

## The Sharing Economy and EU Anti-discrimination Law

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*Conçue aujourd'hui sur le modèle cybernétique, la machine à gouverner n'est plus régie par des lois, mais par des programmes assurant son fonctionnement homéostatique.[...] En cela, elle est fidèle à un autre rêve de l'Occident: celui de l'harmonie par le calcul.<sup>1</sup>*

### INTRODUCTION: WORKING THROUGH ALGORITHMS AND THE MYTH OF “HARMONY BY NUMBERS”

Alain Supiot’s description of a dystopian modern world ruled by seemingly neutral, effective, efficient, objective, transparent, yet fundamentally inhumane programs, is sadly, and somewhat ironically, increasingly backed by an emerging amount of data, confirming that the algorithms supporting various service providers in the so-called “sharing economy” are no less biased than the humans that have programmed and operate, or use, them. For instance, it is increasingly clear that the gender pay gap and other forms of unequal treatment are even wider in the sharing economy than in other, comparable, sectors of the “real” economy.<sup>2</sup> While “price discrimination” appears to be predominantly based on gender-related bias,<sup>3</sup> studies increasingly show that race, ethnic origin, and religion/belief also appear to be relevant factors, for instance, when assessing the distribution of work opportunities among so-called “gig-workers.” For instance, according to a study conducted in a number of US cities, on-demand drivers are far more likely to be asked for rides if they do not belong to ethnic or religious minorities, two traits that are often inferred from their name and surname, picture, and other personal information provided to the platform to potential “clients.”<sup>4</sup> The data altogether suggest how relevant and concrete the risk of discrimination by seemingly facially neutral software is. A benign reading of the problem would be that programmers do not intentionally seek to produce discriminatory outcomes, but that their software, by mirroring and leaving unaddressed the bias and prejudices of their customers, and society at large, perpetuates and reinforces existing discriminations.<sup>5</sup> A less benign reading

<sup>1</sup> A. Supiot, *La Gouvernance par les nombres* Ch. 1 (2015).

<sup>2</sup> Arienne Renan Barzilay and Anat Ben-David, *Platform Inequality: Gender in the Gig-Economy*, 47 *Seton Hall L. Rev.* 393 (2017).

<sup>3</sup> Sara C. Kingsley, Mary L. Gray, and Siddharth Suri, *Monopsony and the Crowd: Labor for Lemons? 2014 Policy 1* (2016), [http://ipp.oii.ox.ac.uk/sites/ipp/files/documents/Monopsony\\_and\\_theCrowd\\_SCK\\_MLG\\_SS.pdf](http://ipp.oii.ox.ac.uk/sites/ipp/files/documents/Monopsony_and_theCrowd_SCK_MLG_SS.pdf).

<sup>4</sup> Yanbo Ge, Christopher R. Knittel, Don MacKenzie, and Stephen Zoepf, *Racial and Gender Discrimination in Transportation Network Companies*, NBER Working Paper No. 22776, Oct. 2016.

<sup>5</sup> Erika Kovács, *Gender Equality in Virtual Work: The Regulatory Aspects*, paper presented at the LLRN<sub>3</sub> Toronto Conference, June 2017, manuscript.

would be that companies operating in the sharing economy design their operations, and the software that supports them, with the full awareness of these pitfalls, but fail to take remedial action and consciously or unconsciously sacrifice fairness on the altar of consumer choice, transparency, and business reason.

A central concern of the present chapter is the extent to which EU law, and more specifically EU equality legislation, is suitably equipped and structured to tackle the old problems generated by discriminatory practices in the seemingly new context provided by the working and service arrangements in the “sharing economy.” It is worth noting that the European Parliament itself, while recognizing “that many rules from EU *acquis* are already applicable to the collaborative economy,” also encourage the Commission “to reflect the provisions of the relevant anti-discrimination legislation in the context of further analysis and recommendations in this field.”<sup>6</sup> Thus, the following section of this chapter begins by assessing the extent to which working arrangements in the collaborative economy can be analyzed by reference to the traditional categories developed to understand work relations in more conventional sectors of the labor market. Section III moves on to assess the important potential contribution of EU equality law to combatting discriminatory practices in the sharing economy. With a nominally broad scope of application and a dual nature as both an economic right and a fundamental social one, EU anti-discrimination law would be perfectly suited, in principle, to apply to these new forms of work. However, as Section IV will go on to discuss, this potential may go partly unfulfilled, though admittedly mostly because of some inherent structural doctrinal deficiencies affecting EU equality law as interpreted and applied by the Court of Justice of the EU (CJEU), rather than because of some insurmountable complexities and peculiarities affecting work relations in the sharing economy.

