparation and delivery), *Qii* and *MyClean* (house cleaning), *Luxe* (valet parking), *Shyp* (mailing) and *Hello Alfred* (errands and chores) hire their workers as employees, while *Instacart* (groceries) has reclassified several of its workers.⁶² Evidence shows that, despite the above ‘costly’ initiatives, most of these platforms are doing well economically—and the same has been confirmed by *Deliveroo*, *Amazon* and *Uber* before the UK House of Commons.⁶³ Other platforms, such as *Even*, have put into place savings accounts for their providers, perequating bad with good months in order to make sure they receive a fixed monthly income.⁶⁴

⁵⁹ Schmid-Drüner (n 17) 9.

⁶⁰ See also the OECD (n 5) 33.

⁶¹ A Aloisi, ‘Commoditized Workers: Case Study Research on Labor Law Issues Arising from a Set of “On-Demand/Gig Economy” Platforms’ (2016) 37 *Comparative Labor Law and Policy Journal* 653, 683.

⁶² Codagnone, Abadie and Biagi (n 4) 49.

⁶³ UK House of Commons, Work and Pensions Committee, ‘Self-employment and the gig economy’ (2017) 13th Report of Session 2016–17, 12, available at <https://publications.parliament.uk/pa/cm201617/cmselect/cmworkpen/847/847.pdf>.

⁶⁴ Das Acevedo (n 2) 33.

The above measures, partly at the platforms' initiatives, partly as a response-settlement to judicial 'misclassification' actions, are intended both to make collaborative workers happier and, to a large extent, to keep platforms outside the focus of the judiciary and the regulators. Indeed, most of the problems mentioned above would be remedied if collaborative workers were afforded the status of 'employee', which explains why both individual and class actions have been brought to this effect. There is only so much that courts can do, however, without breaking into the territory of the regulator.

III. Courts Struggling on a Binary Logic: Self-employed versus Employees

The collaborative economy developed out of private initiative and entrepreneurship in order to make better use of idle capacity, so 'most of the workers in the digital labour market should be considered freelancers, since they make money from labour outside an employee-employer relation'.⁶⁵ This somehow 'easy' assertion, however, needs to be checked against actual realities. Indeed as explained in Chapter 2, where the platform exerts control over the important aspects of the service provided, and the supplier only has a secondary role, the latter may legally qualify as an employee of the former. This legal classification is supported by—so far limited and non-conclusive—empirical research, which shows that an increasing number of suppliers in the collaborative economy work in conditions that in the traditional economy would qualify as 'employment'.

In the absence of any special legal category specifically corresponding to the characteristics of the collaborative economy, courts on both sides of the Atlantic have struggled to apply old rules to new realities. They have tried to fit atypical and extremely variable tripartite contractual relations into the typically binary distinction between employees and self-employed persons. Or, as Judge Chhabria put it in the *Lyft* litigation in California 'in this case we must decide whether a multifaceted product of new technology should be fixed into either the old square or the old round hole of existing legal categories, when neither is a perfect fit'.⁶⁶

The discussion of major US cases showcases the very real risks of divergent and, indeed, inconsistent decisions in the field of employment law (see section A below). Then the EU, more limited, experience is discussed (see section B below). Further, the EU Commission's approach is outlined (see section C below), before, lastly, a brief comment is added on EU labour law rules (see section D below).

⁶⁵ De Groen and Maselli (n 13) 12.

⁶⁶ *Cotter v Lyft Inc* 60 F Supp 3d 1067, ND Cal 2015.

A. US Case Law

In the California *Uber (Berwick)* case⁶⁷ the Los Angeles County Court made reference to a California Supreme Court ruling,⁶⁸ according to which the factors that should be taken into account in the assessment of the employer/employee relationship are the following:⁶⁹ whether the supplier's occupation is distinct from the platform's business; whether the supplier provides the instrumentalities, tools and the place for the supplier (or whether these are provided by the platform); whether the service requires special skills from the supplier (and is not supervised by the principal); whether the suppliers have an opportunity for profit or loss depending on their managerial skills; whether the job is only for a short time and/or not permanent; whether the payment is per job and not per hour; and whether the parties believe that they are entering an employment relationship. If some of the above criteria are fulfilled then the supplier should not qualify as an employee.⁷⁰ The Los Angeles County Court further made reference to the California Courts of Appeal in *Yellow Cab*, where the criteria used in order to qualify cab drivers as employees were that the 'platform' found the passengers for them and broadly controlled their operation.⁷¹

Applying the above criteria in the case of *Uber* drivers the Los Angeles Court found that 'by obtaining the clients in need of the service and providing the workers to conduct it, Defendants [*Uber*] retained all necessary control', while being 'involved in every aspect of the operation [as they] vet prospective drivers [who] cannot use Defendant's [*Uber*'s] application unless they pass Defendant's [*Uber*'s] ... checks'; the Court also held that 'Defendants [*Uber*] control the tools the drivers use; for example drivers must register their cars with Defendants [*Uber*], and none of their cars can be more than ten years old' and that 'ownership of the vehicle ... may be a much less important factor'. Moreover, the Court held that 'the passengers pay Defendants [*Uber*] a set price for the trip, and Defendants

⁶⁷ *Uber Technologies Inc v Barbara Berwick* Case No 11-46739 EK California Labor Commissioner, 2015 (Berwick), available at cdn.arstechnica.net/wp-content/uploads/2015/06/04954780-Page0-20.pdf.

