



## Regulatory Techniques for ‘Virtual Workers’\*

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### 1. Introduction

This article focuses on the regulatory options as regards the legal status of on-demand workers and crowdworkers. It specifies the various possible regulatory mechanisms for persons providing service in the sharing economy and raises the question as to which regulation can provide the most beneficial legal environment for them. The key challenge addressed in this article is identifying the appropriate form of regulation that guarantees the protection of virtual workers in the new forms of work without unnecessarily regulating and thus hindering work performance in the sharing economy.

The article first defines virtual work and classifies the two main forms of virtual work. Next, the article outlines the possible regulatory techniques for the status of the persons performing work in the so-called ‘gig economy’ and demonstrates the risks through an example. The article then describes the various possible legal strategies of statutory labour and social law, as well as the pros and cons of self-regulation. Finally, the article briefly tests the various mechanisms on two selected fields of labour law, namely (i) health and safety regulation and (ii) unfair dismissal.

### 2. Definition and Classification of Virtual Work

The sharing economy has brought about various new forms of work which are known as digital work, platform(-based) work, crowdwork, work-on demand, or virtual work. *Cherry* used the expression ‘virtual work’ to allude to work taking place online.<sup>1</sup> In a European Trade Union Institute (ETUI) Working Paper the term ‘virtual work’ refers to all forms of work at any workplace using the Internet,

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<sup>1</sup> Miriam A. CHERRY: A Taxonomy of Virtual Work. *GA. L. Rev.*, vol. 45, 2011. 951., 954.

computers or other IT-based tools.<sup>2</sup> This article focuses on such forms of work where work is organized through an online platform,<sup>3</sup> and excludes other potential forms of virtual work as defined by *Valenduc and Vendramin* (such as casual work, employee sharing and job sharing). In the author's opinion, the major novelty of the new forms of work in the sharing economy is the existence of a platform that connects service providers (workers) with clients/users. In certain cases, these platforms are regarded as being employers or a placeholder for employers, while in other cases they act merely as intermediaries. The platforms introduced a new form of work organization that significantly influences the manner in which work is carried out. The specific nature of work performance affects the legal classification of the relationship between worker and client/user on the one hand, as well as between worker and platform-based firm on the other hand. This article addresses only labour-based platforms and leaves aside asset-based platforms, as its focus is on labour and on those people who provide labour in the sharing economy.<sup>4</sup>

The world of virtual work covers a broad range of diverse types of work that need different regulatory responses based on their special nature. For the sake of schematized regulatory responses, it is necessary to formulate certain categories of virtual work. The identification and classification of the various forms of virtual work will facilitate their integration into law.

In the author's opinion, there are two major forms of virtual work organized through a platform, namely crowdwork and work on demand.<sup>5</sup> These two categories reflect major differences that indicate differing regulatory responses. In the case of typical crowdwork,<sup>6</sup> the entire work is performed in cyberspace, and thus there is no personal connection between the service provider and the client/user. By contrast, work on demand is organized only by apps, but is performed in the real world. This means the provision of normal local services, such as food delivery, cleaning, driving, babysitting, and handyman activities. In such cases, known as 'work on demand via apps' by *De Stefano*,<sup>7</sup> the platform places workers or service providers with clients/users. The novelty is the connection between service providers and clients through mobile apps or online platforms (also called network- or platform-based companies). Unlike the global scope of crowdwork, the work for network companies is territorially bound.

<sup>2</sup> Gérard VALENDUC – Patricia VENDRAMIN: Work in the digital economy: sorting the old from the new. *ETUI Working Paper*, 2016. 03., 29.; see also Juliet WEBSTER – Keith RANDLE: Positioning Virtual Workers Within Space, Time and Social Dynamics. In: Juliet WEBSTER – Keith RANDLE (ed.): *Virtual Workers and the Global Labour Market*. 2016. 3–34.; Pamela MEIL – Vassil KIROV: Introduction. In: Pamela MEIL – Vassil KIROV (ed.): *Policy Implications of Virtual Work*. 2017. 5–7.

<sup>3</sup> Jeremias PRASSL – Martin RISAK: The Legal Protection of Crowdworkers: Four Avenues for Workers' Rights in the Virtual Realm. In: MEIL–KIROV op. cit. 274.

<sup>4</sup> Brhmie BALARAM – Josie WARDEN – Fabian WALLACE-STEPHENS: Good Gigs. *RSA*, 2017. 10. Subject of the transaction through the platform can be labour, services, or sharing of assets, see See Jesnes and Nesheim's definition of sharing economy: cited by J. DØLVIK – K. JESNES: *Nordic labour markets and the sharing economy*. Nordic Council of Ministers, 2017. 12.

<sup>5</sup> This categorization mainly follows De Stefano's classification who differentiates in the 'gig economy' between crowdwork and 'work on demand via apps', see V. DE STEFANO: *The rise of the »just-in-time workforce«: On-demand work, crowdwork and labour protection in the »gig-economy«*. [Conditions of Work and Employment Series No 71] ILO, 2016. 2–3.

<sup>6</sup> Eg. Amazon Mechanical Turk, Clickworker, InnoCentive, etc. See on the legal qualification of crowdwork: Johannes WARTER: *Crowdwork*. Wien, ÖGB Verlag, 2016. Cf. DØLVIK–JESNES op. cit. 12.

<sup>7</sup> DE STEFANO op. cit. 1.

