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Session I: Precarious Work – The New Normative Model for Labour Law?

Precarious Digital Work and the Role of Online Platforms –
The Inefficacy of Traditional Tests and the Need for an Indirect Approach
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1. A taxonomy of crowdwork: narrowing the focus of legal analysis.
– The common understanding of the expression “digital work” relates to a series of diverse situations, in the context of the digitalisation of the economy,¹ in which a person is engaged in performing one or more tasks using digital devices, irrespective of the physical, temporal, or organizational context of such work performance. In this broad sense, digital work places itself in a boundaryless workplace.²

While that expression may immediately bring up images of precarious work situations, not every form of digital work is characterised by precariousness, as the massive use of technology has, among other things, also brought benefits to those “traditional” workers who require a more

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flexible arrangement in their working life. Moreover, digital work may well play a role in a sustainable and participative future yet to come.\(^3\)

Over the last decade, a particular form of digital work has been on the rise, in correlation to the widespread and ever-expanding use of the Internet around the world as well as the vertical development of new technology companies. This controversial form of digital work is commonly linked to a process called “crowdsourcing”, which has been defined by some as “the act of taking a job traditionally performed by a designated agent (usually an employee) and outsourcing it to an undefined, generally large group of people in the form of an open call”\(^4\).

The particular attributes of the crowdsourcing process – when compared to more common trends in vertical disintegration of the firm\(^5\) – lie in the fact that, on the one hand, small or repetitive tasks are typically sent outside the company, to possibly hundreds or even thousands of people across the globe, to be performed by one or more of them, and, on the other, the process is aided and has developed by means of huge crowdsourcing platforms, which make massive use of complex technologies with the aim to respond to both the expectations of client companies and the economic needs of the workforce. In the context of crowdsourcing processes, the mass of individuals seeking to perform digital tasks is called “the crowd”, from which the term “Crowdworker” is derived.\(^6\)

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\(^6\) An interesting set of clear definitions is provided by S. C. KINGSLEY, M. L. GRAY and S. SURI, Monopsony and the Crowd: Labor for Lemons?, at: http://ipp.ox.ac.uk/sites/ipp/files/documents/Monopsony_and_theCrowd_SCK_MLG_S_S.pdf (last visited 7 April 2016).
Crowdwork is, therefore, characterised by the fact that a company requires a website – an online platform – to search for someone capable of performing a specific and detailed task at a given rate within a certain period of time. The most important (and studied) global online platform is the Amazon Mechanical Turk (AMT), which was publicly launched in November 2005. How it functions is well known: it basically counts on a series of Human Intelligence Tasks (HITs) being advertised on the website by so-called Requesters (i.e., final users or employers) seeking so-called Providers, or, even more colloquially, Turkers (i.e., the workers), to perform the HIT as specified in the advertisement. Generally, this kind of crowdwork involves individuals doing small tasks, such as coding, tagging, or describing items or images. But, there are reliable reports that crowdwork has been, and continues to be, used to run more complex projects at the request of private and even public-body Requesters.

While AMT is to be considered the prototype of all crowdsourcing websites, it must be noted that many other online platforms – sometimes product-oriented, sometimes not – have developed in recent years, usually adopting a similar structure and using comparable legal arrangements. Given their organizational features, this type of online platform must be distinguished from other important phenomena in the so-called gig-economy, especially from the “work–on-demand-via–apps” phenomenon, whose prototype is rather to be found in the Uber system.

8 The Amazon Mechanical Turk website reports that many NASA, US Federal Government, and private projects operate with the assistance of the crowd.
9 See for example: Crowdflower, Crowdsource, Clikworker, PeoplePerHour, CloudFactory, CrowdComputing Systems, MobileWorks, and oDesk.
This study focuses only on the AMT-type of platforms, presenting their somewhat different legal problems, which are, to some extent, already at issue before national jurisdictions in EU and in the US.\textsuperscript{11}

The exponential growth in the use of Crowdworkers, in the economies of both developed and developing countries, has given rise to fundamental questions in terms of definition, classification, social protection, and eventually commodification\textsuperscript{12} and exploitation\textsuperscript{13} thereof, as the trend might appear to be the latest form of “organised irresponsibility”\textsuperscript{14} or even an employer’s escape plan.\textsuperscript{15}

To date, perhaps not surprisingly, neither the US nor the EU has paid any particular attention to the legal implications rising out of the spread of such online platforms. Recent policies embodied in the European Commission’s European Digital Agenda do not seem to address the issue of Crowdworkers,\textsuperscript{16} which could well explain why, at the European level, trade unions responded to it negatively\textsuperscript{17}


\textsuperscript{14} H. Collins, A Review of The Concept of The Employer by Dr Jeremias Prassl, Oxford Law Faculty Blog, 10 November 2015, at https://www.law.ox.ac.uk/content/labour-law-0/blog/2015/11/review-concept-employer-dr-jeremias-prassl (last visited 27 April 2016).