#### I WORKING ARRANGEMENTS IN THE SHARING ECONOMY AND ANTI-DISCRIMINATION LAW – A CONCEPTUAL FRAMEWORK

While the sharing economy is undoubtedly characterized by a large range of different arrangements for the provisions of services and goods, it would appear to us that, among the various forms of digital work coordinated through algorithms, software, and mobile applications, two main models have become, in many ways, prototypical: crowdworking and working on-demand via apps.<sup>7</sup>

The first model is characterized by the fact that an individual or, most likely, a company requests an online platform to search for someone capable of performing a specific, detailed, and digitally based task, at a given rate within a certain period of time. The most well-known and studied<sup>8</sup> global online platform of this kind is arguably Amazon Mechanical Turk, which relies

<sup>6</sup> European Parliament, “European Parliament resolution of 15 June 2017 on a European Agenda for the collaborative economy” (P8\_TA-PROV(2017)0271), paragraph I.

<sup>7</sup> On the (perhaps flimsy) assumption that platforms operating peer-to-peer property rental and sharing services predominantly involve the exchange of rent for the use of property, with labor, where present, playing a marginal and ancillary role in the contractual transaction, we venture to suggest that the other, main, prototypical form of online platform, best exemplified by service providers such as Airbnb, can be provisionally excluded from the scope of the present chapter, without, however, suggesting that such services are immune from discriminatory practices.

<sup>8</sup> See Birgitta Bergvall Kåreborn and Debra Howcroft, *Amazon Mechanical Turk and the Commodification of Labour*, 29 *New Tech., Work & Emp.* 213 (2014); Miriam A. Cherry, *A Taxonomy of Virtual Work*, 45 *Ga. L. Rev.* 951 (2011); Miriam A. Cherry, *The Global Dimensions of Virtual Work*, 54 *St. Louis Univ. L.J.* 471 (2010); Miriam A. Cherry, *Working for (Virtually) Minimum Wage*, 60 *Ala. L. Rev.* 1077 (2009); Miriam A. Cherry, *Cyber Commodification*, 72 *Md. L. Rev.* 381 (2013).

on a number of small tasks (named Human Intelligence Tasks, HITs) advertised on the platform by clients (end-users), seeking for someone to perform them. The economic advantage of this kind of arrangement lies in the fact that both the platform and the final user profit from the optimization of resources and the de-synchronization of working and non-working time.<sup>9</sup> While Amazon Mechanical Turk is in many ways the prototype for this kind of crowdsourcing platform,<sup>10</sup> many other providers<sup>11</sup> have developed similar business models and entered comparable arrangements with a plethora of “workers” and final clients, performing the most disparate tasks.

The second model, instead, typically involves the performance of tasks in the “real” world and tends to create “mobile labor markets,”<sup>12</sup> offering their customers a set of different services, from private transport to moving furniture, to cleaning and other small home works: its prototype is the transportation company Uber,<sup>13</sup> but other platforms such as TaskRabbit and Lyft may be classified in the same category.<sup>14</sup>

A substantial difference can be traced between the two models just mentioned: while in the first one, the online platform performs as an intermediary,<sup>15</sup> working on-demand via app involves a more proactive role by the platform, which creates the organizational preconditions for the gigs to be performed, unilaterally fixes the price of the gig or ride, handles the payment transactions, collects and disseminates feedback, and finally retains a commission for the service provided.<sup>16</sup> Empirical analyses show that the algorithm-based management run by online platforms has had the effect of strengthening the power of the platform (and/or the final user) to constantly control the performance of the individual: this can be tested both when the individual’s performance happens in the “real” world in real time – such as in the Uber or Lyft model – but also when it comes to controlling, standardizing, and evaluating digital work done via platforms.<sup>17</sup>