⁶⁸ *SG Borello and Sons Inc v Dept of Industrial Relations* (1989) 48 Cal 3d, 341.

⁶⁹ The case did not concern electronic platforms, thus the language used is 'adapted' to the present context.

⁷⁰ For a discussion of these judgments and of the criteria set, see MJ Sorensen, 'Private Law Perspectives on Platform Services: Uber—a business model in search of a new contractual legal frame?' (2016) 5 *Journal of European Consumer and Market Law* 15, 16–17.

⁷¹ *Yellow Cab Coop v Workers Compensation Appeals Board* (1991) 226 Cal App 3d, 1288; US case law on whether cab drivers are in an employment relationship with the dispatching platform/call-center is quite extended; in cases where the cab is not owned by the cab driver it is easier to establish the existence of an employment relationship, see eg *HT Cab Co v Ginns* 280 SW 2d 360 (Tenn Civ App 1955) and *Scott v Manzi Taxi and Transportation Co* 179 AD 2d 949 (NY App Div 1992), but the same conclusion may also be reached in cases where the cab driver owns the vehicle, see eg *Weingarten v XYZ Two Way Radio Service Inc* 183 AD 2d 964 (NY App Div 1992); for a discussion of these cases see A McPeak, 'Sharing Tort Liability in the New Sharing Economy' (2016) 49 *Connecticut Law Review* 171, 206–209, available at <https://ssrn.com/abstract=2776429>.

[*Uber*], in turn, pay their drivers a non-negotiable service fee. Defendants [*Uber*] alone have the discretion to negotiate this fee with the passenger'; further the Court held that

Plaintiff's [driver's] car and her labor are her only assets. Plaintiff's [driver's] work did not entail any 'managerial' skills that could affect profit or loss ... But for the Defendant's [*Uber's*] intellectual property, Plaintiff [driver] would not have been able to perform the work.

Thus, the Los Angeles County Court found that *Uber* drivers are employees of the platform.

The complete opposite conclusion was reached by the Florida Court of Appeal in the *Uber (McGillis)* case.⁷² Broadly the same criteria as the ones ensuing from the California Supreme Court ruling (discussed above) are set under Florida law,⁷³ in order to characterise an employment relationship. On the basis of those the Florida Court upheld the decision of the Department of Economic Opportunity, denying Mr McGillis reemployment assistance on the basis of: (a) the clear terms of the contract and the fact that *Uber* acts on reliance upon it (for its fiscal and social obligations); (b) the fact that drivers supply the most essential equipment of their work, the car; (c) drivers choose whether, when, where to drive; (d) drivers are not subject to direct supervision by *Uber*; and (e) drivers are allowed to work for other competing platforms. The Court dismissed as being irrelevant the right of *Uber* to 'terminate' drivers and held that the fact that *Uber's* principal business is to provide transportation does not affect the above assessment.

On the basis of this judgment (at least presumably), in May 2017, Florida's governor signed into law a Bill establishing that drivers of transportation platforms (such as *Uber* and *Lyft*) are independent contractors—and not employees—provided that this is clearly stipulated into their contract, that they are free to choose when to work, and that they are free to work for competing platforms, or indeed, pursue any other economic activity. It should be noted, however, that such law only shields platforms from the application of State, not Federal, employment laws, such as the Fair Labor Standards Act.⁷⁴

The above two examples, taken from the *Uber* litigation,⁷⁵ make clear that employment law issues raised by collaborative platforms are certain to yield different solutions in different jurisdictions. More surprisingly still, they are likely to reach different solutions under US Federal laws, given that, as Carboni

⁷² *Darrin McGillis v Department of Economic Opportunity and Rasier/Uber* Florida DC Appeal, 3d N. 3D15-2758, delivered in February 2017.

⁷³ (Second) Restatement of Agency, para 220 id at 174–75.

⁷⁴ See AP Lazarus and KJ White, 'Florida Legislation Establishes That Ride-Sharing Drivers Are Independent Contractors, Not Employees' *Hunton Employment & Labor Law Perspectives Blog* (23 May 2017), available at www.huntonlaborblog.com/2017/05/articles/employeeindependent-contractor/florida-legislation-establishes-ride-sharing-drivers-independent-contractors-not-employees.