\textsuperscript{15} W. Däubler, T. Klebe, Die neue Form der Arbeit – Arbeitgeber auf der Flucht?, NZA, 2015, 1032.

\textsuperscript{16} In the document Digital Contracts for Europe, issued in December 2015 by the EU Commission in the form of a Communication to the EU Parliament and the Council (COM(2015) 633 final), not one word is spent dealing with online exchange of goods and services via platforms, completely leaving aside the position of individuals who work via these platforms.

The following pages offer an overview of the legal issues stemming from the emergence of this new type of work arrangement, taking into account the need to restrict the field of analysis to just those forms of crowdworking performed by means of digital platforms. As will be noted, a major setback in labour law regulation in this context rests on the fact that crowdwork is mercurial in nature, so that, \textit{ex ante}, its characteristics seem to change in space and time so as to make it nearly impossible to classify. \textit{Ex post}, its legal implications appear difficult to grasp because they are continually changing.

\section*{2. Traditional approaches to crowdwork} – In the European context, labour law, conceived as an autonomous set of statutory regulations intended to protect the vulnerable position of servants and to shape firms’ organizational behaviour, dates back to the end of the nineteenth century and continued to develop throughout the twentieth century. In targeting these regulations, a pivotal role was played by the concept of subordinate employee. Nevertheless, the definition of a subordinate employee has consumed some of the most gifted minds of legal doctrine and jurisprudence.\textsuperscript{18}

It is a shared starting point for labour lawyers, in Europe as well as in the US, to start every investigation into new legal issues through the lens of the fundamental dichotomy: subordination/self-employment. The legal analysis carried out over the last decade on the crowdwork phenomenon proved this predilection: both labour lawyers and judges have focused their attention on the legal nature of the relationship between the worker and the platform, the final client, or both, making persistent reference to the standard contract of employment with the apparent aim of seeing the most relevant protections (such as minimum wage, working time, non-discrimination, dismissals, and collective rights) applied to Crowdworkers.

A common understanding of the legal issue is that “no clear consensus has emerged on how the courts will determine employee versus independent contractor status for workers in the on-demand economy”, being that the legal tests for discerning such status are “largely malleable and based on past precedent, largely indeterminate”.\(^{19}\)

The present investigation tries to wriggle out of this bottleneck by contemplating both the content of the legal arrangements signed by the parties involved\(^{20}\) and the concrete exercise of powers and prerogatives while the task is performed and, thereafter, when the results are later delivered and accepted.

In the following sub-sections, two alternative approaches will be taken into account.

A first approach is to classify Crowdworkers as proper employees, by means of applying long-standing qualification tests (e.g., the control and economic reality tests), and by looking at the power to evaluate the worker’s performance, without reference to the usual express contractual terms accepted by such workers before entering the entire system of platform performance, thereby disregarding the contractually mandated self-employed status of Crowdworkers.

The results of such tests being mostly unsatisfactory, some authors envision a second approach, which calls for the construction of an intermediate category of workers (i.e., quasi-subordinate workers) that could be somewhat useful in those countries where at least some legal provisions are already in place to grant such workers a special set of protections.

2.1. Crowdworkers as employees. – In virtually all cases, workers performing tasks via online platforms are formally classified as independent

\(^{19}\) M.A. CHERRY, Beyond Misclassification: The Digital Transformation of Work, cit., 18 and 28.

\(^{20}\) The prototype is again provided by AMT’s Participation Agreement, cit. (at https://www.mturk.com/mturk/conditionsofuse, last update December 2014 (last visited 27 April 2016).
contractors. This classification is also a common feature in the work relationships promoted by on-demand apps such as Uber and Lyft.

The performing individual has to be classified as an independent contractor because she has no obligation: (a) to take up the job, (b) to accomplish it in due time, or (c) to meet the client (Requester)’s satisfaction. Also, her individual performance can take place wherever in the physical world, in any organizational condition, and at any time of the day or the night, all as she sees fit.

