

LYFT, UBER AND CO - ON THE ASSESSMENT OF "NEW" SERVICES UNDER LABOUR LAW

LYFT, UBER A CO – O POSOUZENÍ „NOVÝCH“ SLUŽEB PODLE PRACOVNÍHO PRÁVA

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Abstract

To work from home or any other place as you have the time, inclination and ideas – the dream of every worker ?! The new forms of "self-employment" are mainly offered via internet services (so-called platforms) and are used by large companies to promote new projects with "external" ideas without tying the employees to themselves through an employment relationship. This gig economy has serious disadvantages for employees, not only from the point of view of the trade unions: People's ties to a specific company are dwindling and social protection against illness, unemployment and old age is mostly lacking. The article presents the manifestations of the new self-employment and discusses possible solutions in Germany, the Czech Republic and California in comparison.

Keywords

Gig Economy, platforms, new working relationships, lack of social security, freelancers, on-demand economy, crowdworkers, legal assessment, Czech Republic, Germany, California

Abstrakt

Pracovat z domova nebo z jiného místa, jak máte čas, chuť a nápady – sen každého pracovníka?! Nové formy „samostatné výdělečné činnosti“ jsou nabízeny hlavně prostřednictvím internetových služeb (tzv. platformy) a jsou využívány velkými společnostmi k propagaci nových projektů s „externími“ nápady, aniž by zaměstnanci byli vůči nim vázáni pracovním poměrem. Tato gig ekonomika (zakázková ekonomika) je pro zaměstnance značně nevýhodná, a to nejen z pohledu odborových svazů: vazeb lidí na konkrétní společnost ubývá a sociální zabezpečení při nemoci, nezaměstnanosti a stáří většinou chybí. Článek představuje projevy nové samostatné výdělečné činnosti a srovnává možná řešení v Německu, České republice a Kalifornii.

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Klíčová slova

gig ekonomika, platformy, nové pracovní vztahy, nedostatek sociálního zabezpečení, nezávislí pracovníci, ekonomika na vyžádání, zástupy lidí, právní hodnocení, Česká republika, Německo, Kalifornie.

INTRODUCTION

The self-employment rate (Däubler and Klebe, 2015) is also considered an indicator of competitiveness and economic sustainability in an international comparison. Part-time jobs and project work are also economic perspective indicators of the flexibility of the labour market and of self-directed work. Digitalisation – in particular services mediated by electronic platforms (hereafter: Gig Economy)² – accelerates this transformation process. In the process, social interrelationships related to working life as a whole and to old age are deliberately ignored, and provision against illness and incapacity for work is individualised. In the absence of forward-looking provision, individuals will often fail to make adequate provision against illness, unemployment and old age, which, experience shows, results in state support to avoid poverty in old age.

At the same time, this development brings different demands on protection in two areas of law to the fore: While labour law regards new "flexible" work structures as an individually and collectively incalculable risk to be regulated by the state, commercial law focuses on the gain of freedom through self-determined work (Schubert, 2018).

The following is to introduce to typical manifestations of "new" service relationships and employment relationships (2.) and discuss their special features under labour law (3.). Section 4. shows examples of regulatory approaches in Germany, the Czech Republic and California and evaluates them (5.).

1. PLATFORMS AS GATEKEEPERS OF GIG-ECONOMY

In line with their partly idealistic but in practice largely strictly economic approach, idle resources are identified and made immediately available via electronic platforms. Leaving aside the electronic mediation ("mediatization"), traditional mediation, middlemen and organisational structures are eliminated or can be monopolised. The platform-based business models leave little of the original idea of sharing among like-minded people, but

² The term 'gig' originally comes from the music industry and means 'performance/concert'. In the digital economy, it means working on call without a fixed employment contract.

reduce the intermediary service to a few potentially profitable areas. Here, two business models in particular have become type-defining: Platforms that organise and broker passenger transport services and platforms that enable short-term rentals of residential space. This is represented by the business models of Uber and Airbnb (Ludwigs, 2017). This access to areas that have not been economically exploited so far requires that the addressed resources are sufficiently available and can be made available in line with the market. Here, three resources in particular are the focus of the platforms and the centre of public discussion, which is why this contribution will primarily be limited to them:

- private residential space that has hardly or never been used commercially at all,
- private means of passenger and goods transport, and
- unbound human capital.

The idea of using such resources is actually not new but always available on the market if there is sufficient demand. The "market entry" is often obstructed by lack of regulatory requirements (technical qualifications, permits, start-up capital, easy access to "consumers").

Examples: Letting guest rooms to tourists and migrant workers; car and goods transport by solo self-employed persons; temporary or seasonal work in the cultural and event sector; all types of goods and passenger transport, here primarily passenger transport as well as food and parcel transport.

However, the on-demand and timely availability of idle resources has three further prerequisites to ensure direct and rapid communication:

- permanent mobile accessibility,
- an electronic application (app) that enables an easy-to-use, largely automated linking of supply and demand,
- high-performance IT infrastructure.