⁷⁵ There are more 'reclassification' cases concerning *Uber* in the US, as well as *Lyft* and other—non-driving—platforms, such as *CrowdFlower*, *Handy*, *Homejoy* and *Postmates*; see Codagnone, Abadie and Biagi (n 4) 48.

convincingly shows, ‘under several federal statutes, definitions of what constitutes an employee versus an independent contractor differ.’⁷⁶ As she puts it,

companies wishing (or more realistically, needing) to analyze whether their workers are properly classified as employees or independent contractors, they must look at a myriad of tests that pair with the appropriate statute regulating certain segments of business, labor and employment law. For instance there is the Internal Revenue Service’s ‘right to control’ test used for federal tax purposes [20 criteria]; the common law right to control test used for federal discrimination law [11 criteria]; the Employment Retirement Income Security Act of 1974 (ERISA); a modified Treasury version of the common law right to control test used for Affordable Care Act purposes; a newly modified version of common law right to control test formulated for National Labor Relations Act; and the economic realities test applied to Fair Labor Standards Act [6 criteria].⁷⁷

In view of the above exasperating uncertainty, it is plainly regrettable, from a legal point of view, that *Uber* has chosen to settle all its employment court cases,⁷⁸ therefore precluding guidance from the US Supreme Court. It is worth noting that in the *Uber (O’Connor)* case the California District Court has mooted the idea that established jurisprudence for defining employment (ie the *Borello* test)⁷⁹ should be revised by higher courts, in order to take into account the characteristics of the collaborative economy;⁸⁰ and that legal doctrine has put forward alternative criteria.⁸¹

B. EU Case Law

The situation in the EU is hardly any better. In the first *Uber* case to be published concerning labour law, the Central London Employment Tribunal, in case *Aslam, Farrar et al v Uber* found in favour of the drivers.⁸² Judge Snelson held that reality could not be bound by ‘armies of lawyers’⁸³ who resort to ‘fictions, twisted language and even brand new terminology’⁸⁴ in order to contrive

⁷⁶ Carboni, ‘A New Class of Worker for the Sharing Economy’ (2016) 13.

⁷⁷ *ibid* 13–14; the number of criteria in square brackets are taken from the analysis following this excerpt.

⁷⁸ See Codagnore, Abadie and Biagi (n 4) 49.

⁷⁹ For which see above n 66.

⁸⁰ *O’Connor v Uber Technologies, Inc et al*, C13-3826 EMC, 2015 WL 1069092, N.D. Cal; however such an approach has been criticised as being ‘techno-determinist’ in the sense that it is based on the (false) idea that pre-existing laws cannot rule a set of social phenomena, see Aloisi, ‘Commoditized Workers: Case Study Research on Labor Law Issues Arising from a Set of “On-Demand/Gig Economy” Platforms’ (2016).

⁸¹ See eg GE Brown, ‘An Uberdilemma: Employees and Independent Contractors in the Sharing Economy’ (2016) 75 *Maryland Law Review* 15, available at <http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1042&context=endnotes>.

⁸² See Case Nos 2202551/2015 & Others, *Aslam, Farrar v Uber*, Judgment of 28 October 2016, available at www.judiciary.gov.uk/judgments/mr-y-aslam-mr-j-farrar-and-others-v-uber.

⁸³ *ibid* para 78.

⁸⁴ *ibid* para 87, notes omitted.

documents ‘in their clients’ interests which simply misrepresent the true rights and obligations in both sides.’⁸⁵ He further took into consideration that although the contracts signed between *Uber* and its drivers made it plain that no employment relationship existed, all other *Uber* literature, whereby it provided guidance to drivers (through written instructions, email and messaging), did in fact point in the opposite direction.⁸⁶ Third, Judge Snelson took into consideration that the services—and the brand—being promoted by the platform were those of the platform, not of the individual drivers, and agreed with the North Carolina District Court in finding that ‘*Uber* is no more a “technology company” than Yellow Cab is a “technology company” because it uses CB radios to dispatch taxi cabs.’⁸⁷ Moreover, he found *Uber*’s argument that it is a mosaic of 30,000 linked small businesses, consisting of ‘a man in a car seeking to make a living by driving it’ as he put it, ‘faintly ridiculous.’⁸⁸ He further ridiculed *Uber*’s argumentation in the following words:⁸⁹

Uber’s case is that the driver enters into a binding agreement with a person whose identity he does not know (and will never know) and who does not know and will never know his identity, to undertake a journey to a destination not told to him until the journey begins, by a route prescribed by a stranger to the contract [*Uber*] from which he is not free to depart (at least not without risk), for a fee which a) is set by the stranger, and b) is not known by the passenger (who is only told the total to be paid), c) is calculated by the stranger (as a percentage of the total sum) and d) is paid to the stranger.

The learned judge further based his assessment that an employment relationship exists between *Uber* and its drivers on the facts that *Uber*: (a) interviews and recruits drivers; (b) controls key information concerning clients and excludes the drivers from it; (c) pushes, under the menace of ‘termination’, drivers to accept/not to cancel trips; (d) sets the default route; (e) fixes the fare; (f) imposes conditions, instruct and controls drivers; (g) subjects drivers, through the rating system, to performance management/disciplinary procedure; (h) handles complaints about the drivers; and (i) reserves the power to amend the driver’s terms unilaterally.⁹⁰

In view of the above, and other elements, the Employment Tribunal reached the conclusion that ‘the terms on which *Uber* rely do not correspond with the reality of the relationship between the organisation and the drivers. Accordingly, the Tribunal is free to disregard them.’⁹¹ So much so that the Tribunal also plainly set aside a contractual clause subjecting all disputes to Dutch law, stating that the contract in which this clause was included (the formal one, in which *Uber* was supposed to be working for the drivers) had the complete opposite content from

⁸⁵ *ibid* para 96.