### 3. Possible Regulatory Techniques for the Legal Status of Virtual Workers

#### 3.1. Legal strategies to determine the status of virtual workers

Companies in the sharing economy often operate in a legal vacuum at the onset of their expansion in a certain country.<sup>8</sup> This legal lacuna also affects the legal classification of service providers. When speaking of the regulation of virtual work, many possible fields of law are challenged. Virtual forms of work raise several concerns, including particularly the distortion of competition and tax evasion, as well as uncertainties regarding the classification of the relationship with the service provider.<sup>9</sup> Legislative considerations are needed in competition law; data protection law; tax law; labour and social law; and anti-discrimination law.

The existing legal landscape of virtual workers is diverse. Most prominently and frequently, the classification difficulties regarding Uber drivers lead to litigation. In the United States, several states have passed regulations that classify Uber and Lyft drivers as independent contractors. In April 2017, also rulings by the US Court of Appeals for the Second Circuit classified “black car” drivers as independent contractors.<sup>10</sup> On the other hand, in the United Kingdom, in a first instance decision, a court found that Uber drivers are ‘workers’ and not self-employed contractors.<sup>11</sup> However, the classification of Uber drivers is, in many states, still not in the foreground, mainly because of ambiguities as to the lawfulness of cab-driving activities of Uber drivers at all,<sup>12</sup> or simply because of the relatively small number of persons involved. While Uber drivers are usually the focus of attention, legislatures pay much less attention to other virtual workers.

Among the regulatory techniques, the author highlights hard and soft law, as well as statutory state law and various self-regulatory techniques by collective representation. There seems to be scant literature on the question as to how far soft law can appropriately govern virtual work, although codes of conduct and international framework agreements could play a significant role in the regulation of cross-border forms of virtual work, as they could overcome the limited geographic scope of national labour laws.<sup>13</sup>

<sup>8</sup> DØLVIK-JESNES op. cit. 14.

<sup>9</sup> Ibid.

<sup>10</sup> US: Court of Appeals for the Second Circuit, 12 Apr. 2017, *Mazhar Saleem, et al. v. Corporate Transportation Group, Ltd., et al.*, Docket No. 15-88-cv.

<sup>11</sup> The decision was being appealed by Uber. Bethan CARNEY: Uber drivers found to be workers – 2017/10. *European Employment Law Cases*, 2017/1. 37–40.

<sup>12</sup> Disputes on the uncertain legal status of Uber have been proceeded eg in Denmark, Bulgaria: C. K. CLASEN – R. P. ANGELOVA: Comments on 2017/10. *European Employment Law Cases*, 40–41.; in Canada, see Miriam A. CHERRY – Antonio ALOISI: “Dependent Contractors” in the Gig Economy: A Comparative Approach. *American University Law Review*, 2017. 654.

<sup>13</sup> See on the chances of soft law methods: Rüdiger KRAUSE: International Framework Agreements as Instrument for the Legal Enforcement of Freedom of Association and Collective Bargaining – The German Case. *Comp. Lab. L. & Pol’y J.*, vol. 33, 2012. 749.; on the legal nature of these soft law methods: M. Antonio GARCÍA-MUÑOZ ALHAMBRA – Beryl TER HAAR – Attila KUN: Soft on the Inside, Hard on the Outside: An Analysis of the Legal Nature of New Forms of International Labour Law. *Int’l. J. Comp. Lab. Law & Indus. Rel.*, 27, no. 4, 2011. 337–363.

Speaking of statutory state law, there are basically three options for regulating the status of virtual workers. Firstly, virtual workers can be integrated into the scope of labour law by considering them as employees, employee-like persons or persons belonging to a special category (e.g., teleworker, agency worker). The second alternative is to classify virtual workers as self-employed. Finally, it is possible to provide some (but not labour law) protection to the workers by their inclusion in the social security system. The next section will review the pros and cons of these three main framing options.

### 3.2. *The example of Foodora*

The practice of the food delivery company Foodora in Austria exemplifies the difficulties in determining the status of virtual workers. Foodora employs its riders in three legal forms, namely as (i) *freie Dienstnehmer* ('free employees', i.e. with a basic contract of personal service), (ii) employees (part time or full time, also with marginal working time) and (iii) self-employed.<sup>14</sup> The so-called free employees have, by definition, little or no personal dependency, use their own tools for work performance and do not need to perform their work in person. They are obliged to perform an activity for a certain period (and not to deliver a predefined outcome or result). Labour law does not apply to free employees, but they are fully covered under the social security regime in a manner similar to employees. The basis of differentiation between the possible legal forms is not only the availability of the riders for work that shows their personal dependency. New riders can begin to work only as self-employed or free employees. Status as employee is afforded only after a certain period of time as a sort of promotion. Riders have different payment systems depending on their legal status, such that riders with the status of employee earn more than their colleagues do.<sup>15</sup> Consequently, the legal status – which is determined in a one-sided manner by Foodora – directly affects the payment.

