Task Force 4
Digital Transformation

Policy brief

LEGAL REGULATION OF THE PLATFORM ECONOMY*

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ABSTRACT

This Policy Brief provides proposals as to how different jurisdictions may implement the ILO Declaration on Fundamental Principles and Rights at Work, and the ILO Report on Decent Work in the context of platform work, within the constraints of their respective constitutional and legislative orders. The purpose is to provide guidance as to how states can use – or modify – their existing legal frameworks to ensure that the platform economy complies with the norms and standards set out in the relevant ILO documents.

CHALLENGE

This Policy Brief addresses the challenge of devising a set of globally applicable norms and standards for the legal regulation of platform work. Platform work may be broadly defined as "work which is digitally mediated, in that work and worker are brought together through the platform or digital base" (Fredman and Du Toit 2019). Platform work is becoming an increasingly important part of national economies, and, as we shall see below, has thrown up, and continues to throw up, a host of regulatory issues.

In simple terms, as platform work involves "work", it would, logically, be governed by labour law frameworks (although many platform companies dispute this and present themselves as only providing services to self-employed workers in transacting with their customers). However, while platform work is a global phenomenon, national labour law regimes are different and particular. Furthermore, because of the relatively recent provenance of this kind of work, existing labour law frameworks are still playing catch-up to the realities of global platform work. This is visible in the way that different courts often reach different conclusions on similar facts with regard to the status of platform workers, with a judge remarking that deciding whether platform workers are self-employed or employees is like being "handed a square peg and asked to choose between two round holes" (Heiland 2020).

However, while national labour law regimes may differ, the structure of the disputes between platforms and their workers follows similar and often overlapping patterns. The platform business model that rests upon labelling platform workers as "partners" or "entrepreneurs", and treating them as independent contractors entering into transactions with consumers with the platform playing only a facilitating role, has proven to be controversial across many jurisdictions and given rise to sustained litigation. This includes "misclassification" lawsuits (i.e., whether workers should be classified as "employees" – and therefore protected under labour law or not). These lawsuits often raise high stakes, because in many jurisdictions, employment (or, as the case may be, intermediate worker) status serves as a gateway to accessing further labour rights, as well as a prerequisite to be able to engage in collective bargaining, and therefore have major implications for platform profit levels.

In this context, what is required is a set of standards for the legal regulation of platform work that are both general enough to have global salience notwithstanding specific differences between labour law regimes, and also concrete enough to be useful to legislators, policymakers and courts across the world. This Policy Brief seeks to lay a basis for this by identifying commonalities that exist in legal systems in different countries, and by using standards set out by the International Labour Organization (ILO) for determining baseline thresholds in the context of platform work.

PROPOSAL

The ILO's Declaration on Fundamental Principles and Rights at Work sets out the "immutable nature" of the ILO's core principles and seeks to promote their "universal application" (ILO 1998). Alongside this, the ILO Report on Decent Work fleshes out the Declaration in more detail and defines "decent work" as "productive work in which rights are protected, which generates an adequate income, with adequate social protection" (ILO 1999). The Declaration on Fundamental Principles and Rights at Work and the Report on Decent Work provide a threshold set of norms and standards that provides general guidelines to legislators, policymakers and courts in different jurisdictions.

In recent times, the rise of platform work has provided a unique set of challenges to labour laws and labour rights frameworks. Because of its heterogeneous, flexible, and segmented nature, platform work does not fall cleanly within the traditional understanding of "employment", which has historically been the subject matter of labour law. It is equally clear, however, that in most if not all cases, platform workers do not engage with platforms as equally placed "independent contractors", and that it would be unjust to leave the relationship between the two parties to be determined solely by contract law. The proposed set of standards should therefore take into account the unique features of platform work while remaining anchored within the basic thresholds for fundamental rights at work, and for decent work, as set out by the framing ILO documents. They should also inform – and be informed by – recent initiatives such as the European Union's proposed Digital Services Act, which require platforms to take into account fundamental rights as part of their terms of service.

To accomplish this goal, this Policy Brief articulates a set of principles that are general enough to have cross-jurisdictional purchase, but also concrete enough to serve as useful frameworks for policymaking or litigation. These include a reconceptualisation of the embedded employee/independent contractor (or self-employed) binary in a manner that considers the realities of platform work, as well as advocating a threshold set of five principles: fair pay, fair conditions, fair contracts, fair management, and fair representation. Together, these principles offer a framework for the legal regulation of platform work that may be useful for legislators, policymakers and judges across countries.

The proposals, elaborated in greater detail below, can be summarised as follows:

> Existing tests used to distinguish between relationships of employment and those between independent contractors ought to be fundamentally reconceptualised to recognise the realities of platform work, if not done away with altogether. At the very least, the distinction between employees and independent contractors in the context of platform work ought to be based on specific criteria relevant to platform work, such as the role played by the platform "app", the manner of control exercised through the app, the power to set terms and conditions for service provision, and so on.