These features are explicitly addressed or at least implied in the legal arrangements that the worker must enter into to meet the job request. Intuitively, the online platform’s inclusion of these types of provisions demonstrates its awareness of the legally ambiguous nature of the relationship. Otherwise, there would be no reason to explicitly state: that the individual is performing in her “personal capacity as an independent contractor and not as an employee” or that the agreement “does not create an association, joint venture, partnership or franchise, [or] employer/employee relationship”; or that the individual “will not represent herself as an employee or agent of a Requester or Amazon Mechanical Turk”; or even that the individual “will not be entitled to any of the benefits that a Requester or Amazon Mechanical Turk may make available to its employees, such as vacation pay, sick leave, insurance programs, including group health insurance or retirement benefits”.21

But, the existence of such an agreement, both in civil law and in common law jurisdictions, makes clear that the first obstacle to overcome is the express terms of the signed contract between the parties. So, to ascertain the actual arrangement, one must first seek to invalidate the express conditions of engagement by demonstrating that they are merely part of a sham contract and that the “real” arrangement is quite different in nature. This first alternative, in many legal systems, is complicated by the legal concept of sham or simulated relationships, which requires proof that is, most of the time, difficult to obtain and requires the decisive intervention of a judge

21 All quotations are extracted from AMT’s Participation Agreement, cit. (at clause 3.b.).

If, for a moment, the technicalities of proving sham arrangements are put to the side and the focus of the investigation is shifted to the reality of the situation, there are two long-standing tests to ascertain whether a subordinate employment relationship exists between the individual and the online platform: the control test and the economic reality test. In common law jurisdictions, these two tests are considered the most relevant for qualifying a contractual relationship as one of subordinate employment;\footnote{For the UK, see S. DEAKIN, G. MORRIS, \textit{Labour Law}, Hart, 2012, 136-140} similar tests are used for employment regulations in civil law countries.\footnote{For France, see E. PESKINE, C. WOLMARK, \textit{Droit du travail}, Dalloz, 2016, 30-33.}

The advocates for classifying Crowdworkers as employees focus on the fact that the online platform provides individuals with job opportunities, exercises general control over their performance (e.g., allowing the final user to retain the work done),\footnote{Again AMT’s Participation Agreement, cit. (at clause 3.b.) expressly states that the work product “is deemed a ‘work made for hire’ for the sole benefit of the final client.} and, more generally, unilaterally dictates the terms and conditions of employment. Further, the online platform allows the final user to monitor the individual’s performance at any time, to rate the final result, and to review the individual as a task performer, which such advocates see as having little in common with the independence typical of self-employed people. In practice, many final users are also allowed to take screenshots from the individual’s computer, to validate (or not) the individual’s intermediate steps or tasks before continuing the collaboration. Finally, the fact that the final user peremptorily establishes the time period in which the task must be completed demonstrates that the individual is subject to the power of control and direction of someone else.

These are just a few of the arguments made by those who advocate for classifying individuals working through an online platform as employees.
Although the factual basis for such arguments cannot be refuted, it must be acknowledged that none of those arguments has led to satisfactory results, as a consequence of a number of plausible counterarguments that can be put forward and the objective difficulties in classifying these kinds of workers as subordinate. Also, reversing the question (i.e., considering individuals as genuine independent contractors) would not provide a better result, at least in legal terms, as the structure of the mutual obligations “remain[s] quite murky”.26

But, assuming that the facts demonstrated an employee status, then it would appear to be difficult to determine who should be deemed to be the worker’s employer – that is, the legal entity responsible for providing the entitlements that derive from such employee status. Should it be the platform itself? The final user? Perhaps even both of them? From a legal perspective, that question is multifaceted. However, for present purposes, suffice it to say that the question implies there are alternative responses.

On the one hand, some authors suggest recognizing a joint-employer status of the platform and the final user, using the common law doctrine of joint employment, which has been accepted by appellate courts and administrative bodies in the US (e.g., its National Labor Relations Board [NLRB]). Policy arguments supporting this view refer to the online platform’s deeper pocket and best position to regulate employment standards.27 Final users themselves would somehow be alleviated by the consideration of the platform as a joint-employer and would, practically, fall into the definition of joint employment given by the US’s Fair Labor Standards Act, which finds it “where one employer is acting directly or indirectly in the interest of the other employer”.28 In the European context, the affirmation of a situation of joint- or multiple employers might be more problematic, for a deeply rooted inclination of legislatures and courts to