The first prerequisite is not produced by the individual companies but it is used as an infrastructure in view of the almost complete penetration with mobile end devices (smartphones, iPads, laptops) and private motor vehicles. The business model is further based on a functional, market-accepted application ("app") as well as financial and human resources for consistent market penetration. The traditional production factors of labour and capital (including space and transport capacities) are provided by third parties, i.e. contractually at disposal and provided in return for payment. In essence, then, this business model enables the global use of foreign labour and services through an "intelligent" algorithmic design and without the previously guaranteed labour and social security obligations.

Independent work has traditionally prevailed in individual areas - such as lecturing, translating and artistic activities. However, the new, digitalised entrepreneurial activity attacks the employment relationship in numerous other areas; it unfolds (potentially) disruptive, system-shattering attitude to traditional employment relationships. Although it is difficult to define the new forms of gainful employment, the distinction between self-employment and dependent - socially insured - employment is for the time being essential in legal and socio-political terms. Three main types of "new" work will be briefly presented here.

2. OUTSOURCED LABOUR RELATIONS

2.1. Main Types of "New Self-Employment"

Types of new self-employment can be divided into freelancers, on-demand economy workers and crowdworkers.

Freelancers (in German "Freie Mitarbeiter") work as contractors for a company on a temporary basis and are often employed in the fields of education, the music industry, radio and television. Such contractual relationships can nowadays also be found in architecture, advertising and gastronomy. Freelancers mostly work on a service and task contract basis and receive a remuneration. Instead of instructions, the client often specifies in detail the results of the work (Ruland, 2019). It is, in fact, a traditional form of employment, however, today it has permeated wide areas of the so-called cultural and creative industries.

A new economic sector in the true sense of the word is the on-demand or gig economy. Here, people register on an Internet platform that arranges services for a specific customer. The contractors provide – in addition to their labour – further resources of their own (vehicles, computers, working material, overnight accommodation, mobile phones) which are necessary for the provision of the service advertised by the company. The companies³ Airbnb, Uber, MyHammer, Helpling or Putzfee should be mentioned here in representation of others, as well as platforms for designers, translators or copywriters. These platforms receive an intermediary commission and pass on the remuneration to the service providers who are mostly treated as self-employed (Ruland, 2019).

Probably the most multifaceted, digitised type of new work is the so-called crowdworker. A company makes use of this group by outsourcing certain tasks and asking people to contribute on the Internet (crowdsourcing). The virtualisation of working conditions leads to a detachment of work performance from the company as a spatial-functional organisational unit. In this respect, employees are personally more independent, but hardly less economically dependent than the persons employed in the enterprise (Schubert, 2018). Here, an Internet platform is used to involve external parties in the company's internal value creation process (Ruland, 2019). The respective project is typically divided into small, simple work steps and distributed among a large number of professionally suitable crowdworkers. Many crowdworkers work part-time and are not directly controlled by a company, but are subject to time constraints and an assessment and rating regime (Ruland, 2019).

2.2. Legal Classification Criteria

Under the employment contract, an employee is obligated to serve to another performing work determined by another and subject to directives in a relationship of personal dependence. This typifying understanding of the employment relationship

³ In the Czech Republic, Jidloted and DameJidlo are worth mentioning as counterparts of Lieferando and Lieferheld. Uber Eat has ceased its activities in the Czech Republic in 2020.

covers work activities in industrial enterprises as well as in administrative units, although the degree of freedom of action may vary greatly between the sectors. Whether a contract of employment exists is decided in the overall consideration of all circumstances whereby the designation of the contract as a contract of employment or a free service contract is irrelevant (Ruland, 2019).

Here, the decisive factor is whether the service appears organisationally as a service of the company, i.e. the service of the service provider is interchangeable, or whether it is provided as an independent service of the crowdworker, albeit one that requires mediation.

In accordance with EU law, the essential characteristic of the employment relationship is accordingly that the employee is bound by instructions, i.e. someone performs services for another for a certain period of time according to the latter's instructions and receives reward for this. Another decisive factor is whether the person is integrated into the company for the duration of the employment relationship (Bourazeri, 2019). The protection of crowdworkers under labour law therefore stands and falls with their classification as employees (Schubert, 2018).

3. CURRENT STATE IN GERMANY, THE CZECH REPUBLIC AND CALIFORNIA

3.1. Germany

Outsourced employment relationships escape general legal classification. It is therefore necessary to examine on a case-by-case basis whether the existing relationship is an employee relationship or a self-employed service relationship.

Thus, despite their designation as such, the so-called freelancers can be employees or persons similar to employees due to the content of their service contract. This applies in particular if there is an circumventing transaction. Also, the degree of personal dependence, in particular the integration into the work organisation and the extent of the right to issue instructions are considered (Palandt, 2018). The conversion of an employment relationship into the position of a freelancer requires a contract. A tacit amendment is therefore not sufficient. Freelance work is, as already mentioned, often found in the media, especially in the press, radio and television companies. Treatment as an employee or quasi-employee is ruled out if the freelancer can freely determine the time, place and duration of the service. This applies, for example, to honorary teachers at universities and education centres.