⁸⁶ *ibid* para 88.

⁸⁷ *ibid* para 89.

⁸⁸ *ibid* para 90.

⁸⁹ *ibid* para 91.

⁹⁰ *ibid* para 92; the judgment uses 13 criteria, which are here presented in a more summary way.

⁹¹ *ibid* para 96.

the (unwritten) employment contract actually concluded between *Uber* and its drivers.⁹² This judgment has been appealed by *Uber* and judgment is awaited.⁹³

In other cases concerning other collaborative platforms, the Central London Employment Tribunal has again found in favour of the existence of an employment relationship. This was so in case *Dewhurst v Citysprint*, concerning a cycle courier,⁹⁴ where Judge Wade (sitting alone) found the contract between the platform and the supplier to be ‘window dressing’ for an employment relationship,⁹⁵ given that ‘the claimant [was] both economically and organisationally dependent upon *Citysprint* not only for her livelihood, but also for how it is earned’.⁹⁶ The judge held that in construing contracts relating to work, which are typically concluded between unequal parties, ‘whilst the express terms of the contract are key pieces in the jigsaw, the bar is low before the true situation can be explored’;⁹⁷ even if this amounts to a ‘purposive approach to the problem’.⁹⁸ Similar logic has been followed by the London Central Employment Tribunal in relation to cycle couriers employed by *Excel*.⁹⁹ In a more nuanced, and extremely well-reasoned judgment, the UK Court of Appeal held that a plumber engaged by *Pimlico Plumbers* (which intermediated between him and the clients) was not an ‘employee’ but was, nonetheless, entitled to ‘worker’ status, which is more protective than that of the ‘self-employed’.¹⁰⁰ Further, at the time of writing, the Central Arbitration Committee was expected to rule on whether *Deliveroo* riders are to be considered as ‘workers’ and may unionise or not.¹⁰¹ This litigation has been initiated by the Independent Worker’s Union of Great Britain, but if worker status were recognised, then every individual rider could claim all the statutory benefits accruing to this legal category. In the meantime, in a move to appease its drivers and MPs complaining about the way *Uber* treats drivers, *Uber* announced that it would offer insurance to UK drivers in case of injury or sickness.¹⁰²

⁹² *ibid* para 105.

⁹³ C McGoogan and J Yeomans, ‘Uber loses landmark tribunal decision over drivers working rights’ *The Telegraph* (28 October 2016).

⁹⁴ Case No 2202512/2016 *Ms Dewhurst v Citysprint UK Ltd*, Judgment of 5 January 2017, available at https://www.egos.co.uk/ir35_cases/Dewhurst_v_City_Sprint_2016.pdf.

⁹⁵ *ibid* para 55.

⁹⁶ *ibid* para 57.

⁹⁷ *ibid* para 60.

⁹⁸ *ibid* para 61, citing Lord Clarke of the Supreme Court; in favour of a purposive approach see G Davidov, ‘The Status of Uber Drivers: A Purposive Approach’ (2017) 6(1–2) *Spanish Labour Law and Employment Relations Journal* 6; Hebrew University of Jerusalem Legal Research Paper No 17-7; available at <https://ssrn.com/abstract=2877134>.

⁹⁹ C McGoogan, ‘Blow for “gig economy” as tribunal rules Excel must pay courier holiday’ *The Telegraph* (24 March 17).

¹⁰⁰ *Pimlico Plumbers Ltd v Gary Smith* [2017] EWCA Civ 51, available at www.judiciary.gov.uk/wp-content/uploads/2017/02/pimlico-plumbers-v-smith.pdf; the Court of Appeal upheld the judgment of the Employment Appeal Tribunal, itself upholding the judgment of the Employment Tribunal.

¹⁰¹ C McGoogan, ‘Tribunal to rule on Deliveroo riders’ employment status’ *The Telegraph* (6 March 2017).

¹⁰² S Gosh, ‘Uber will offer insurance to UK drivers in case they are injured or sick’ *Business Insider* (27 April 2017).

In France, the Paris Labour Tribunal (Prud'hommes) in December 2016 reclassified the relation between *LeCab* (one of *Uber's* competitors) and one of its drivers from a commercial to an employment contract.¹⁰³ This judgment, however, which concerned the individual driver, was to a large extent based on the exclusivity clause contained in the contract, a clause which has since been eliminated—and no longer figures in *Uber's* contracts. In view of this, in a special mediation concluded in February 2017, and in view of avoiding a collective finding that its drivers are all employees, *Uber* offered to provide transitional financial aid to its drivers in difficulty, thus simulating a minimum guaranteed income scheme.¹⁰⁴ Further, *Uber* won, on technical grounds concerning the administration of proof, a case brought against it by the Employees' Social Security Fund (URSSAF, Ile-de-France), whereby URSSAF was claiming the reclassification of *Uber* drivers and the payment of social security charges for them.¹⁰⁵ An appeal against this judgment, as well as URSSAF's criminal action against *Uber* for contribution-evasion,¹⁰⁶ are pending.