In addition, the Policy Brief recommends five principles that should presumptively apply to all platform workers: (i) fair pay (through minimum wage regulations, possibly adapted to take into account the segmented and fragmented nature of platform work), (ii) fair conditions (that speak to health and safety and physical working conditions, and may involve a splitting of obligations between the platform and the customer or consumer), (iii) fair contracts (that provide transparency and seek to mitigate the imbalance of power between the platform and the worker), (iv) fair management (that includes non-discrimination and mitigating unaccountability and algorithmic bias), and (v) fair representation (including rights to organise and negotiate collectively).

THE EMPLOYER/INDEPENDENT CONTRACTOR BINARY AS A GATEWAY TO LABOUR RIGHTS

Most jurisdictions draw a distinction between "employees" (who are entitled to labour law protections) and "independent contractors" (who are not). The employee/independent contractor binary has evolved in the context of the concept of work during the nineteenth and early twentieth centuries, where "employees" worked for a single, identifiable employer, for a sustained period of time, using the employer's equipment, and at a physical location such as a factory or office. Many of these characteristics are absent from platform work. For this reason, courts and legislatures around the world have struggled to apply the employee/independent contractor paradigm to platform work. Some jurisdictions have created an "intermediate category" of workers, who do not have the full range of rights available to employees but do retain a more limited set of rights (e.g., as defined in the UK Employment Rights Act 1996; see Uber v Aslam and Farrar, *Fredman and Du Toit* 2019).

This Policy Brief suggests that the substance of the relationship between the platform and the worker should determine the question, with all workers who are dependent on platforms or working to deliver a platform's brand being granted the threshold rights set out in (b) above.

Consistent with the realities of platform work, the following criteria – none of which should be conclusive in itself, but are only indicative in nature – may be used to determine access to the threshold rights:

- who designs and markets the service;
- who has *potential or actual* control over terms of use, and over determining the price of the service;
- whether the worker is obliged to deliver the service personally;
- how much control the platform exercises over the worker, especially through the app, and especially over the manner in which the worker delivers the service;
- whether the use of the app is purely to allow users to communicate with workers, or whether it plays a more extensive role (such as, for example, fixing the price, exercising surveillance through a "ratings" system, and so on);
- whether and to what extent the worker is economically dependent on the platform;

- whether the worker is associated with the platform through "badges of employment" (such as uniforms etc.).

These criteria take into account the realities of platform work and remain alive to the fact that platform work is of different varieties, with certain platforms *genuinely* playing only a minimal, facilitative role in allowing service providers and consumers to find each other, while others (such as ride-hailing and food-delivery services) may play a much deeper role and exercise far greater control. The criteria can be set out in national or federal legislation or be embodied in case law. For example, these criteria make it clear that drivers for digital platforms engaging in "ride-sharing" (such as, for example, *Uber*) are "workers" (even if not employees); this is consistent with judicial trends around the world, exemplified most recently by the decision of the UK Supreme Court in *Uber vs Aslam and Farrar*.

It is important to note, further, that these criteria are not dependent on the market share enjoyed by a specific platform (much as the application of labour laws in the physical world is not dependant on the market dominance that may be enjoyed by a particular firm). They are limited to considering the relationship *inter se* between the worker and the platform.

THE FIVE PRINCIPLES OF FAIR WORK

While the range of rights available to platform workers may vary across jurisdictions, the five outlined principles represent a basic minimum threshold, consistent with the ILO standards referred to above.

First, on fair pay. Labour legislation in many jurisdictions stipulates a minimum wage. Where it exists (and is not the result of collective bargaining), the minimum legal wage ought to cover platform workers. Where there is no legal minimum wage, administrative or other measures used to stipulate minimum conditions for workers not covered by collective agreements should be applied to platform workers also. In all cases it should be recognised that platform work presents additional issues pertaining to minimum wage. Often, platform workers are expected to provide their own equipment and carry the cost of providing the service. Where this is so, minimum wage should be calculated so as to take those costs into account. Furthermore, the time spent by workers with their app switched on (for example, an Uber driver while waiting to be assigned a trip) should be counted as working time and factored into the minimum wage. In this context, it is important to note that the business model of many platforms depends upon the maintenance of a "reserve army of labour" that is available for work at all times (Prassl 2018). For this reason the United Kingdom Supreme Court recently accepted that time spent between assignments with the app on should be counted towards working hours for the purposes of the minimum wage (see *Uber vs Aslam*, UKSC 2020).