Assessing an exponential growth in the use of both forms of work, interpreters and judges have started to question their definition and classification, and to advance concerns on the issues of social protection, commodification,<sup>18</sup> and exploitation.<sup>19</sup> Some have stressed that both forms of work can be seen in the context of a general strategy of employers toward an “organized irresponsibility.”<sup>20</sup> when not also an “exit strategy” for the employer from its labor and social

<sup>9</sup> For a theoretical framework see Émilie Genin, *Proposal for a Theoretical Framework for the Analysis of Time Porosity*, 32 Int'l J. Comp. Lab. L. & Indus. Rel. 280 (2016).

<sup>10</sup> See also Eurofound, *New Forms of Employment* 1, 104 (2015), [www.eurofound.europa.eu/publications/report/2015/working-conditions-labour-market/new-forms-of-employment](http://www.eurofound.europa.eu/publications/report/2015/working-conditions-labour-market/new-forms-of-employment).

<sup>11</sup> See, e.g., among the multitude: Crowdflower, Crowdsource, Clikworker, Fiverr, PeoplePerHour, CloudFactory, CrowdComputing Systems, MobileWorks, oDesk, OneSpace.

<sup>12</sup> See Christiano Codagnone, Fabienne Abadie, and Federico Biagi, *The Future of Work in the “Sharing Economy”: Market Efficiency and Equitable Opportunities or Unfair Precarisation?* 1, 17–20 (2016), [publications.jrc.ec.europa.eu/repository/bitstream/JRC101280/jrc101280.pdf](http://publications.jrc.ec.europa.eu/repository/bitstream/JRC101280/jrc101280.pdf).

<sup>13</sup> Valerio De Stefano, *The Rise of the “Just-in-Time Workforce”: On-Demand Work, Crowdwork, and Labor Protection in the “Gig Economy,”* 37 Comp. Lab. L. & Pol'y J. 471 (2016).

<sup>14</sup> Jeremias Prassl, *Humans as a Service. The Promise and Perils of Work in the Gig Economy* (2018).

<sup>15</sup> Luca Ratti, *Online Platforms and Crowdwork in Europe: A Two-step Approach to Expanding Agency Work Provisions?* 38 Comp. Lab. L. & Pol'y J. 477 (2017).

<sup>16</sup> De Stefano, *supra* note 13.

<sup>17</sup> The evaluation of individuals’ productivity by Upwork, for example, is mainly based on keystrokes. See John J. Horton and Prasanna Tambe, *Labor Economists Get Their Microscope: Big Data and Labor Market Analysis*, 3 Big Data 130 (2015).

<sup>18</sup> Antonio Aloisi, *Commoditized Workers, Case-Study Research on Labor Law Issues Arising from a Set of “On-Demand/ Gig Economy” Platforms*, 37 Comp. Lab. L. & Pol'y J. 653 (2016).

<sup>19</sup> Trebor Scholtz, *Digital Labor: The Internet as Playground and Factory* (2013).

<sup>20</sup> Hugh Collins, *A Review of the Concept of the Employer* by Dr. Jeremias Prassl, Lab. L. Blog (Nov. 10, 2016), [www.law.ox.ac.uk/content/labour-law-o/blog/2015/11/review-concept-employer-dr-jeremias-prassl](http://www.law.ox.ac.uk/content/labour-law-o/blog/2015/11/review-concept-employer-dr-jeremias-prassl).

law obligations.<sup>21</sup> The crucial issue for labor law is to ascertain the legal nature of the relationship – to the extent that there is a “relationship” as opposed to a single, one-off exchange or bargain – established between the online platform, the individual who performs the given tasks, and the final user/client/customer. In virtually all situations, individuals performing via online platforms are formally classified as independent contractors or self-employed people, having no obligation to take up the job/gig/ride, to accomplish it in due time, or to meet the client’s satisfaction, let alone direct instructions. All these elements are normally addressed (explicitly) in the legal arrangement that the individual is asked to enter while meeting the job request. The awareness by the platforms of the risks inherent to a reclassification of those relationships is clearly revealed by the accuracy with which platforms draft those legal arrangements: in the Amazon Mechanical Turk “Participation Agreement,” for instance, it asks “Requesters” (i.e., 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.”<sup>22</sup>