In Spain, on the other hand, the Second Commercial Tribunal of Madrid, in a judgment delivered in the framework of unfair competition (thus not specifically concerned with labour law relations) incidentally held that *BlaBlaCar* drivers—which contrary to *Uber's* go to their destination and only take 'passengers' in order to share the costs of the trip—are in no employment relationship with the platform.¹⁰⁷

A preliminary question concerning the status of *Uber* drivers has been submitted to the CJEU by the Brussels District Commercial Court, only to be turned down by the CJEU as being inadmissible.¹⁰⁸ At the time of writing no other case concerning the (employment/freelancer) status of *Uber*—or any other collaborative platform's suppliers—was pending before the CJEU. This means that in the years to come, different Member State jurisdictions are likely to reach different conclusions on this issue: it is true that the evidence adduced and the arguments put forward by the Central London Employment Tribunal are difficult to ignore, but it is also true that national labour laws differ and that different collaborative platforms—and even *Uber* itself—use different agreements in different jurisdictions; the US experience briefly sketched above only confirms this danger. Therefore, the risks of fragmentation and of unjustified discrimination between people performing the same tasks (under contract law), and people harmed by those (under tort law—since vicarious or other strict liability applies to employers for the deeds of their employees), are present.

¹⁰³ C. Crouzel, 'Pour la première fois, un chauffeur de VTC est reconnu salarié par la justice' *Le Figaro* (27 January 2017).

¹⁰⁴ 'VTC: la proposition d'Uber clôt la médiation' *Le Figaro* (7 February 2017).

¹⁰⁵ G. Sebag, 'Uber Wins Driver-Status Case in France on Legal Technicality' *Bloomberg* (15 March 17).

¹⁰⁶ I. de Foucaud, 'L'Urssaf lance une bataille juridique pour requalifier les chauffeurs Uber en "salarié 3"' *Le Figaro* (17 May 2016).

¹⁰⁷ *Confébus v BlablaCar* SJM M 6/2017 (2 February 2017) ECLI:ES:JMM:2017:6, 8.

¹⁰⁸ Case C-526/15 *Uber Belgium v Taxi Radio Bruxellois* EU:C:2016:830; for a brief discussion of this case see Ch 7 below.

C. The EU Commission's Approach

Such fragmentation and discrimination is undesirable not only in terms of national contract and tort law, but also—and more importantly—for the purposes of applying national and EU labour protection rules.¹⁰⁹ EU 'labour law' rules come into play when a 'worker' may be said to exist.¹¹⁰ The Commission in its Collaborative Economy Communication has tried to illustrate the way in which the three criteria set out by the case law and the doctrine, ie the existence of subordination, the pursuance of genuine work and the existence of remuneration, apply in the collaborative economy.¹¹¹ In respect of the first criterion the Commission distinguishes situations where the platform determines the choice of the activity, remuneration and working conditions, from those where it merely processes the payment deposited by the receiver and passes it on to the provider. In relation to the second criterion the Commission distinguishes effective and genuine work from work which is purely marginal and accessory. Lastly, remuneration is used in order to differentiate work from volunteering.

The above criteria have been developed by the CJEU in order to define, in an extensive way, the scope of one of the fundamental freedoms, the free movement of workers. They are bound to lead to the qualification of an employment relationship in as many situations as possible. It is questionable, therefore, whether it is helpful/desirable to directly transpose them in the context of the collaborative economy, as they risk denaturing the essence of the relations there developed; by the same token it would risk creating a straightjacket to the further development of the collaborative economy. What is more, if such an over-expansive approach to the concept of 'worker' and 'employment' were to be followed it would lead to holding the platforms as employers in the vast majority of cases. This, however, would be directly contrary to the Commission's tendency described above, ie to apply very strict criteria for holding a platform as the supplier of the underlying service. In other words, if the Commission were to follow the criteria it has enunciated in its 2016 Communication, on the one hand it would find that most

¹⁰⁹ The fact that labour law remains essentially a matter of national regulation should not overshadow the fact that there are EU rules, inter alia, on working time (Directive 2003/88/EC), information on individual working conditions (Directive 91/533/EC), posted workers (Directives 96/71/EC, 2014/67/EU and Regulation 883/2004/EC), anti-discrimination for non-standard forms of employment (eg part-time, fixed-term or workers employed under temporary agencies, Directives 97/81/EC, 1990/70/EC and 2008/104/EC respectively), anti-discrimination on grounds of gender, ethnicity, sexual orientation (Directive 2000/78/EC), protection in case of insolvency of employers (Directive 2008/94/EC), protection in case of collective redundancies (Directive 98/59/EC), in case of transfer of undertakings (Directive 2001/23/EC) or in case of cross-border mergers (Directive 2005/56/EC).

