



What regulations for the gig economy?

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Introduction

Platforms are a new organizational form that transforms many industries and changes how we socialize in daily life. In a very general sense, platforms mediate social and economic interactions online (Kenney and Zysman 2016; Van Dijck et al., 2018). Zooming in on how platforms are being deployed in the economy, we see platforms being used particularly as digital marketplaces, connecting large numbers of suppliers with large numbers of consumers. Here, suppliers are not only professional parties, but also individuals who earn income as independent contractors. Examples are Uber for taxi services, Helpling for cleaning services, and Deliveroo for meal deliveries. Such one-off services, intermediated by online platforms, are now commonly headed on the gig economy, which involves “ex ante specified, paid tasks carried out by independent contractors mediated by online platforms” (Koutsimpogiorgos et al., 2020, p. 525). The term gig thus refers to the trade in discrete tasks (taxi ride, cleaning job, delivery service), where the gig worker is paid separately per gig.

Platforms have proven to be very successful in matching supply and demand. A particular feature that most platforms have is the possibility for consumers to leave reviews and ratings about a gig worker (and sometimes vice versa). Such evaluations are a way to establish trust between market participants, thus reducing transaction costs among them. Reviews and ratings help users of platforms to make informed choices, and the platform to ensure the average quality of service on their platform.

While gig platforms are marketplaces, in the sense that they provide a matching device for supply and demand for a paid service, most platforms are designed in a way that such markets are not entirely ‘free’ (Koutsimpogiorgos et al., 2020). Instead, by having supply and demand accept the terms and conditions of the platform before they can use it, a platform can structure the way supply and demand interact. For example, most platforms use algorithms to rank search results without disclosing how such algorithms work and what kind of data are fed into them. This can be simple data, such as geographical proximity between gig worker and client, but also more complex data, based on reviews, ratings, and speed of delivery. This would incentivize workers to do their utmost best, as low performance may result in a lower ranking or even being banned from the platform altogether. Furthermore, the specific type of service, or combination of services, that can be offered on a platform is generally restricted through the use of fixed categorizations. In some cases, platforms also determine the price for services. In all, such restrictions remove some of the entrepreneurial freedoms that independent contractors generally enjoy offline.

Issues

Gig work was initially welcomed as a source of income in the wake of the 2008 financial crisis. What is more, gig platforms are very popular among consumers, who value the flexibility and good service that platforms generally assure. This initial enthusiasm, however, faded away as it became apparent that some gig work was underpaid. While the payment per gig may be quite high, the total income that one can obtain in a month may still be below the minimum wage level, as gig

workers are not compensated for waiting time, appliances, or health insurance. This means that, while some do gigs as a side job next to regular work or study, others have to work longer than forty hours to earn a living. What is more, as gig workers are incentivized to perform well as they are rated by clients, they may take irresponsible health risks in carrying out their tasks (such as speeding on the road, or working many hours without resting). In protest, some gig workers started to unionize but only to limited effect, as current Competition Law generally does not allow independent contractors to collectively bargain wages.

Working on platforms in particular has raised the issue of whether the classification of gig workers as independent contractors is justified. As the platform exercises forms of control over the gig workers, it is often argued that a platform worker should be regarded as an employee on the platform for which (s)he works. The platform, in turn, should then be seen as an employer. If gig work were to be regulated in such a way, many concerns regarding low pay and lack of security would be removed, as gig workers would enjoy minimum wages and social security. At the same time, gig workers undeniably enjoy more freedom than regular employees. In particular, they choose their own working hours, their assignments, and whether to work for multiple platforms simultaneously (*multi-homing*). As employees of a platform, these freedoms would be largely removed.

Solutions

Many governments around the world are currently contemplating how to regulate gig economy platforms in view of the social concerns about the remuneration and wellbeing of workers. Apart from classifying the relationship between platform and gig worker as an employer-employee relationship, there are a host of alternative solutions that should be considered. In all, one could distinguish between five solutions (Drahokoupil and Piasna, 2017; Frenken, 2017; Prassl and Risak, 2017):

1. Classify online platforms as **intermediaries** and platform workers as **independent contractors**.
2. Classify online platforms as **employers** and platform workers as **employees**, as already discussed.
3. Create an **intermediate category** for gig workers in between classic employee and classic independent contractor. This 'third category' would still treat gig workers as independent contractors, who can choose their working times and assignments, but with additional social rights. These rights could include social security and protection from being banned from the platform without reason.
4. Competition Law could be amended to allow independent contractors to engage in **collective negotiation** with online platforms, for example with regard to minimum wages, social security and working conditions.
5. One could let the **hourly rate** determine whether there is an actual employee status. For example, at a rate lower than, say, 150% of the minimum wage and for a work period of, say, one month, the status of independent contractor will automatically be transformed into the status of an employee.

Evaluation

Variant 1 actually refers to the *status quo* in most countries. It seems to serve the interests of online platforms and the consumers served by gig workers, but not the interests of the workers themselves. Work and income remain uncertain and many will not take out insurance, rendering them precarious. However, this variant may be favourable to gig workers who only want to offer their services occasionally to supplement their main income drawn from a regular job or pension scheme.