Even assuming that an employment status can be found in some cases, an apparently insurmountable legal problem appears to be that of identifying the employer, being difficult while not impossible to determine whether it is the platform or the final user to be deemed responsible for providing the employment-related entitlements. The doctrine of joint employment, accepted by appellate courts and administrative bodies in the United States (e.g., the National Labor Relations Board or NLRB), may be suitable to deem the platform to be a joint employer, whose status would fall into the definition of joint employment given by the Fair Labor Standards Act, which finds joint employment “where one employer is acting directly or indirectly in the interest of the other employer.”<sup>23</sup> In the European context, however, this doctrine proves to be more problematic, as a consequence of both legislatures and courts conceptualizing the employment relationship from a “single-employer” perspective,<sup>24</sup> with the exceptions of contractual obligations in the context of groups of companies<sup>25</sup> and, in tort law, particularly that of vicarious liability.<sup>26</sup>

Due to the limited acceptance of the co-employment concept in Europe, some other authors propose to rely on the functional concept of the employer, envisaging the application of separate

<sup>21</sup> Wolfgang Däubler and Thomas Klebe, *Die Neue Form der Arbeit – Arbeitgeber auf der Flucht? [The New Form of Work – Employers on the Run?]*, 17 *Neue Zeitschrift Für Arbeitsrecht* 1032 (2015).

<sup>22</sup> AMTurk’s Participation Agreement, 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.” (AMTurk’s Participation Agreement, at clause 9.a.).

<sup>23</sup> C.F.R. § 791.2(b)(2), relying on the initial definition in the FLSA and *Greenberg v. Arsenal Building Corp. et al.*, 144 F.2d 292 (2d Cir. 1944). More recently, the NLRB expanded its definition of joint employment, stating: “two or more statutory employers are joint employers of the same statutory employees if they share or codetermine those matters governing the essential terms and conditions of employment.” See *Browning-Ferris Indus. of California, Inc.*, 362 N.L.R.B. No. 186, 2 (2015).

<sup>24</sup> See Jeremias Prassl, *The Concept of the Employer* (2015); Luisa Corazza and Orsola Razzolini, Who is an Employer?, in *Comparative Labour Law* 132 (Matthew W. Finkin and Guy Mundlak eds., 2015).

<sup>25</sup> This occurs in many Member States, and was also given certain recognition by the CJEU in *Albron Catering*, 2010 E.C.R. C-2342/109, 21.

<sup>26</sup> See Luca Ratti, *Agency Work and the Idea of Dual Employership*, 30 *Comp. Lab. L. & Pol’y J.* 835 (2009). This result is recognized by most jurisdictions as an application of the policy argument for the protection of the generality of citizens.

rules depending on the different employer function exercised by the putative employing entity.<sup>27</sup> In this interpretation, the analysis of the element of control exercised over the individual in an employment relationship is replaced by an emphasis on whether and to what extent the typical functions of the employer are taken up by the online platform: although many online platforms explicitly reject, in their user agreements, the employer role, one need only look at the functional reality of the arrangement to conclude that the platforms are the employer or, perhaps, a co-employer for different purposes, therefore bearing or sharing the relative obligations, risks, and advantages.<sup>28</sup>

The standard regulatory framework underpinning labor law implies the existence of a subordinate employment relationship, based on long-standing qualification tests.<sup>29</sup> But the practice of crowdworking and working on-demand via apps shows that these tests may not return satisfactory results, partially because the same characteristics of these forms of work tend to change in space and time so constantly as to make them nearly impossible to classify. For this reason some scholars have argued that platform workers should be included in a new, intermediate category, that of quasi-subordinate workers,<sup>30</sup> which would keep with the individual's perception of their work.<sup>31</sup> The advocates of this midway approach often call for legislative intervention to regulate relationships that do not easily fit into that dichotomy.<sup>32</sup> In these terms, the question more resembles that of FedEx drivers,<sup>33</sup> and significantly one court in the United States has already accepted this midway approach with respect to Lyft drivers.<sup>34</sup> But in practice, even in those legal systems where such intermediate categories exist, the difficulties surrounding labeling and the correct classification of working persons are not resolved.<sup>35</sup> The set of rights to be given to those falling in this third category is very much a matter of debate, while equipping it with too generous a set of rights could bring about service providers to indulge in new "avoidance" and misclassification strategies.<sup>36</sup>