This example exposes major concerns. The platforms make use of the various kinds of legal relationships according to their needs, comparable to forum shopping (which can be referred to here as 'status shopping'). In the author's opinion, this means evading the protection embodied in labour law if the employer were to choose between the forms of legal relationship based on the length of the worker's service. The determination of the legal status of a working person should not be exposed to the unilateral will of the employer. Making the employment status dependent on the length of service contradicts the idea under employment law that the real features of the relationship and the level of the worker's personal dependency are decisive in the classification of the relationship. Employment law itself contains instruments for a progressive protection such as a probationary period, an increase in the notice period and a redundancy payment based on the length of service. The legal status

<sup>14</sup> T. DULLINGER: *Essenszustellung: foodora*. In: M. RISAK – D. LUTZ: *Arbeit in der Gig-Economy*. 2017. 189.; also available: <http://www.gig-economy.at/> (last visited: 15. 12. 2017.)

<sup>15</sup> Ibid.

of the worker should be determined based on the objective criteria of the work performance, but must not become the employer's free choice. It is usual to have professions that can be performed in different statuses. For example accountants and journalists can carry out their work as employees, self-employed persons or in an intermediary category, if the latter exists in the country concerned. However, in such cases, the determination of the status should be based on the actual circumstances of the work performance.

#### 4. Options for Statutory Regulation and Self-Regulation

##### 4.1. Employees

The performance of virtual work presents specific features that make it more difficult to subsume virtual workers under the traditional categories of labour law.

The major argument against the subsumption of virtual workers under labour law is that workers do not possess the necessary personal dependency on the service provider to classify them as employees. Indeed, both crowdwork and work on demand are characterized by the irregularity of the work performance. Additionally, one can notice higher flexibility through less instruction regarding working time and working place. Still, instructions and control have not disappeared entirely, but are present in new forms such as user ratings and algorithms based on users' behaviour.<sup>16</sup> The new way of management and control that occurs by data and through fully automated process by algorithm, is known as algorithmic management.<sup>17</sup> Both instruction and supervision have been outsourced to clients/users, such that they seemingly act as managers over virtual workers through the possibility of ordering the tasks and evaluating the workers' performance.<sup>18</sup> Ratings constitute a very intensive quality control. The results of these ratings influence workers' promotion, employability and – indirectly – the payment and sometimes even their legal status or the continuation of the relationship. In this way, virtual work creates new forms of monitoring of and control over workers.<sup>19</sup> However, outsourcing the managerial prerogatives to clients/users occurs only superficially. In fact, it is not the clients/users, but rather the platform itself that performs the managerial functions. Clients merely feed data to the platform, but the decisions are made by the platform-based company. The company programs the functioning of the algorithms and is responsible for running them. Therefore, platforms can be regarded as employers or at least as placeholders for employers.

<sup>16</sup> Min Kyung LEE – Daniel KUSBIT – Evan METSKY – Laura DABBISH: *Working with Machines: The Impact of Algorithmic and Data-Driven Management on Human Workers*. Proceedings of the 33rd Annual ACM Conference on Human Factors in Computing Systems. 1609–1610.

<sup>17</sup> LEE–KUSBIT–METSKY–DABBISH op. cit. 1609.

<sup>18</sup> A. ROSENBLAT – L. STARK: Algorithmic Labor and Information Asymmetries: A Case Study of Uber's Drivers. *Int'l J. Comm.*, 2016/10. 3772.

<sup>19</sup> E.g. Uber creates weekly performance metrics for the performance of workers. See ROSENBLAT–STARK op. cit. 3772.

Another rationale against the classification of virtual workers as employees is that, theoretically, they can refuse assignments. However, the appearance of free determination of working time by on-demand workers is deceptive, and regular refusal of work is penalized. Even if workers can reject certain assignments, platforms use strong incentives to push workers to accept further orders by issuing frequent messages and alerts about high demand, which obviously can hinder rest periods and extend working hours.<sup>20</sup> Overall, virtual work (particularly, work on demand) in many cases reveals the usual features of personal dependency.

Crowdwork presents two further major features that make it difficult to subsume crowdwork under the realm of labour law. These characteristics are specifically, in the case of crowdwork, the possible cross-border relationship and the multiplicity of parties providing work that creates multi-party relationships and causes the fragmentation of employer functions. Crowdworkers often perform micro tasks, which take just a couple of minutes. In this way, they can accomplish a huge number of tasks for different clients in a single day. The three-party (triangular) relationship with the involvement of a platform as an intermediary exacerbates the recognition of virtual workers as workers within the realm of labour law. As *Prassl and Risak* highlight, crowdworkers are usually part of multi-party relationships that can be described as an ‘interdependent net of contracts’. In their opinion, such a chain of contracts should be regarded as a single phenomenon.<sup>21</sup> Even if one were to accept this idea, it is difficult to implement this concept due to the participation of different legal systems in such networks of contracts. Moreover, they point out, some online service provider such as Uber can be regarded as an employer, while others like TaskRabbit reflect a strong fragmentation of employer functions among customers, the platform and even the person performing virtual work that makes their identification as employer difficult.<sup>22</sup> Bearing in mind the overwhelming tension between the cross-border nature of crowdwork and the very limited geographic scope of statutory state regulation, one quickly reaches the boundaries of the regulation of crowdwork as an employment relationship.

Taken as a whole, the adoption of a broad definition of employee could include a large percentage of on-demand workers. However, this very likely would not work for cross-border or multiple-party relationships.<sup>23</sup> Therefore, in the author’s opinion, integration into employment law is a real option for workers in the ‘work on demand via apps’ sector, while it is not a viable alternative for crowdworkers.