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conceptualize the employment relationship from a single-employer dimension.²⁹ Oversimplifying the normative evolution of the concept, a co-employment situation is to be recognized in contractual obligations especially in the context of groups of companies³⁰ and in tort law, particularly that of vicarious liability.³¹

Taking into account the strict concept of co-employment developed in European legal systems, a second alternative interpretation has been elaborated;³² it builds on the functional concept of the employer, according to which one or more legal entities can exercise an employer’s typical function.³³ From this perspective, the contractual analysis of the employment relationship is replaced by an emphasis on the typical functions of the employer: although many online platforms explicitly reject an employer role, one need only look at the economic reality of the arrangements to conclude that those platforms are employers or co-employers for different purposes, therefore bearing or sharing the relative obligations, risks, and advantages.³⁴

³⁰ This occurs in many Member States, and was also given a certain recognition by the Court of Justice of EU in CJEU, 21 October 2010, C-242/09, *Albron Catering*, ECLI:EU:C:2010:625.
³³ J. PRASSL, *The Concept of The Employer*, cit., has listed at least five of these functions: 1) inception and termination of the employment relationship; 2) receiving labour and its fruits; 3) providing work and pay; 4) managing the enterprise-internal market; and 5) managing the enterprise-external market.
2.2. Crowdworkers as a third category of workers (quasi-subordinate?) – Neither rejecting nor supporting the terms and conditions of employment contained in the contracts signed by the parties through the use of an online platform seems to return satisfying results. In keeping with the individuals’ perception of their work, some authors argue that Crowdworkers might then fall into an intermediate category of workers, in a sort of a grey area between traditional employees and genuinely independent contractors.35

The advocates of that middle-way approach (i.e., those who believe in grey areas in labour law) – a domain of law typically based on the fundamental dichotomy between subordination and independence – tend to call for the intervention of the legislature to regulate relationships that do not easily fit into the dichotomy.

The issue with those concepts is a central one, which relates to the changing nature of employment relationships accompanying transformations in the economy.36 In this respect, the promoters of such a middle or third category of workers between employees and independent contractors use the argument to apply some protections typical of subordinate employees,37 reflecting the judicial approach taken in a rather similar context with respect to Lyft drivers.38 It must be noted, however, that the argument for creating a new category of workers is more consistent

37 M. A. CHERRY, A Taxonomy of Virtual Work, cit., 27.
with working-via-apps than with crowdworking, and in these terms the question more resembles that of FedEx® drivers.39

Some scholars whose national labour law systems have, over the past decades, created intermediate categories now push for the inclusion of crowdwork into these boxes. The Italian example is useful, in this regard, as not only some authors,40 but also the legislature tends to put this form of work in an intermediate category.41 Nevertheless, a convincing argument highlights the fact that building a new category of workers in the grey area between subordination and autonomy brings more negative implications than positive ones: the creation of such a category may, in all likelihood, constitute an obstacle to achieving full labour protection, either because a true employment relationship is disguised as an intermediate relationship or when reality demonstrates the practical inapplicability of traditional tests.42

3. The need to move beyond a bilateral view of crowdworking – Although summarised here in minimalist terms, the debate around the classification of Crowdworkers shows that a direct approach to the issue risks reflecting a certain circularity of theoretical disquisitions on the legal nature of those working relationships that diverge from the historical prototype (i.e., the industrial subordinate male worker with an open ended and full time contract of employment).

The knowledge-based performance and proclaimed independence typical of every Crowdworker are too disparate to allow the use of a unique judicial test;43 indeed, the mercurial nature of crowdworking does not promote a

39 Full references to the case of FedEx® in R. SPRAGUE, Worker (Mis)Classification in the Sharing Economy: Square Pegs Trying to Fit in Round Holes, cit., § III.A.
simple legal answer to the intricate question of the legal status of the parties involved.

Efforts to build a subordinate employment relationship for workers who may not even know the final user of their work, or for those who are willing to remain ignorant of that information, are in vain, if not inaccurate from a legal perspective. Nor do those efforts seem able to cope with the real problems and aspirations of Crowdworkers, few of whom see themselves as “normal” employees.44

The idea of solving the problem by identifying the platform and the final user as joint or co-employers does not seem to represent a true alternative, either: in the end, it by-passes the issue without addressing that, to establish a joint employment situation, there must also be a juridical classification of the relationship between the parties as one of subordinate employment.