Secondly, on fair conditions. In the context of platform work, this includes issues around health and safety, compensation for injuries, working hours, and paid leave, among others. Platform workers are exposed to a variety of occupational hazards, such as accidents on the

road for ride-sharing or delivery workers, and accidents within the home for domestic platform workers. Labour legislation normally restricts compensation for injuries suffered to the "course of employment", and the nature of platform work requires this term to be interpreted broadly, as with the calculation of the minimum wage, to include all activities undertaken by a worker as a result of services performed for the benefit of a platform (for example, a delivery rider on the way to collect food to deliver should be deemed to be "in the course of employment"). This is buttressed by the ILO's Violence and Harassment Convention, which applies to all sectors and protects all workers while at "work". "Work", in turn, is defined comprehensively as including "workrelated trips", "through workrelated communications, including those enabled by information and communication technologies" or "when commuting to and from work" (International Labour Organization 2019).

Thirdly, on fair contracts. This is linked to the problem of misclassification that has been highlighted above. Contracts between platform companies and their workers are often unilateral, with the terms being set by the platform to its advantage, and handed to workers on a take-it-or-leave it basis. For example, most contracts describe platform workers as "independent contractors", regardless of the true nature of the relationship between the platform and the worker, and specifically preclude any challenges to the worker's status. In addition, platforms have been known to unilaterally vary the terms of the contract to the disadvantage of workers once the platform in question has achieved a certain degree of market dominance. Legislative or other appropriate measures should be taken requiring courts to depart from the strict contractual principle of *pacta sunt servanda*, by invoking public policy exceptions that are found in many jurisdictions or other standards of fairness (as embodied, for example, in consumer protection law), to ensure that the (more) powerful platforms cannot vary contractual terms or impose one-sided terms to the disadvantage of (less) powerful workers.

Fourthly, on fair management. Labour laws in many jurisdictions protect employees against unfair dismissal, as well as discrimination at work. These or equivalent protections should be available to all platform workers, regardless of their formal classification, adapted to their conditions of work. National legislation that bars discrimination against employees on grounds, *inter alia*, of race, religion, sex, sexual orientation, pregnancy, and other aspects of the human personality should be made applicable to platform workers, regardless of their formal status. This should include the use of algorithms which impact disproportionately on, for example, women, people of colour, or persons with disabilities; at present, laws of property are normally invoked to justify algorithmic opacity, and to prevent scrutiny of the workings of platform algorithms (another issue that is proposed to be dealt with by the European Union's Digital Services Act). At the procedural level, certain platforms require disputes to be resolved by arbitration, the seat of which is located in a different country, thus making it impossible for workers to pursue disputes or gain access to justice. Such arbitration clauses should be deemed contrary to public policy. Thus, in *Uber Technologies Inc. v. Heller*, the Canadian Supreme Court struck down the arbitration clause in Uber drivers' contracts confining them to the jurisdiction of the Netherlands as unconscionable (*Uber vs Heller*, CanSC, 2020). These and other methods to evade local jurisdiction through the use of multiple corporate entities should be countered by measures enabling workers in all cases to pursue legal claims against platforms in their home jurisdiction.

Finally, on fair representation. Collective bargaining is vital in securing the rights of workers against powerful employers but, in most jurisdictions, the right to unionise is limited to workers with the status of "employees". Anti-trust, restraint of trade, and competition laws are often invoked to prevent "non-employees" from unionising or forming associations to advance their interests through collective action. It is therefore necessary to ensure that the right to collective action, negotiation or bargaining is extended to platform workers – whatever their contractual status – on an equivalent footing with "employees", having regard to the circumstances under which platform work is performed. This is buttressed by the fact that the ILO's Freedom of Association and Protection of the Right to Organise Convention is applicable to all workers "without distinction", and the fact that the ILO recognises the right of collective bargaining as being "general in scope" and that, except for organisations representing the armed forces, the police and public servants engaged in the administration of the State, "all other organizations of workers in the public and private sectors must benefit from it" (International Labour Organization 2012).

In sum, this Policy Brief proposes that: (a) the binary employee/independent contractor distinction be re-conceptualised to factor in the realities of platform work, and create a comprehensive concept of worker that will include, regardless of contractual status, platform workers who are in positions of dependence upon platforms, through price-fixing, control over the manner of service provision or other mechanisms; and (b) that the above-mentioned five principles – fair pay, fair contracts, fair conditions, fair management, and fair representation – be applied to platform workers across the board, regardless of formal status, in the form of binding regulations, and that platforms be required to comply with them. These principles may be implemented in different ways in different jurisdictions, by means of legislation or other measures, but provide a framework and criteria for such measures that is consistent with the ILO standards referred to above. Finally, and in view of practical utility in the context of the G20, this Policy Brief suggests that these principles take the form of a global Convention on Platform Work, that will be binding on signatory states. The principles outlined above are articulated at a level that is abstract enough to afford enough legislative play in the joints for individual jurisdictions, while also specific enough to exercise supervisory force.

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