Atypical work, trends and challenges for workers rights

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Introduction

- What is typical (work) and what is atypical (work)?
- The "*laboratory of platform work*":
  - what if platform workers (and/or gig workers) were – at least, in part – genuine self-employed workers?
- The social urge to take into consideration the social and economic needs of the vulnerable – albeit potentially non technically subordinated – "*persons performing (platform) work*" (Article 2, par. 1, letter c), PWD).

Labour Law Beyond Employment

- Apart from misclassification (or «sham») cases, there are different – non alternative – **techniques** of **protection of self-employed workers**:

  a) **assimilation** to employees;

  b) **special regulation or special rights** granted to Self-employed workers in general or to special categories of Self-employed workers (so called «*intermediate categories*»);

  c) access to **collective bargaining (**«standard» or «ad hoc» collective bargaining → adaptability and ductility).

Three examples of "Collective Road" in Platform Work

1. UGL Rider-**Assodelivery** C.A., **September 2020**:
   - Basic rights for **self-employed riders**;
2. CGIL-CISL-UIL-**Just-Eat** C.A., **March 2021**:
   - Flexible working conditions for **fully-employed riders**;
3. CGIL-CISL-UIL-**Assogrocery** C.A., **February 2024**:
   - Specific protection of **self-employed, organized workers**.

The Shadows of Antitrust Law on the "Collective Road"

- E.C.J. Case-Law:
  - **Self-Employed Workers**, as **independent economic actors** of the market, are treated as **undertakings** for the purposive of EU **competition law** → the agreements contracted by their representatives (which are not technically "Unions", but rather business associations) are not collective (labour) agreements → anti-competitive conducts prohibited by competition law!
  - …**unless** the represented workers are «**false**» self-employed workers (E.C.J. 4th December 2014, C-413/14, «Kunsten»);

Once again a (mis)classification issue…?

- The "tricky" notion of "false" self-employed workers, combining elements of both competition law and labour law:
- a) On the one hand, "*a service provider can lose his status of…an undertaking, if he/she does* ***NOT determine independently his own conduct on the market****, but is entirely dependent on his principal, because* ***he/she does not bear any of the financial or commercial risks arising out of the latter's activity*** *and operates as an* ***auxiliary within the principal's undertaking***";

Once again a (mis)classification issue…?

- b) On the other hand, "*the term 'employee' for the purpose of EU law must itself be defined according to objective criteria that characterize the employment relationship…*
- *…it is settled case-law that the essential feature of that relationship is that* ***for a certain period of time one person performs services for and under the direction of another person*** *in return for which he receives remuneration*".

A Comparative note…

- US Case-Law:
  - Self-Employed Workers are excluded from the scope of application of US collective labor law (1935 NLRA – "Wagner Act")…
  - …accordingly, they do not enjoy the Labor Antitrust exemption, even if they have "*no established places of business…no employees…no capital investment except a small equity in the truck…no skill or special qualifications*" (L.A. Meat 1962)…
  - …unless unions negotiate the rates of pay of both employees and self-employed workers with the aim of protecting the former from the competition of the latter (Musicians vs. Carroll 1968).

The Case of Seattle City Ordinance

- **Seattle City Ordinance of 14 December 2015 → Antitrust Immunity for the collective negotiation** of the working conditions of for-hire drivers (Uber, Lyft, etc.):
  - The Antitrust claim by the Chamber of Commerce of Seattle and the settlement of the dispute in April 2020;
- **Seattle City Ordinance of 29 September 2020 (Antitrust Dispute Settlement)**:
  - **minimum pay rate**, along with **H&S** guarantees and platform **log-off limitations**, accorded by the platform companies to the for-hire drivers…
  - …in exchange of the **Antitrust Immunity repeal.**

Rethinking the Scope of Antitrust exemption in Labour Law

- The three rationales of a paradigm shift:

a. **A market-based view**: the role of passengers/community in the Seattle Ordinance (compare Justice John Marshall Harlan's Dissenting Opinion in Lochner v. New York);

b. **A semi-social opening**: the prevailing interest of the employees (in need to be protected against the unfair competition of independent contractors);

c. **A truly social stance**: the protection of the human factor regardless of any classification (decent work argument: liberty and freedom).

The 2022 Guidelines of the EU Commission on the collective protection of «solo self-employed workers»

"*Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons*" (30th September 2022):

- **Self-employed persons**…even if they are individuals working on their own…**are, in principle, undertakings** within the meaning of Article 101 TFEU, since they offer their **services for remuneration on a given market** and perform their activities as **independent economic operators**;
- Yet, **some** self-employed persons face **difficulties in influencing their working conditions**. This is particularly the case for **solo self-employed persons**, who **work on their own** and **primarily rely on their own personal labour to make a living**, as they may not be entirely independent of their principal or **they may lack sufficient bargaining power** → **collective negotiations** may provide an important means to improve the working conditions of these **solo self-employed persons.**

The 2022 Guidelines of the EU Commission on the collective protection of «solo self-employed workers»

Against this background, the Guidelines clarify:

(a) that collective agreements by solo self-employed persons who are **in a situation comparable to that of workers** fall **outside** the scope of Article 101 TFEU (→ no ban on concerted restraints of trade), and;

(b) that the Commission will not intervene against collective agreements of solo self-employed persons who experience an **imbalance in bargaining power vis-à-vis their counterparty/-ies**.

The 2022 Guidelines of the EU Commission on the collective protection of «solo self-employed workers»

- **Examples** of Solo self-employed persons who are in a **situation comparable to employees**:

1. **Economically dependent solo self-employed persons** (economic dependence is when the person earns, on average, at least 50% of total work-related income from a single counterparty, over a period of either one or two years) → the "***fair threshold dilemma***";
2. **Solo self-employed persons working 'side-by-side' with workers** (solo self-employed persons who perform *the same or similar tasks 'side-by-side' with workers for the same counterparty*, are in a situation comparable to that of workers. These solo self-employed persons provide their services **under the direction of their counterparty** and do not enjoy sufficient independence as regards the performance of the economic activity concerned) → the "***fair classification dilemma***";
3. **Solo self-employed persons working through digital labour platforms → the "*over-selectivity dilemma*".**

Concluding Remarks

- Blood & Sweat (Labour Law) vs. Gilded Butterflies (Antitrust Law)?
- Labour Law between Universalism and Selectivity;
- The urge to "pave the way" for the (and of the) Collective Road under the guidance of the polar star of "*decent work for all*".

Thanks for the attention!

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