Variant 2 is especially favourable to platform workers in terms of continued payment during illness and holidays, protection against dismissal, protection against discrimination and intimidation, and a guaranteed income. For platforms, however, having to treat their gig workers as employees would necessitate fundamentally re-thinking their business model and re-designing their platform, as they would no longer be able to rely on a flexible workforce to take care of their own appliances. What is more, platforms would have to pay workers – as employees – for the waiting time. For consumers, this variant could also be detrimental in terms of foregone consumer surplus, as the flexibility of services would decrease, and prices would increase. However, in several countries, flexibility can be combined with an employee status, for example, with zero-hour contracts or intermediation via a temp agency. Thus, the original business model of platforms, and its benefits for consumers, may still thrive if the employment status does not preclude flexible working hours.

Variant 3, introducing a third category, would clearly improve the position of independent contractors, as they would gain additional social rights without losing the flexibility of choosing their working hours and assignments. To establish if someone would fall under the third category, working via an online platform would probably not be a sufficient criterion. Rather, it should apply to gig workers, who not only get their assignment via online platforms, but who also experience a dependent relationship with the platform, with the latter exercise a substantial control of the worker. If this control is absent, a gig worker could still be considered a classic independent contractor. While a third category is often mentioned as a solution, even by some platform companies, it may bear the unintended result that workers, who currently have employee status, may come to fall into the intermediate category over time. In that scenario, the position of (the small number of) gig workers may increase but at the expense of a potentially much bigger group of current employees that see their labour protection deteriorating if they end up in the intermediate category. It is for this reason that this solution may not get much support from labour unions. In addition, a system with three, instead of two, worker categories obviously complicates matters for labour inspectorates, as they will have to oversee not just one type but two types of borderline cases. Even if a clear distinction has been made at one moment in time, the evolutionary nature of platform technologies and business models may mean that this distinction can quickly become outdated. This may create legal uncertainties for platforms, stifling investments and creating uncertainty for workers over their status.

Variant 4, allowing collective bargaining, can be considered as a form of compromise between platform and worker, as with variant 3. It assures better pay and conditions for workers but without the platform having to fundamentally adapt

its business model, as in variant 2. However, different from variant 3, variant 4 leaves the exact outcomes to the negotiation process between gig workers and platforms. It is in this direction that some legal scholars seek the solution to the concerns raised about gig workers (see, for example, Lao, 2017). The disadvantage, however, is that in the case of collective bargaining, some form of categorisation may nevertheless be necessary, as exemption from competition law will not be granted to all independent contractors. Thus, as for variant 3, some criteria need to be established for gig workers to be allowed to unionize and to enter into collective bargaining with platforms.

Variant 5 introduces a distinction between employee and freelancer in a pragmatic way. It uses a monetary threshold (here using the example of 150% of a country's minimum wage) to divide gig workers into precarious, independent contractors, who need protection via an employment status, and independent contractors, who are quite well paid and do not need protection. It further allows for a 'probation time' before the default status of independent contractor is transformed into the status of an employee. It would allow gig workers to try out the work first without causing an immediate administrative burden for the platform. While using a percentage of the minimum wage as a threshold may seem straightforward to apply, this solution may prove difficult to implement in practice. For example, platforms may make use of 'dynamic pricing', adjusting prices depending on the real-time conditions of supply and demand. Second, to compare earnings with a minimum wage, one would have to establish the income of gig workers per hour. This, in turn, would necessitate making a proper estimation of waiting time, which may be hard to assess.

Reflections

In order to compare the solutions, the interests of gig workers, platforms and consumers must be weighed. None of these variants seems to properly represent all interests. While variant 1 serves the interests of platforms and consumers, variant 2 improves the position of most gig workers. The other three solutions can be understood as a more subtle balancing of the interests of workers, platforms and consumers. Even if the latter solutions may seem more balanced, the first and second solutions have the clear benefit of fitting into existing categorizations carrying less administrative complexity for government agencies. Having said this, these two solutions seem to 'take sides' and would still necessitate amendments in labour law to prevent court cases about the status of gig workers as either independent contractors or employees from continuing.

Administrative complexity is not only an issue that may affect government agencies, it can also bear implications for the contestability of the market for platform intermediation. Complex regulatory solutions raise the fixed costs for platforms to operate, which makes it harder for new platforms to enter a market of labour intermediation and contest its leadership. This is all the more relevant today, as we witness several attempts by gig workers themselves to start worker-cooperatives to compete with for-profit operators. As such, cooperatives could improve the pay and working conditions of gig workers without necessitating new regulations per se, regulators should design regulations in such a way that the future founding of worker cooperatives is not frustrated.

On a final note, the data-driven nature of online platforms also poses new data-related issues for governments that go beyond decent pay and labour protection (Helberger et al., 2017; Van Dijck et al., 2018). For example, there is the issue of the portability of review data, which gig workers may wish to bring to a new platform if they decide to switch between platforms. Ensuring that the ownership of such data lies with workers would empower them vis-à-vis platforms. Platforms may also violate the privacy of gig workers and use algorithms that lead to discriminatory biases. We have not gone into these issues here, as these are generally dealt with at the European level and build on a different type of (legal) scholarship. Having said that, these issues are equally important and should be taken into account, should governments decide to regulate the gig economy in new ways.

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