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<sup>20</sup> For example, Uber predicts high demand for the next hours and days and sets incentives to motivate drivers to be available during those times. Even if these are not clear instructions, they are incentives that influence the behaviour of drivers regarding working time and working place. In detail, see ROSENBLAT–STARK op. cit. 3765–3771.

<sup>21</sup> PRASSL–RISAK (2017) op. cit. 278–279.

<sup>22</sup> PRASSL–RISAK (2017) op. cit. 282–283.; See also DE STEFANO op. cit. 8.

<sup>23</sup> PRASSL–RISAK (2017) op. cit. 279.

#### 4.2. *Alternative perspective: The employer's approach*

The classical approach to classifying crowdwork focuses on the status of the person performing the work. An alternative approach that goes mainly back to the work of *Prassl*, shifts its attention to the concept of employer.<sup>24</sup> *Prassl* follows a functional-typological approach by identifying five major functions of the employer, namely (i) the inception and termination of the employment relationship, (ii) receiving labour and its fruits, (iii) providing work and pay, (iv) the internal managing of the enterprise and (v) managing the enterprise on the external market. According to his arguments, if the company fulfils these requirements, it is to be identified as an employer and must assume obligations as such. *Prassl and Risak* argue that some crowdwork platforms, such as Uber, exercise the full range of employer functions and can be identified as a sole employer.<sup>25</sup> It is more difficult to evaluate the situation in the case of crowdwork, where a multiplicity of parties are involved. Platforms often exercise employer functions even in such cases.

To approach the problem of legal classification of virtual workers from the employer's side is certainly a bright idea. Looking at the other side of the coin is instructive to obtaining the whole picture of the classification of virtual workers. However, this proposal has its drawbacks, as well. In many European countries, there is no universally valid statutory notion of employer,<sup>26</sup> but employers are the evident and necessary party vis-à-vis employees. Moreover, the continental European legal system is traditionally hostile towards any form of intermediary between employers and employees.<sup>27</sup> In the author's opinion, these two characteristics exacerbate the acceptance of the idea that the determination of the platform as employer can be decisive for the existence of an employment relationship.

#### 4.3. *Intermediate category of workers between employees and self-employed*

Some authors have proposed the introduction of an intermediary category in the United States, known as 'dependent contractors' or 'independent workers', and the integration of virtual workers into this category.<sup>28</sup> This option should end the traditional binary division of labour law by offering virtual workers graded protection adjusted to their higher flexibility. The underlying notion of this intermediary category is that the putative independency contradicts the economic reality.

<sup>24</sup> Jeremias PRASSL: Die Schwierige Suche nach dem Arbeitgeber im Englischen Recht. *EuZA*, 2013/4. 472–492.

<sup>25</sup> Jeremia PRASSL – MARTIN RISAK: Uber, TaskRabbit & Co: Platforms as Employers? Rethinking the legal analysis of crowdwork. *Comp. L.L. & Pol. J.*, 2016. 635–641.

<sup>26</sup> This is the case in Austria, see FRANZ MARHOLD – Michael FRIEDRICH: Österreichisches *Arbeitsrecht*. 2016<sup>3</sup>. 58–59.

<sup>27</sup> However, some common law countries accept a plural employer model. With examples, see Luisa CORAZZA – Orsola RAZZOLINI: Who is an employer? In: Matthew W. FINKIN – Guy MUNDLAK (eds.): *Comparative Labor Law*. 2015. 135–141.

<sup>28</sup> Seth D. HARRIS – Alan B. KRUEGER: A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker". *The Hamilton Project*, DP 2015-10, [http://www.hamiltonproject.org/assets/files/modernizing\\_labor\\_laws\\_for\\_twenty\\_first\\_century\\_work\\_krueger\\_harris.pdf](http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf); Orly LOBEL: *The Gig Economy & The Future of Employment and Labor Law*. *U.S.F. L. Rev.*, vol. 51, 2017. 64–71.

With reference to the Canadian example, *Lobel* suggested the adoption of an intermediary category of worker between employee and independent contractor – at least for the application of some fields such as health and safety, as well as collective bargaining.<sup>29</sup> *Harris and Krueger* proposed the introduction of a new legal category for Uber and Lyft drivers, referred to as the ‘independent worker’. They suggest granting independent workers the right to bargain collectively, workplace antidiscrimination protection and the chance to opt in regarding some other labour and social rights.<sup>30</sup>

An intermediate category of workers (called ‘employee-like persons’ in Germany) already exists in several countries (e.g. Austria, Canada, Germany, Italy and Spain).<sup>31</sup> Similarly, the long-standing UK category of ‘worker’ covers those who possess certain characteristics but are neither actual self-employed nor employees. They enjoy some protection, such as minimum wage and working time restriction.<sup>32</sup>

*Cherry and Aloisi* pointed out in their comparative study on Canadian, Italian and Spanish law that the adoption of an intermediary category has delivered very mixed results in those countries.<sup>33</sup> The Italian and Spanish solutions have been especially criticized mainly for shortcomings and failures of the legal regulation. In addition, *De Stefano* and *Prassl–Risak* correctly emphasize their doubts about the efficiency and success of such a third category. Even in those countries where an intermediary category exists, a third category does not solve the crucial problem of difficulty of classification.<sup>34</sup>

Besides, the scope of the rights to which independent contractors should be entitled is also extremely controversial.<sup>35</sup> Some argue that they should enjoy only certain basic rights, while others criticize this opinion as a deprivation of the rights to which they should be entitled.<sup>36</sup> Affording the third category overly generous rights could bring about the circumstance where a service provider seeks to avoid the use of this category. Conversely, creating an intermediary category of workers with only a few rights could have the effect that employers will attempt to force actual workers into this category.<sup>37</sup>

The introduction of an intermediary category between employees and self-employed persons is a huge challenge, and this third option would not solve the problems attached to the difficulty of classification.