Pseudo-self-employed persons are persons who provide services or work and, in doing so, act as employees in accordance with instructions or in economic dependence on the client although they have expressly concluded a contract for services or a contract for work as a contractual partner. The legal classification as self-employed is mistaken here as it is mere labelling. Pseudo-self-employment is used in an effort to circumvent labour law protection regulations (especially protection against dismissal, continued payment of remuneration), social security contributions and wage tax. Consequently,

the pseudo-self-employed person must be classified as an employee or as a person similar to an employee (Palandt, 2018).

The Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions does not help the issue of classifying employment relationships as opposed to quasi-employment and self-employment (Ruland, 2019). Its purpose is to inform persons in an employment relationship of the essential terms and conditions of employment in writing (Art. 3 f of the Directive). Although the directive makes the essential cornerstones of the employment relationship transparent, it does not set standards to improve working conditions (Kolbe, 2020). In addition, the Directive must first be transposed into national law by the Member States by August 1, 2022 (Art. 21 I of the Directive).

3.2. Czech Republic

Similarly to German law, Czech labour law also distinguishes between "dependent work" and entrepreneurial activity on a commercial basis. The employment relationship is characterised by a superordination-subordination relationship, as well as the employer's authority to issue instructions. In a pseudo-employment relationship so-called "švarc" schwarz system, an employment relationship is circumvented through entrepreneurial activity on a commercial basis and the formal conclusion of a supply or work contract. As in an employment relationship, the remuneration payer controls and directs the natural person (subjection to instructions). The remuneration is based on the duration of the work and the working materials are also provided by the remuneration payer. Finally, the legal relationship – as in the case of an employment contract – is of a permanent nature and the work performance is rendered to the remuneration payer exclusively (Ecovis Jezek, 2021).

3.3. USA on the Example of California

It is not surprising that due to the freedom of contract, all types of contracts for services and works can be concluded in the USA. Accordingly, there is little distinctive existence of national labour law. Therefore, the share of new self-employed is very high, sometimes reaching the 50% mark. It is precisely for this reason that the shady sides of such contractual relationships become all the more visible. Many self-employed people can only earn a living by providing a variety of services with changing clients. Insurance against illness and provision for retirement is hardly possible. Nevertheless, the consequences of the digitization of the labour market are not accepted everywhere without complaint. The State of California passed Assembly Bill 5 (AB5) in September 2019 to address the exploitative working conditions of platforms - including by Lyft and Uber – and to effectively combat pseudo-self-employment. Legislatively, this objective is achieved by shifting the burden of proof. For this purpose, the so-called ABC-Test is applied which was developed by the Supreme Court of the country. A person who provides services for remuneration shall be deemed to be an employee unless the principal proves that

- the worker is not subject to the instruction and control of the principal,
- the work performed is outside the normal activities of the enterprise, and
- the worker has his/her own independent business and works outside the current job as well.

This way, a large proportion of so-called gig workers are not self-employed entrepreneurs but employees (Mediafon.net, 2020).

However, the primarily affected companies Lyft, Uber and Doordash managed to push through their own bill via a referendum. Contrary to the intent of the AB5 Labour Code, gig workers are therefore still considered as "independent contractors".⁴

OPINION AND OUTLOOK

Suggestions on how to meet the challenges of the new self-employment can be found in the literature. There is a rather business-friendly plea not to restrict the desire for economic independence, especially since the development of the digital economy has only just begun. Insofar as (Däubler and Klebe, 2015) unbalanced contractual terms are used, grievances can be remedied by judicial review of the general terms and conditions (Schubert, 2018). An extension of labour law to crowdworkers would then be unnecessary. There is also a call for greater trade union involvement, both through (digital) education of crowdworkers about their working conditions and through the inclusion of this group of people in future collective agreements (Däubler and Klebe, 2015).

Finally, it is the task of the national, or even better, the EU legislator to subject crowdworkers to labour law, at least as persons similar to employees, and thus to achieve a minimum level of protection. It also seems worth considering – despite all the dogmatic difficulties of classification – to include certain areas of the new self-employed in the social security systems. This would not break any new ground in Germany: Artists' social insurance has obliged self-employed artists and publicists to arrange mandatory insurance since 1983 - just as the statutory social insurance for employees had for a hundred years before. The contributions for this compulsory insurance are paid proportionally by the insured, the Federal Republic of Germany and the cultural and media enterprises commissioning the artists. This would also provide for the "new" self-employed in case of illness and upon entering retirement.

However, there is still a long way to go before an effective regulation is in place!

⁴ How Faber, Uber and Lyft win in California: Drivers Remain 'Independent' Entrepreneurs, Taxitimes visited on NOV 04, 2020.

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