One author suggested reversing the traditional subordination test, by asking instead “who is dependent upon whom”; in that regard, TaskRabbit, Uber, Lyft, and other similar entities are found to be “wholly dependent upon their workers”,45 rather than the other way around. But, this does not sound like an ultimate response to the theoretical and practical issues surrounding the legal status of Crowdworkers, either. Differences between crowdworking and working on demand via mobile applications cannot be denied and pose different legal questions, which, in turn, cannot lead to such a reverse use of the traditional test.

The judicial use of such a reversed test appears to be unable to grasp such undeniable differences and its use appears to disfavour individuals. Thus, it is not by chance that even legislatures tend not to enter into such a debate or to create, ex novo, a new category of worker.

Looking at the position of an individual vis-à-vis the companies that are supposed to be the employer makes it clear that a direct approach to the

44 The observation is common to many empirical analyses: see, among others, S.C. KINGSLEY, M. L. GRAY and S. SURI, Monopsony and the Crowd: Labor for Lemons?, cit., § IV.
45 R. SPRAGUE, Worker (Mis)Classification in the Sharing Economy: Square Pegs Trying to Fit in Round Holes, cit., § IV.
issue of protecting Crowdworkers is impracticable and brings unresolvable uncertainties. The features of that approach – familiar to every labour law system – when compared to the absolute novelty of Crowdworkers’ parcelled, intermittent, and digital performance should highlight the need for labour law to reflect on the need to adopt a rather different approach to the issues at stake. To this are dedicated the following paragraphs.

4. The inherent, intermediary nature of online platforms: what, in legal terms, do online platforms actually do? – Some argue that the most precise definition of crowdworking is “cognitive piecework”.46 This definition emphasizes the knowledge-based nature of the work and the work’s similarities to the globally widespread use of piecework, historically developed in agriculture and manufacturing. From a Coasean vertically integrated firm point of view, crowdworking can be seen as the last move in the process to “put out” work, dealing with it by relocating outside of the firm one or more portions of its production cycle.

What is undeniable is that crowdsourcing presents a tripartite structure:47 in between the firm (final user; client; requester) and the worker (individual; provider; Turker), there must be an economic entity – in this case, an online platform (crowdsourcer; marketplace; vendor) – who develops and operates a website upon which the firm broadcasts its tasks, which are, in turn, picked up and performed by the worker.

According to a recent report issued by EU-Osha:

Typically at least three actors are involved in any transaction taking place via one of these platforms: the ultimate client, the online intermediary and the worker. In the case of platforms matching professional freelancers with clients, the self-employed status of the freelancer is generally clear (though there may be borderline cases where there is some doubt). The most contentious cases

47 J. PRASSL, M. RISAK, Uber, Task Rabbit, & Co.: Platforms as Employers?, cit., § II.A.
are those involving the online co-ordination of low-skill online work and of offline work, resulting the performance done by professionals (lawyers; architects; designers) less problematic.

These are some of the reasons why many commentators describe online platforms as intermediaries, online marketplaces, and even brokers. The role of platforms can be likened to that played by middlemen in medieval Europe; at that time, such middlemen wished to avoid guild regulation when, typically, they acted as agents for firms that wanted to contract out some work. The similarity is confirmed by the fact that, in both situations, the final user (the firm) unilaterally fixes, ex ante, the price for the work to be done (so, indirectly, the wage), giving rise to a monopsonistic situation.

Some authors have stressed the differences between online platforms and middlemen, relying on the fact that the latter did not exercise any form of control over performance of the work, while platforms actually do. But, it is more likely the case that modern middlemen do exercise such control and, just as the platforms do, extract all their revenues from the volume of business conducted by means of their intervention.

If one looks more closely at the reality of the situation and at the contractual arrangements that usually govern the tripartite relationship

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necessary for crowdworking, one cannot help but notice that the power to control the individual’s work performance is typically placed on the final user (the firm),\textsuperscript{54} which control is made explicit in the contract with the platform (e.g., the AMT Participation Agreement).\textsuperscript{55}

Nevertheless, the platform retains the right to terminate the assignment and even cancel the individual’s profile in case of dislike or non-compliance with the rules of the engagement. The platform’s prerogatives suggest that the intermediary keeps fragments of managerial control, which must, therefore, be coordinated with those of the final user.

5. An indirect approach: workforce placement vs. workforce interposition. – The assumption, according to which platforms are to be seen as intermediaries, makes it necessary to analyse that entity in more in detail. In legal terms, the function of public and/or private intermediaries in establishing an employment relationship can be broadly divided into two different types.