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<sup>29</sup> LOBEL op. cit. 64–71.

<sup>30</sup> HARRIS–KRUEGER op. cit. 15–21.

<sup>31</sup> For Canada, Italy, and Spain, see CHERRY–ALOISI op. cit. 635–638.; PRASSL–RISAK (2017) op. cit. 287–288.; regarding crowdworkers as employee-like persons in Germany see particularly Bernd WAAS: *Crowdwork in Germany*. In Bernd WAAS – Wilma B. LIEBMAN – Andrew LYUBARSKY – Katsutoshi KEZUKA: *Crowdwork – A Comparative Law Perspective*. 2017. 142., 160–163.

<sup>32</sup> BALARAM–WARDEN–WALLACE–STEPHENS op. cit. 37–39.

<sup>33</sup> CHERRY–ALOISI op. cit. 656–676.

<sup>34</sup> PRASSL–RISAK (2017) op. cit. 288–290.; DE STEFANO, op. cit. 18–21.

<sup>35</sup> On the caveats of too narrow or too generous rights see: DE STEFANO op. cit. 20.; PRASSL–RISAK (2017) op. cit. 290.; CHERRY–ALOISI op. cit. 677.

<sup>36</sup> DE STEFANO op. cit. 290.

<sup>37</sup> CHERRY–ALOISI op. cit. 677.

#### 4.4. Special category of workers

Virtual work shares important similarities with certain forms of atypical or non-standard kinds of work that have already been the subject of much academic and policy debate.<sup>38</sup>

The online performance of crowdwork resembles *telework*. It is conceivable to make use of the experiences of the regulation of this kind of atypical work.<sup>39</sup> In the European Union, the Framework Agreement on Telework (2002) provides a practical guide on the issues most controversial when performing and regulating telework.<sup>40</sup> The Framework Agreement identifies the main fields requiring particular attention when people perform telework, such as data protection, privacy, health and safety. However, the regulation of telework in the Member States is very diverse, such that it is not appropriate to draw general conclusions from it.<sup>41</sup>

Another alternative is to create a *sui generis* regulation for virtual workers. *Prassl and Risak* suggest special legislation (the Crowdwork Act) on this issue, taking the regulation of the European Union on Temporary Agency Work as a model.<sup>42</sup> Agency work shares one major similarity with the platform-based forms of virtual work, namely the tripartite relationship, where two different employers share the function of employer. According to his arguments, both the intermediary and the final user exercise some power of direction and control over the performance of work.

*Ratti* also emphasizes the tripartite structure of crowdwork, and considers platforms as private intermediaries that should share rights, duties and responsibilities of the parties involved in this arrangement.<sup>43</sup> He considers the possibility of the inclusion of platforms in the category of *agency* in the sense of the Directive 2008/104/EC as a viable option, which could alleviate the precariousness of crowdworkers while simultaneously boosting platform work. However, *Ratti* also perceives the blind spots of this solution, particularly short-term assignments and the global nature of crowdwork.

In the author's opinion, a special regulation on virtual work should be considered only as last resort if the existing general rules cannot appropriately govern this kind of work. The legislature should first make use of the existing legal categories, before creating an innovative new category. This would only make the legal landscape more complicated without any benefit. In the author's opinion, most forms of virtual work can be integrated into the traditional categories, whether telework, agency work or other forms of job performance.

<sup>38</sup> On the difficulty in classifying crowdworkers as homeworkers in Germany, see WAAS op. cit. 163–171.

<sup>39</sup> See the ILO attitude towards telework. ILO: *Conditions of Work Digest: Telework*. (Geneva, 1990), Vol. 9, No. 1. As further reading on telework and its possible ways of regulation see Erika KOVÁCS: Do We Really Wish You Were Here? Hungary and Distance Work. In: Edoardo ALES – Olaf DEINERT – Jeffrey KENNER (eds): *Core and Contingent Work in the European Union*. 2017. 83–110.

<sup>40</sup> Commission Staff Working Paper, *Report on the Implementation of the European Social Partners' Framework Agreement on Telework*, Brussels, 2 July 2008, SEC (2008) 2178, COM(2008) 412 final 4.

<sup>41</sup> On the possibility to apply the Austrian regulation of homework to crowdworkers, see Johannes WARTER: *Crowdwork*. Wien, 2016. 203–238.

<sup>42</sup> PRASSL–RISAK (2017) op. cit. 291.

<sup>43</sup> Luca RATTI: Online Platforms and Crowdwork in Europe: A Two-Step Approach to Expanding Agency Work Provisions. *Comp. Lab. L. & Pol'y J.*, vol. 38, 2017, 477.

#### 4.5. Self-regulation techniques

All forms of work in which work performance has been displaced to a different location beyond the plant such that workers do not meet each other on a regular basis, disadvantage their collective organization. As *Finkin* correctly states, “dispersion of work creates an obstacle to group formation”.<sup>44</sup> This statement is true for on-demand workers and crowdworkers, as well. Unions need special methods to overcome this spatial distance and isolation of workers.