¹¹⁰ On working time see Case C-428/09 *Isère* EU:C:2010:612; on collective redundancies see Case C-229/14 *Balkaya* EU:C:2015:455; and on employment equality see Case C-432/14 O EU:C:2015:643.

¹¹¹ Commission Communication, 'A European Agenda for the collaborative economy' COM(2016) 356 final, 13.

platforms are mere intermediaries (since they do not own the assets etc) but, at the same time, they employ the suppliers of the underlying service. In this way the Commission would be taking with the one hand what it would be giving with the other in terms of the platforms' involvement and liability towards consumers. This inconsistency may be helping consumers, but it is certainly prejudicial to platforms which will not only be held liable towards the consumers, but will also be subject to the full constraints of labour legislation. Such an effect cannot possibly correspond to the Commission's intentions.

D. EU 'Labour Law' Secondary Legislation

Once a supplier in the collaborative economy does qualify as a worker, then s/he is subject to EU labour law rules.¹¹² From these EU rules of secondary legislation two, at least, merit special attention in the collaborative framework.

Firstly, the Working Time Directive (WTD), for the purposes of which it is crucial to identify which activities do count as working time. According to this text 'working time' is defined as 'any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice'.¹¹³ Working time has been extensively construed by the CJEU to cover 'working time spent on call or on stand-by where the worker concerned must be physically present at his place of work',¹¹⁴ in relation to medical doctors and firemen. Moreover, the Court has held that for those workers who do not have a fixed or habitual place of work, travelling to work at the beginning and the end of the day, is 'work'.¹¹⁵ Further, the Court has held that Article 6(b) of the Directive, setting the maximum ceiling of hours that may be worked weekly at 48 hours, 'constitutes a rule of EU social law of particular importance from which any worker should benefit'¹¹⁶ and, therefore, it may not validly be derogated to, even with the worker's consent.¹¹⁷ Also, the Court has held that this same article has direct effect and may be invoked by individuals even where no such right is specifically accorded to them by national legislation.¹¹⁸ Moreover, the Court has

¹¹² See above n 9.

¹¹³ European Parliament and Council Directive 2003/88/EC of 4 November 2003 concerning certain aspects of the organisation of working time (Working Time Directive—WTD) [2003] OJ L 299/9; Art 2(1).

¹¹⁴ See interpreting Directive 2003/88, Case C-429/09 *Fuss v Stadt Halle* EU:C:2010:717, para 55, with further references to Case C-303/98 *Simap* EU:C:2000:528, the order in Case C-241/99 *CIG* EU:C:2001:371, and the judgment in Case C-151/02 *Jaeger* EU:C:2003:437, all interpreting the previous WTD.

¹¹⁵ Case C-266/14 *Federación de servicios privados v Tyco* EU:C:2015:578.

¹¹⁶ *ibid* para 33; see also para 49.

¹¹⁷ *ibid* para 33; see also para 49.

¹¹⁸ *ibid* para 35; see also para 49.

held that workers whose rights under the Directive have been violated may claim damages from their States.¹¹⁹ Therefore, the Court is quite serious about having the rules on working time, especially Article 6(b), respected in all circumstances.

Would the above jurisprudence also cover on-demand workers available on-call—but not on a shift basis, while waiting in their own homes or private cars?¹²⁰ Would it cover only the seconds, minutes or hours that crowdworkers spend performing the actual task assigned to them? Or would it also cover the time they spend waiting for a call, preparing their offer or commuting between different tasks? Would the communication, exchange of information, time spent in rating users etc be accounted for? Further, given that the 48-hour limit imposed by the WTD encompasses work offered for any number of employers, multi-homing, in the way Jennifer Guidry does, would need to be accounted for. These are issues which will certainly need to be answered once it is recognised that crowdworkers are ‘workers’ in the sense of EU law.

The second big question is to know which Directive (or indeed Directives) on NSW are applicable to collaborative workers: both the Fixed Term Work Directive¹²¹ and the Part-Time Work Directive¹²²—and occasionally also the Temporary Work Agency Directive¹²³—could be applied to platforms and their workers. It is true that all three directives are animated by the same objective, ie to make sure that workers falling within their respective scope are not ill-treated and discriminated against. It is also true, however, that their actual form (the first two give binding force to an agreement previously reached by the social partners, while the latter is in the form of a ‘traditional’ European Parliament and Council Directive), their timing and their content differ to a large extent. It is also true that while collaborative working has many resemblances to the above forms of NSW, it is nonetheless different from any of them. Therefore, it would be important for workers in the collaborative economy to know which text/s of secondary legislation, if any, they may validly invoke in their relations with platforms.

¹¹⁹ *ibid* various paras and operative part.