In the absence of a single and unified definition of "worker" at the EU level, and with the Court of Justice embracing a binary division between subordinate employees and independent

<sup>27</sup> Jeremias Prassl and Martin Risak, *Uber, Task Rabbit, & Co.: Platforms as Employers?* 37 *Comp. Lab. L. & Pol'y J.* 619 (2016). The authors list at least five of these functions: 1) inception and termination of the employment relationship; 2) receiving labor and its fruits; 3) providing work and pay; 4) managing the enterprise-internal market; and 5) managing the enterprise-external market.

<sup>28</sup> *Id.*

<sup>29</sup> In this sense it should be recalled that normally 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) and, more generally, unilaterally dictates the terms and conditions of employment. Additionally, the platform allows the final user to monitor the individual's performance at any time, to rate the final result the individual submits, to review the individual's performance, sometimes even allows to take screenshots from the individual's computer and to validate (or not) the individual's intermediate steps or tasks before continuing the collaboration. All these elements call for a classification in terms of employment status instead of independent contractors.

<sup>30</sup> Andrei Hagiu, *Work 3.0: Redefining Jobs and Companies in the Uber Age*, Harv. Bus. Sch. (Sept. 29, 2015), <http://hbswk.hbs.edu/item/work-3-0-redefining-jobs-and-companies-in-the-uber-age>; Andrei Hagiu and Rob Biederman, *Companies Need an Option Between Contractor and Employee*, Harv. Bus. Sch. (Aug. 21, 2015), <https://hbr.org/2015/08/companies-need-an-option-between-contractor-and-employee>. See also S. D. Harris and A. B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First Century Work: The "Independent Worker"* (2015).

<sup>31</sup> Joan T. A. Gabel and Nancy R. Mansfield, *The Information Revolution and its Impact on the Employment Relationship: An Analysis of the Cyberspace Workplace*, 40 *Am. Bus. L. J.* 304 (2003).

<sup>32</sup> Eva Grosheide and Mark Barenberg, *Minimum Fees for the Self-Employed: A European Response to the "Uber-ized" Economy?* 22 *Colum. J. Eur. L.* 193 (2016).

<sup>33</sup> Robert Sprague, *Worker (Mis)Classification in the Sharing Economy: Square Pegs Trying to Fit in Round Holes*, 31 *A.B.A. J. Lab. & Emp. L.* 1, 16 (2015).

<sup>34</sup> *Cotter et al. v. Lyft Inc.*, No. 13-cv-04065-VC (Nd. Cal. 2015).

<sup>35</sup> Prassl and Risak, *supra* note 27, at 288–90; De Stefano, *supra* note 13, at 18–21.

<sup>36</sup> Kovács, *supra* note 5.

contractors,<sup>37</sup> some reports produced by EU institutions have occasionally referred to intermediate statuses such as “economically dependent work”<sup>38</sup> or “dependent self-employed work,”<sup>39</sup> often in an attempt to engage with various recommendations and policy suggestions produced by a number of international organizations, such as the ILO<sup>40</sup> and the OECD.<sup>41</sup> Paradoxically, however, the heterogeneity of the employment and work relationships falling within these intermediate categories<sup>42</sup> may have further complicated the task of identifying a suitable legal characterization for the increasingly diverse and complex forms of work developing in modern labor markets and human resources management practices.<sup>43</sup>

Unsurprisingly, there is an emerging perception that “no clear consensus has emerged on how the courts will determine employee versus independent contractor status for workers in the on-demand economy,” with the legal tests for discerning such status being “largely malleable and based on past precedent [and] largely indeterminate.”<sup>44</sup> EU anti-discrimination law, as we shall see, is no exception to this general trend, in spite of a (nominally) broader personal scope of application covering “conditions for access to employment, to self-employment and to occupation.”<sup>45</sup>