The potential of various self-regulatory techniques of virtual work has not been exploited yet. However, in the last two years one could observe the first signs of self-organization of crowdworkers and on-demand workers. In the case of virtual workers, online communication and organization play a significant role in self-organization. Even the design of a website that workers can use to review and rate clients can be regarded as a first step in the efficient representation of interests.<sup>45</sup> Such websites or apps can at least filter out ‘bad’ clients who misuse the system by either not paying or poorly paying crowdworkers. In Europe, the German trade union IG Metall is a pioneer in the advocacy of the interests of crowdworkers and work-on-demand workers. Headed by this union, a common German-Austrian website was created to inform virtual workers.<sup>46</sup> This website informs even on the representation bodies of virtual workers in Sweden, the United Kingdom and the United States.<sup>47</sup>

Trade unions face similar challenges regarding the representation of virtual workers such as they did with atypical workers and ‘employee-like’ persons. The representation and protection of the interests of the persons at the periphery of labour law have long been a dilemma for trade unions. The new forms of work performance mean rivalry of the classical employees. Therefore, trade unions often have the somewhat justified fear that the legal acceptance of persons beyond the narrow field of employment could threaten the privileged legal position of employees and weaken employee rights.

A step further is the question as to whether crowdworkers and work-on-demand workers can be subject of collective bargaining and collective agreements. It is controversial as to whether unions must claim to represent virtual workers at all if they are not employees. The German Collective Agreement Act, which allows collective agreements to cover certain employee-like persons, can serve as a model.<sup>48</sup> In practice, German social partners rarely made use of this opportunity, and the prevailing majority of collective agreements including employee-like persons focuses on the special

<sup>44</sup> Matthew W. FINKIN: Beclouded Work, Beclouded Workers in Historical Perspective. *Comp. Lab. L. & Pol’y J.*, vol. 37, 2016. 609.

<sup>45</sup> As was the case with Turkopticon in 2008. See M. SIX SILBERMAN – Lilly IRANI: Operating an Employer Reputation System: Lessons from Turkopticon, 2008-2015. *Comp. Lab. L. & Pol’y J.*, vol. 37, 2016. 505.

<sup>46</sup> See <http://faircrowd.work/de>.

<sup>47</sup> See <http://faircrowd.work/de/unions-for-crowdworkers>.

<sup>48</sup> Art. 12a of the Tarifvertragsgesetz (Collective Agreement Act) integrates employee-like persons into the scope of the Act, but excludes sales agents. This is because employee-like persons are regarded those who are economically dependent and in need of labour protection.

field of broadcasting.<sup>49</sup> In other countries, such as in Austria, collective agreements do not apply to employee-like persons, although no solid objections are raised against their inclusion.<sup>50</sup>

The situation is even more hostile for self-employed persons. In most Continental European countries, collective agreements cannot apply to self-employed persons. There is increasing literature on the issue as to whether and how to extend the scope of collective bargaining beyond traditional employees to intermediary categories or even to self-employed workers (or independent contractors).<sup>51</sup> In this regard, it creates an additional difficulty that collective bargaining must comply with rules under competition law and antitrust law. The expansion of the personal scope of collective agreements to include self-employed can give rise to conflict with the prohibition of cartels under Article 101 of the TFEU. Fixing the minimum wage by collective agreements can be seen as a price cartel for labour that leads to a distortion of competition. This has been seen as problematic in the United States.<sup>52</sup> In an EU context, the *FNV Kunsten* judgment of the Court of Justice of the European Union clarified that a provision of a collective labour agreement, in so far as it sets minimum fees for service providers who are ‘false self-employed’, cannot be subject to the scope of Article 101(1) of the TFEU.<sup>53</sup> However, this statement refers to a special group of self-employed persons and not to all self-employed persons.

In countries with a dual channel of employee representation, it is a significant sign of the self-organization of workers depending on whether they initiate the creation of a works council. The Austrian food delivery company, Foodora, is a good example. It was allegedly the first platform-based company where workers created a works council with the support of a trade union.<sup>54</sup> The creation of a works council is the first step in the self-representation of workers. The drawback of this trend is that a works council is not responsible for most workers’ claims, particularly for payment. Furthermore, a works council can represent only the interests of employees, but not those of self-employed riders. Another pitfall is that a precondition for the creation of a works council is the existence of a plant in the meaning of a workplace (*Betrieb* in German). Identifying the plant and the workers belonging to such plant is particularly difficult in many cases because an actual plant (as an operational structure) is often lacking and even if there is a plant, workers are not integrated into it.<sup>55</sup> The cross-border nature of crowdwork exacerbates the situation even more.<sup>56</sup>

<sup>49</sup> DE: Bundesministerium für Arbeit und Soziales, Weissbuch – Arbeiten 4.0, fn. 196, available at <http://www.bmas.de/DE/Service/Medien/Publikationen/a883-weissbuch.html> (last visited 14. 12. 2017).

<sup>50</sup> Rudolf MOSLER: Anwendung des kollektiven Arbeitsrechts auf arbeitnehmerähnlich beschäftigte Selbständige? *DRdA*, 2012. 100–113.

<sup>51</sup> For the possibilities in Australia and Canada particularly, see MCCRISTAL: Designing Collective Bargaining Frameworks for Self-Employed Workers: Lessons from Australia and Canada. *Int. J. Comp. L. L. and Ind. Rel.*, vol. 30, 2014. 217–242.