(A) At one end of the spectrum, we can put those bodies that merely act as placement facilitators: the role of the intermediary in this case is that of facilitating the matching of labour supply and demand. The intermediary does not take any part in the ultimate employment relationship or commercial contract.

An illustrative outline of this first, linear (placement) model is the following:

\[
\text{User firm} \rightarrow \text{Intermediary} \leftarrow \text{Jobseeker}
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Historically and according to the legal traditions of each legal system, a variety of different actors have played the function of placement facilitator.

\textsuperscript{54} Assuming, of course, that this kind of control is somehow more attenuated than that at physical (industrial) worksites: see J.T.A. GABEL, N.R. MANSFIELD, \textit{The Information Revolution and its Impact on the Employment Relationship: An Analysis of the Cyberspace Workplace}, cit., 352.

\textsuperscript{55} AMT Participation Agreement, cit. (clause 3.a.).
In most of European countries, this role was originally attributed to the State, which through its local labour offices provided firms with the required workforce. When the function was run in a monopolistic manner, it could have violated competition rules. For this reason, since the late 1990s, the European Court of Justice has required the opening of public placement services to free competition, except in those systems in which the monopoly had proved to efficiently satisfy the needs of the labour market. Together with the State and other private bodies, as the case may be, some countries also allow trade unions to play a role in governing the dynamics of labour demand.

The ILO Private Employment Agencies Convention, C181, includes this type of service provider in its definition of “private employment agency”, describing them as those natural or legal persons providing “services for matching offers of and applications for employment, without the private employment agency becoming a party to the employment relationships which may arise therefrom”.

Because of the particular position of the intermediary in the placement process, some general principles apply.

Typically, the intermediary is prohibited from charging the job seeker any fees for providing its services; thus, its income is derived from the services provided to the final user (i.e., the firm) who needs the workforce. The issues of transparency, fairness, and non-discrimination have also been crucial, allowing jobseekers to apply for each and every position, notwithstanding any formal or practical obstacle.

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58 See article 7 of the ILO Convention no. 181: “Private employment agencies shall not charge directly or indirectly, in whole or in part, any fees or costs to workers”.
59 See article 5 of the ILO Convention no. 181: “In order to promote equality of opportunity and treatment in access to employment and to particular occupations, a Member shall ensure that private employment agencies treat workers without discrimination on the basis
(B) Alternatively, the role of intermediary can be far more complex and multifaceted, particularly when it acts beyond the mere placement of workforce, taking part in a triangular arrangement, typical of the temporary agency work scheme.

This situation differs greatly from that described above, because of the interaction between the commercial contract binding the user firm and the intermediary, and the contract of employment (or an established employment relationship) binding the intermediary and the worker. This interposition model is often exemplified by a triangle:

![Triangle Diagram]

Historically, the interposition of a private intermediary in the employment relationship was banned in those countries in which the pervasive presence of middlemen (*marchandeurs, Meisters, caporali*) in critical sectors, particularly agriculture and construction, was intertwined with illegality and exploitation of poor, informal workers. In those countries, middlemen were nothing more than ordinary workers, themselves required to hire an undeclared workforce to be paid daily or weekly a small sum of money.

In Europe, once statutory regulation on the role of intermediaries acting as agencies in the labour market were enhanced, basic principles started to be applied. The approval of Dir. 2008/104/EC (the “Directive”) was just a final – and *de minimis* – recognition of what already existed in the most

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of race, colour, sex, religion, political opinion, national extraction, social origin, or any other form of discrimination covered by national law and practice, such as age or disability.”

important European legal systems, although significant divergences still persist, especially in the general approach to the institution of agency work.

The principles on which the Directive was built were: equality in basic working conditions between agency workers and comparable workers of the user firm (although this equality principle was substantially weakened by means of several derogations, provided by articles 5(2), 5(3), and 5(4) of the Directive); access to permanent employment within the user firm; calculation of agency workers in the thresholds for establishing representative bodies of employees; and information at enterprise level on recourse to agency workers within the user firm. Specifically, Article 2 of the Directive recognises the intermediary (the agency) as being the employer of agency workers.

The exact extent of the Directive’s equality principle is a matter of discussion, especially because of its explicit reference to comparable workers made in Article 5(1), which refers to “those [conditions] that would apply if they had been recruited directly by that undertaking to occupy the same job.” In this respect, it is unclear how the comparison must work when, in fact, there are no actual comparable workers hired directly by the end user.