¹²⁰ At present the answer seems to be in the negative; according to a briefing circulated by the UK public service Union, ‘when workers are on-call but based at home or somewhere other than their workplace, on-call time only counts as working time from the time they are called out’; see Unison, ‘Working Time Directive—On Call and Sleeping In’ (2013), available at www.unison.org.uk/content/uploads/2013/06/Briefings-and-CircularsWorking-Time-Directive-On-call-and-Sleeping-in-ver12.pdf; while according to RMT, Britain’s specialist Transport Union, working time does not include time spent on-call unless actually working, see RMT, ‘Working Time Regulations—Your Questions Answered’, available at www.rmt.org.uk/about/policies/research/employment-law/working-time-regulations-your-questions-answered/?preview=true.

¹²¹ Council Directive 1990/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP [1995] OJ L 175/43.

¹²² Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC [1998] OJ L 14/9.

¹²³ European Parliament and Council Directive 2008/104/EC of 19 November 2008 on temporary agency work [2008] OJ L 327/9. This is supposed to apply to ‘contracts of employment or employment relationships with temporary agency workers in order to assign them to user undertakings to work there temporarily under their supervision and direction’, see Directive 2008/104, Art 3(1)(b).

IV. Beyond the Binary Logic: Tentative Regulatory Interventions

From all the above it becomes clear that, while some suppliers in the collaborative economy make easy money with little effort, truly valorising their idle capacity—or that of their homes—others struggle under inhuman conditions to make ends meet. Most of the latter do not qualify as ‘employees’, as this legal category is currently defined by most legal orders, and may not claim the corresponding rights. In the meantime, courts on both sides of the Atlantic are struggling to square new realities with old rules, in an unforeseeable and, necessarily, contradictory manner, thus resolving some problems but creating new ones.

This, in turn, begs the question whether it would be worth discussing specific ‘employment’ rules, applicable in the field of the collaborative economy. If the survey according to which the collaborative economy only employs 0.4 per cent in the US and 0.05 per cent of the workforce is accurate, then the simple answer would be that such an initiative seems premature.¹²⁴ If, however, other surveys showing much higher percentage of the labour force (up to 9 per cent)¹²⁵ involved into collaborative activities are closer to reality, and in view of the sharp yearly increase of both people working in, and revenue generated from the collaborative economy, a different approach may be justified.

More than the numbers, however, what needs to be addressed is the more fundamental question: are we ready to endorse the substitution of people working normal hours under normal conditions with workers like Jennifer?¹²⁶ Or, to use Cherry’s words, ‘the question is whether the crowdwork model that the on-demand economy moves us into is a sustainable and desirable future for work’.¹²⁷

Most authors agree that some kind of regulatory intervention should take place. The second thing they mostly agree upon is that, in the ‘employees or nothing at all’ dilemma, collaborative workers should not be fully assimilated as ‘employees’. Several arguments are put forward to that effect: that this would be discriminatory against other, part-time or else temporary workers;¹²⁸ that it would be unjustifiably stretching legal categories;¹²⁹ that it would be difficult to implement;¹³⁰ that it would not correspond to the ‘workers’ state of mind, since a large proportion remain as occasional suppliers;¹³¹ that it would put unjustifiable

¹²⁴ V Hatzopoulos and S Roma, ‘Caring for Sharing? The Collaborative Economy under EU Law’ (2017) 54 *CMLR* 81, 119.

¹²⁵ See n 14 above.

¹²⁶ See also Das Acevedo (n 2) 35.

¹²⁷ Cherry (n 26) 27.

¹²⁸ Das Acevedo (n 2) 32.

¹²⁹ *ibid.*

¹³⁰ *ibid.*

¹³¹ M Cohen and A Sundararajan, ‘Self-Regulation and Innovation in the Peer-to-Peer Sharing Economy’ (2015) 82 *The University of Chicago Law Review Dialogue* 116, 122–23.

costs on the platforms and would endanger their very business model.¹³² All the authors just cited are US-based; the UK House of Commons, in its 2017 Report on ‘Self-employment and the Gig Economy’, on the other hand, recommends that ‘an assumption of the employment status of “worker” by default, rather than “self-employed” by default, would protect both those workers and the public purse’.¹³³ Therefore, this perceived ‘unanimity’ among authors needs to be relativised, and possibly reviewed, in the EU context.

Agreement among the authors stops there. Several ideas have been put forward by them, which are briefly discussed below.

One idea that seems to have wide support is that of creating a new, intermediary, special status for collaborative economy workers, between employees and independent contractors: that of the ‘dependent contractor’.¹³⁴ This status would have some basic rights (eg basic expenses connected to the activity, mandatory insurance), but not others (eg social security) and would strike a middle way between workers’ protection and platforms’ interests. Carboni, and Harris and Krueger, carry out a comparative analysis and find that such a third category already exists, in different versions, in Italy (para-subordinate), Germany, France (micro-entrepreneur), Spain (economically dependent autonomous employee) and Canada. Those authors do concede, however, that these institutions are subject to critique in their respective legal orders. The main critique of this proposal is that it would cover more people, but would create fresh grey areas at the edges of this new category.¹³⁵ Moreover, it would put at peril the status of several people currently classified as ‘employees’.¹³⁶

A second idea is that of ‘portability’ of welfare rights:¹³⁷ instead of being dependent on employers, personal security accounts should be made portable.