<sup>52</sup> On this discussion, see Elizabeth J. KENNEDY: Employed by an Algorithm: Labor Right in the On-Demand Economy. *Seattle U. L. Rev.*, vol. 40, 2017. 992.; Brett HARRIS: Uber, Lyft, and Regulating the Sharing Economy. *Seattle U. L. Rev.*, vol. 41, 2017. 269.

<sup>53</sup> NL: ECJ, 4 Dec. 2014, Case C-413/13, *FNV Kunsten Informatie en Media*, ECLI:EU:C:2014:2411.

<sup>54</sup> See <http://faircrowd.work/2017/04/28/deutsch-oesterreich-foodora-fahrer-gruenden-betriebsrat/>; <http://orf.at/stories/2386977/2386978/> (last visited 14. 12. 2017).

<sup>55</sup> On this, see Martin MÜLLER: Gewerkschaftliche Organisationsstrategien und alternative Kampfmaßnahmen. In: LUTZ–RISAK (eds., 2017) op. cit. 320, 323.

<sup>56</sup> Hannes SCHNELLER: Betriebsrat und Mitbestimmung in der Plattform-Ökonomie. In: LUTZ–RISAK (eds., 2017) op. cit. 204–235.

There are several barriers to the collective representation of virtual workers. The sceptical attitude of trade unions, the often-absent plant, the spatial dislocation of workers and the traditionally narrow personal scope of the collective agreements, all create theoretical and practical drawbacks for the collective representation of this group. Even if there have been some pioneering efforts in collective representation, this is, overall, an extremely underdeveloped field.

#### *4.6. Inclusion and empowerment of self-employed persons*

If virtual workers are neither classified as employees nor belong to an intermediary or special category of workers, they should be regarded as self-employed persons. In this context, it could be possible to grant self-employed persons certain core labour rights. *Prassl and Risak* suggest, among other things, the application of minimum wage, working time restrictions, annual paid holiday and the right to paid sick leave to these persons.<sup>57</sup>

Furthermore, in the author's opinion, self-employed persons should be entitled to the right to equal treatment between men and women. The extension of some core rights to self-employed persons has the advantage of avoiding the classification difficulties of virtual workers. The detachment of the minimum rights from the status of employee could guarantee minimum labour standards for virtual workers.

#### *4.7. The social security solution*

Another significant alternative is to expand social security protection or a portion of the regime to virtual workers.<sup>58</sup> The broad personal scope of social security legislation can contribute to the avoidance of disputes surrounding the legal classification of virtual workers, as was the case regarding Uber drivers in Belgium.<sup>59</sup>

The difficulty of the social insurance coverage of virtual workers lies in the fact that the irregularity of their work makes it more difficult to qualify for social security benefits and pensions, as these usually depend on the length of the person's employment relationships. To avoid this problem, social insurance should be tied to income. An *earnings-related insurance system* serves the needs of virtual workers better, as well as the needs of all those participants in the labour market who fall beyond the scope of classical employment.

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<sup>57</sup> PRASSL–RISAK (2017) op. cit. 287.

<sup>58</sup> For the recent considerations in the United States, see LIEBMAN–LYUBARSKY op. cit. 109–114.

<sup>59</sup> E.g. in Belgium, see K. DEVLOO: Comments on 2017/10. *European Employment Law Cases*, 2017. 41–42.

Social security laws that are based on income instead of the labour law classification of the work performed (e.g. in Austria) can serve as a model.<sup>60</sup> The Austrian law provides a comprehensive social coverage independently from the employment status, but based on income, meaning that over a certain income (EUR 425/month in 2017), everyone is covered by statutory health, pension and occupational insurance. This earnings-related, compulsory social insurance scheme has the benefit of avoiding the difficulty of status classification of workers by covering all economically active persons.<sup>61</sup> The social security law provisions do not apply the notion of employee, but make use of their own term (*Dienstnehmer*), which has a slightly broader meaning than ‘employee’ under labour law. This social security term refers to the Income Tax Act (“Einkommensteuergesetz”).

Traditionally, in Austria, social security insurance was linked to and organized by occupation. In 1998, the system was changed completely by attaching social protection to a gainful activity, more precisely to the income tax. In the last 20 years, the parliament extended social security coverage to all kinds of risks for self-employed persons, as well. The last step of this development was the provision of the opportunity for self-employed persons to opt in to the statutory unemployment scheme. By this step, the protection of self-employed persons became comparable to that of employees.

Applying this system to virtual workers means that they are covered by the compulsory social insurance if they fall under the Austrian legal system and have an income over EUR 425/month.<sup>62</sup> The Austrian social security system applies to those virtual workers who perform work mainly in Austria. This rule applies both to self-employed persons and employees. If the income of virtual workers does not exceed this limit, they are covered only by occupational insurance. However, in most cases, they also have income from other sources. In this case, income from various sources must be aggregated. Linking the insurance to income helps to avoid the difficulty surrounding the classification of the legal relationship that arises from the fact that most tasks of crowdworkers have a very short duration (so-called micro tasks).

This system is close to the idea asserted by *Fredman*,<sup>63</sup> who advocates for ‘free standing social rights’ independently from the employment relationship, alleging that treating the employment relationship as a privilege is – in itself – discriminatory. The narrow scope of employment; the difficulty in defining employee and employer; and the aim to avoid the insider-outsider discussion clearly speak for the extension of social rights beyond the scope of an employment relationship.