Moreover, the Directive remains a de minimis compromise because it leaves open to Member States the ability to introduce massive derogations to the equality principle and because it does not require the establishment of a mandatory solidarity regime between the agency and the end user, nor any registration or licencing of such agencies by an administrative body of

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the State. On the contrary, a quick read of Article 4 of the Directive seems to push for the removal of those kinds of registration, which could be considered inadmissible “prohibitions or restrictions”.

The Court of Justice did not fully confirm this concern, nor did the EU Commission. The former, in the AKT case, ignoring the opinion of the Advocate General, read Article 4 of the Directive to only place procedural obligations on national authorities and skipped over the issue of giving any substantial qualifications to the exception. In its 2014 assessment report on the application of the Directive, the EU Commission admitted the Directive leaves open the possibility for Member States to simply maintain their own avant-contrat requirements, interpreting in a broad sense the concept of “grounds of general interest” contained in said Article 4.

6. Towards a broader interpretation of agency work provisions? – The idea of including online platforms into the broad category of interposition bodies is not new, but up to now, it has proved to be one of the least developed from a theoretical point of view.

If one tries to go beyond what may seem to be mere intuition, one can notice, at the very outset, that the employment intermediary models described above have one, and only one, common feature: in both the placement and the interposition models, the intermediary profits from the establishment of a relationship pursuant to which the individual performs tasks for the sake of a final user (the firm). Notwithstanding the legal nature of this relationship, a significant difference lies in the fact that, in the first

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65 Contrary to the ILO Convention no. 181 (article 3(2)), the Directive does not spend even a word trying to establish a common framework for licencing at the European level.


67 For a comment on the AKT case, see A.C.L. Davies, The legal nature of the duty to review prohibitions or restrictions on the use of temporary agency work, in Common Market Law Review, 2016, 493.

model, the role of the intermediary ends at the very moment when the worker and the user start their relationship; in the latter model, on the contrary, the intermediary continues to play a significant role throughout the relationship.

Considering this to be a matter of fact, one should try to find a legal framework to support the allocation of rights, duties, and responsibilities of all of the parties involved.

From the outset, it appears that online platforms acting as intermediaries must be included in the second type (B): this can respond to the needs of the labour markets for an exhaustive access of all parties to the relevant positions of user firms and workers. The role of the platform, in fact, seems to be “similar to those of a fiduciary, in that they should act in the best interest of all parties on the platform, and not the select interest of a few” 69

But, at least in terms of legal definitions, trying to find a legal institution suitable for adaptation to the business model of online platforms is problematic. One proposal that bears further scrutiny and development in this regard is the inclusion of such platforms in the broad category of the agencies referred to in Directive 2008/104/EC; this is explicitly promoted in a policy discussion paper issued by the European Agency for Safety and Health at Work.70

The Directive envisions the agency as one of the necessary elements of the triangular arrangement; it explicitly recognises that the agency can be the employer (see the wording of Article 2). Moreover, according to Article 3(1)(b) of the Directive, a temporary-work agency means:

  any natural or legal person who, in compliance with national law, concludes contracts of employment or employment relationships with temporary agency workers

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in order to assign them to user undertakings to work there temporarily under their supervision and direction.

A point of contention with respect to including platforms in this description is likely to revolve around the meaning of the expression “concludes contracts of employment or employment relationships”, as some will argue that the legal arrangements concluded by the individual and the online platform do not qualify as either an employment contract or a contract that creates an employment relationship. In this respect, it must be noted that the definition is so broad that one can include virtually any employment relationship. Also, it is likely to be argued that a Crowdworker is free to accept or decline to accept any of the tasks advertised on the website. But there are similar situations (i.e., zero-hour or intermittent labour contracts) to look to, at least when commitments are frequent, which may be useful in finding some kind of an employment relationship between the Crowdworker and the platform. The obvious problem with this argument is that the legal outcome will always depend on the factual circumstances of the individual case, rather than on an ex ante legal assessment.

Correspondingly, the definition of temporary agency worker provided in Article 3(1)(c) of the Directive stresses the individual’s position as that of

a worker with a contract of employment or an employment relationship with a temporary-work agency with a view to being assigned to a user undertaking to work temporarily under its supervision and direction.