¹³² On this point see, among others, Codagnone, Abadie and Biagi (n 4) 50, who explain that a regulatory solution mid-way between the complete lack of protection and the judicial recognition of a full employee status would be much preferable.

¹³³ See n 63 above; it should be further noted that this Report is highly critical of the practices and contractual clauses used by platforms in relation to suppliers working for them.

¹³⁴ SD Harris and AB Krueger, ‘A Proposal for Modernizing Labor Laws for Twenty-First Century Work: The “Independent Worker”’ (2015) The Hamilton Project Discussion Paper 2015-10, available at www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf; A Hagi and R Biederman, ‘Companies Need an Option Between Contractor and Employee’ *Harvard Business Review* (21 August 2015), available at <https://hbr.org/2015/08/companies-need-an-option-between-contractor-and-employee>; Carboni (n 2); A Bolton, ‘Regulating Ride-Share Apps: A Study on Tailored Reregulation Regarding Transportation Network Companies, Benefiting Both Consumers and Drivers’ (2015) 46(1) *Cumberland Law Review* 101, 141–42.

¹³⁵ See Codagnone, Abadie and Biagi (n 4) 50; and V De Stefano, ‘The rise of the “just-in-time workforce”: On-demand work, crowdwork and labour protection in the “gig-economy”’ (2016) ILO, Conditions of work and employment series No 71, 19 available at http://www.ilo.org/travail/whatwedo/publications/WCMS_443267/lang--en/index.htm.

¹³⁶ De Stefano, ‘The rise of the “just-in-time workforce”: On-demand work, crowdwork and labour protection in the “gig-economy”’ (2016) 20.

¹³⁷ J Berg, ‘Income Security in the On-Demand Economy: Findings and Policy Lessons from a Survey of Crowdworkers’ (2016) 37(3) *Comparative Labor Law and Policy Journal* 543; Harris and Krueger, ‘A Proposal for Modernizing Labor Laws for Twenty-First Century Work: The “Independent Worker”’ (2015); Aloisi (n 61).

'Benefits (wage insurance, health insurance, disability and injuries insurance) should be designed universally and not being tied to specific employers'.¹³⁸

Every worker would hold an account regardless of the number of businesses they work for or the nature of the contractual agreement. For each job, the client would have to pay a proportion of the earnings into this account, thus having the same obligation vis-à-vis its platform workers as with its employees.¹³⁹

The OECD in its 2016 Report on 'New Forms of Work in the Digital Economy'¹⁴⁰ seems to be embracing this solution, and one would have thought that the EU—used as it is to the principle of social security portability through Regulations 1408/71 and 883/2004—would do so too.

A report prepared by the Research Service of the European Parliament, however, mooted the idea of including collaborative economy service providers in the scope of the general rules applicable to self-employment and allowing platforms to develop their own benefits policies in competition with other insurance options otherwise available.¹⁴¹

With the same logic, but pushing it further, others have proposed to set a time-constrained 'safe harbour' for platforms to develop their own protective policies before imposing any rules on them.¹⁴²

Apart from this last option, all other proposals argue in favour of some regulatory intervention in order to make sure that the collaborative economy does not lead to an employment middle-ages, but does indeed manage to deliver most of its potential, not only for consumers and firms, but also for those who make it happen.

Further, according to the European Commission JRC report,¹⁴³ endorsed by the EP report,¹⁴⁴ a Fair and Dignified Support Infrastructure should be adopted which should include the following pillars:¹⁴⁵ (a) minimum wage, coupled with maximum number of hours worked per day and a prohibition on deactivating worker's accounts if their acceptance rate falls; (b) a minimal form of social protection and health insurance; (c) liability insurance for damage to third parties; (d) regulation of privacy protection; and (e) algorithms that do not produce discrimination. Further ideas, such as the prohibition of exclusivity clauses, thus allowing multi-homing, and the non-applicability of cartel prohibitions in order to enable platform workers to coordinate have been put forward.

Many of these issues are further discussed in Chapter 7 below.

¹³⁸ Codagnone, Abadie and Biagi (n 4) 51, with reference to Berg and other sources.

¹³⁹ Schmid-Drüner (n 17) 21, also with reference to Berg.

¹⁴⁰ OECD (n 5) 30–31.

¹⁴¹ P. Goudin, 'The Cost of Non-Europe in the Sharing Economy: Economic, Social and Legal Challenges and Opportunities' (2016) European Parliament, European Parliamentary Research Service, available at [www.europarl.europa.eu/RegData/etudes/STUD/2016/558777/EPRS_STU\(2016\)558777_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/558777/EPRS_STU(2016)558777_EN.pdf).

¹⁴² A. Sundararajan, *The Sharing Economy, The End of Employment and the Rise of Crowd-Based Capitalism* (Cambridge MA, The MIT Press, 2016).

¹⁴³ Codagnone, Abadie and Biagi (n 4) 58.

¹⁴⁴ Schmid-Drüner (n 17) 7.

¹⁴⁵ These are freely represented here.