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<sup>60</sup> For an excellent analysis of the Austrian social security system and particularly its expansion to full coverage, see Franz MARHOLD: Social Protection of Contingent Work: Austria and the Full Coverage Social Insurance System. In: ALES–DEINERT–KENNER op. cit. 233–254.

<sup>61</sup> In Germany, the expansion of social insurance to all gainfully employed persons has been discussed by scholars, but compulsory insurance is still basically bound to the employment relationship. See WAAS op. cit. 184–185.; Franz RULAND: Ausbau der Rentenversicherung zu einer allgemeinen Erwerbstätigenversicherung? *ZRP*, 2009. 165–169.

<sup>62</sup> In detail, see Sarah BRUCKNER – Caroline KRAMMER: Sozialversicherung in der Gig-Economy. In: LUTZ–RISAK (eds., 2017) op. cit. 254., 258–259.

<sup>63</sup> Sandra FREDMAN: Women at work: The broken promise of flexicurity. *ILJ*, vol. 33, 2004/4. 299–319.

## 5. Test of the Different Regulatory Mechanisms

The next step is to test the suggested regulatory techniques on two topics that are highly relevant. In order to reach well-founded results, two different fields are selected for proving the appropriateness of the regulatory mechanisms, namely (i) health and safety regulation and (ii) dismissal protection. Health and safety regulation in the European Union has an extremely broad personal scope that goes far beyond the traditional notion of employee, while dismissal protection is rather narrowly framed and applies only to employees.

Regarding *health and safety protection*, the regulatory challenge lies in the desire to protect workers against risks while having extremely limited control over their working conditions. As *Ales* in his comparative study states, national legislators of health and safety have detached from the labour law notion of employees and employers. Instead, they typically apply general safety obligations beyond the limited personal scope of labour law.<sup>64</sup> According to *Ales*, anyone who organises a productive activity and/or exercises managerial prerogatives is responsible for the application of the preventive and protective measures of safety obligation.<sup>65</sup> Platform companies obviously are in charge of organizing workers' activities, and therefore fall under the scope of health and safety rules independently from the classification of their legal statuses. However, the situation of crowdworkers can be more controversial for two reasons. First, the broad personal scope of the rules is reduced by the limited territorial scope of the health and safety rules. It is particularly problematic that crowdworkers often sit in developing countries. Another concern is that crowdworkers carry out their jobs at home. The EU Framework Agreement on Telework of (2002) states that the employer is responsible for the protection of the occupational health and safety of the teleworker. In practise, it is difficult to control compliance with the rules if the workers have complete freedom regarding their working place and working time. The application of health and safety rules to virtual workers is mainly regardless of their legal classification.

The regulation of *dismissal protection* touches on essential problems such as the classification of the status of the person performing the work and the often very short-term contracts. The current practise of automatic deactivation or 'firing by algorithm' by some service providers calls for a regulatory response. The restriction of the termination of the work is a significant issue for virtual workers. Prove of this can be seen in the judicial settlements regarding Uber and Lyft drivers. Many Uber drivers complained that dismissals were arbitrary and particularly cruel because they happened automatically after client complaints or the dropping of the driver's rating below a certain threshold. Therefore, in *O'Connor v. Uber Technologies, Inc.* the settlement included an agreement that workers will receive a hearing before an arbitrator prior to any dismissal.<sup>66</sup> Similarly, in the settlement between Lyft

<sup>64</sup> Edoardo ALES: Occupational Health and Safety: A Comparative Perspective. In: Edoardo ALES (ed.): *Health and Safety at Work*. Kluwer Law International, 2013. 419–421.

<sup>65</sup> ALES op. cit. 429.

<sup>66</sup> CHERRY–ALOISI op. cit. 644.

drivers and Lyft, the drivers reached an agreement to replace the prior practise of termination for any reason without warning with a due process hearing.<sup>67</sup> One can conclude that in the case of on-demand workers, it is extremely important for the workers that they enjoy some protection against arbitrary termination of the relationship. This statement is particularly true for those who perform virtual work as a main job and thus depend on the regular income. Crowdworkers can have similar problems if they perform tasks for the same platform for a long time. The problem here is that dismissal protection is coupled with the employment status. Consequently, if virtual workers are not classified as employees, they are not protected against at-will termination of their contract with the platform. This clearly calls for a regulation.

## 6. Conclusion

This article has outlined the major possibilities for regulating the situation of those persons who perform work through a platform-based company. The situations of on-demand workers and crowdworkers show major similarities, but also significant differences. It is easily conceivable that on-demand workers in most cases could be integrated into the realm of labour law. This could happen through a broad interpretation of the term ‘employee’ or their subsumption into a special category (agency workers, teleworkers), or even their coverage under an intermediary, third category between employees and self-employed persons.

The integration of crowdworkers into labour law reveals huge deficiencies in realization. Especially the limited geographic scope of national laws speaks against this solution. If crowdworkers are left beyond the scope of labour law, they need other forms of protection, for example against unfair and discriminatory ratings or arbitrary termination of their contracts. Furthermore, statutory social security regimes should cover crowdworkers. This is theoretically feasible in the case of income-based social security systems.

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<sup>67</sup> LOBEL op. cit. 67–68.