The difficulty of applying this definition to Crowdworkers lies not just in the contractual arrangement, but in the need to find, in particular, an exercise of supervision and direction of the performance by the user. As

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71 The legal-nature-of-the-relationship problem, in any case, is crucial; it must be clarified in order to apply the Directive. In this regard, a suggested interpretation, according to which non-contractual arrangements could also fall within the material scope of application of article 3 could be made. See B. NYSTRÖM, 2008/104/EC: Temporary Agency Work, in M. SCHLACHTER (ed.), EU Labour Law: A Commentary, Wolters Kluwer International, 2015, 249, 251, fn.7, referring also to CJEU, 21 October 2010, C-242/09, Albron Catering, ECLI:EU:C:2010:625.

supervision and direction, in the case of knowledge-based work, is seen, at best, as attenuated when compared to more traditional forms of employment, it is highly likely that the final user (the firm) typically retains the right to evaluate the performance, to fix deadlines and technical features, and, eventually, to refuse or accept the final result.

In light of the above-mentioned concerns, it seems appropriate to briefly sketch out a way to approach the challenge of crowdworking, in terms of policy and legislative development.

At the outset, one must acknowledge the apparently insurmountable problem with such online platforms, their global nature: the AMT and other several other platforms are based in the US, operating there and in India.\(^73\)

Thus, a European Crowdworker would not be entitled to claim any rights before her national courts because of the law applicable to the legal arrangement binding her and the platform. But, if one looks at the issue more closely, one will note that, at the European level, Article 8 of Regulation no. 53/2008 (Rome I) and Article 21 of Regulation no. 1215/2012 (Brussels I bis) apply. So, the actual choice made by the parties to apply a different legislation and/or jurisdiction cannot deprive the worker of those rights provided by, in principle, the law applicable to her habitual work place. This means that even a Crowdworker could claim before her national court that her national law applies, if that is found to be the law applicable to her habitual work place.

A second issue – that of identifying a comparable worker – must also be addressed. It has been argued that the definitions of both “temporary-work agency” and “agency worker” might be stretched in order to allow both platforms and Crowdworkers, respectively, to fall within the scope of application of Directive 2008/104/EC. If this approach was undertaken, that would provide basic (and de minimis) protection for Crowdworkers, in connection with the application of the equality principle proclaimed in Article 5 of the Directive. As previously noted, that principle could apply

\(^73\) See the mturk tracker website (http://demographics.mturk-tracker.com/#/countries/all), where it is shown that more than 75% of workers perform in the US.
not only to real comparable workers, but also to potential or hypothetical comparable workers occupying the “same job” within the user firm (Article 5(1)), thus leaving open the question of who should be considered the “token” comparable worker.

Another point must also be stressed, particularly in light of the frequent use of agency work to perform intermittently short-term assignments, as is also the case in crowdworking. In this regard, the British regulation on agency work – which excludes from its scope assignments of less than 12 weeks – seems to be the most stinging example of a way to escape from the Directive’s protections. As statistics clearly demonstrate, the 12-week threshold established by the legislature excludes almost 55% of British agency workers from equal treatment.74 Fortunately, continental European Member States have not introduced such limitations, so that even short assignments, like those typically undertaken by Crowdworkers, can still fall within the Directive’s scope of application. The above-referenced AMT Participation Agreement is well aware of the issue: that agreement requires the final user to acknowledge:

that, while Providers are agreeing to perform Services for you as independent contractors and not employees, repeated and frequent performance of Services by the same Provider on your behalf could result in reclassification of that employment status.75

With European legislation as it is, the issue of protecting Crowdworkers by recognizing platforms as intermediaries still remains open. But, counter arguments to this indirect approach appear to be less challenging than those

75 AMT’s Participation Agreement, cit. (at clause 3.a.). Correspondingly, the platform includes in the Agreement an indemnity clause according to which “you will indemnify and hold harmless Amazon Mechanical Turk and its Affiliates (and their respective employees, directors, agents and representatives) from and against any and all claims, costs, losses, damages, judgments, penalties, interest and expenses (including reasonable attorneys’ fees) arising out of any claim, action, audit, investigation, inquiry or other proceeding instituted by a person or entity ("Claim") that arises out of or relates to (…) (iii) your failure to comply with any applicable laws and regulations in connection with your use of the Site.” (AMT’s Participation Agreement, cit., at clause 9.a.).
that simply rely on the application of the subordination test. A broad interpretation of the provisions contained in the Directive (especially the definitions) might be consistent with the double aim envisaged by the European legislature: on the one side, it protects agency workers and, on the other side, it promotes agency work as a reliable legal institution which provides a stepping stone towards permanent employment.

A normative discourse could go even further, developing a rather more inclusive approach to triangular work relationships, capable of requiring the application of the solidarity principle and stableness requirements to all intermediaries acting in the European labour market.