## II EU EQUAL TREATMENT AND ANTI-DISCRIMINATION LAW BETWEEN MARKET REGULATION AND FUNDAMENTAL PRINCIPLES

EU equal treatment legislation is rich and complex, dating back to the establishment of the European Economic Community with the 1957 Treaty of Rome. In trying to break down this multifaceted area of EU social legislation into a limited number of coherent regulatory instruments and principles, it is possible to suggest that EU equality law can potentially interact with the regulation of work in the sharing economy through three distinct dimensions: its fundamental market freedom dimension; its social rights dimension; and its fundamental rights/principle dimension.

To this day, the EU remains a free trade area, or more precisely an internal market operating on the basis of a customs union and a common foreign commercial policy. The most fundamental regulatory principle governing the EU’s internal market is the principle of free movement

<sup>37</sup> See Nicola Countouris, *The Concept of “Worker” in European Labour Law: Fragmentation, Autonomy and Scope*, 47 Indus. L. J. 192 (2018), citing in particular the landmark decisions *Allonby* (CJEU, Jan. 13, 2004, case C-256/01, ECLI:EU:C:2004:18), *O’Brien* (CJEU, Mar. 1, 2012, case C-393/10, ECLI:EU:C:2012:110), and *Betriebsrat der Ruhrlandklinik* (CJEU, Nov. 17, 2016, case C-216/15, ECLI:EU:C:2016:883).

<sup>38</sup> EU Commission, *Green Paper Modernising Labour Law to Meet the Challenges of the 21st Century* 5–6 (2006), www.europarl.europa.eu/meetdocs/2004\_2009/.../com\_com(2006)0708\_en.pdf.

<sup>39</sup> EU Commission, *Employment and Social Developments in Europe* 2015 86 (2016).

<sup>40</sup> ILO, *Non-Standard Forms of Employment* 14–15 (2015), www.ilo.org/wcmsp5/groups/public/@ed\_protect/@protrav/@travail/documents/meetingdocument/wcms\_336934.pdf.

<sup>41</sup> OECD, *OECD Employment Outlook* 2014, 153 (2014), www.oecd.org/els/employmentoutlook-previouseditions.htm.

<sup>42</sup> EU Parliament, *Social Protection Rights of Economically Dependent Self-Employed Workers* 8 (2013), adapt.it/professionionigi/docs/Economically\_dependent\_selfemployment.pdf.

<sup>43</sup> A full comparative overview is provided by Nicola Countouris, *The Changing Law of the Employment Relationship* (2007). In particular, on the German concept of *Arbeitnehmerähnliche Personen*, see Wolfgang Däubler, *Working People in Germany*, 21 Comp. Lab. L. & Pol’y J. 77 (1999); Armin Hoeland, *A Comparative Study of the Impact of Electronic Technology on Workplace Disputes: National Report on Germany*, 24 Comp. Lab. L. & Pol’y J. 147 (2005). On the Austrian concept of quasi-subordinate (*freie Dienstnehmer*), see Stefanie Watzinger, *Der Freie Dienstvertrag im Arbeits- und Sozialrecht* (2016).

<sup>44</sup> Miriam A. Cherry, *Beyond Misclassification: The Digital Transformation of Work*, 37 Comp. Lab. L. & Pol’y J. 577 (2016), at 18.

<sup>45</sup> Cf. Article 3(1)(a) of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

between goods, services, capital, and economically active persons, sometimes referred to as “the four freedoms.”<sup>46</sup> As a general rule, subject to a limited number of exceptions, free movement has historically entailed an obligation not to discriminate between the treatment guaranteed by one EU Member State, for instance, to its own domestic goods or workers and that guaranteed to goods and workers arriving from other Member States. In recent years, the more liberal and pro-market integration principle of “market access” has emerged as a dominant principle in the regulation of the single market,<sup>47</sup> but non-discrimination remains a central tool for the regulation of the EU’s market. Identifying activities performed under “collaborative economy” arrangements as “services” will inevitably result in these activities being covered by various areas of EU free movement of services regulation, both general and specific.<sup>48</sup> It is worth noting that a parallel market regulatory function has been historically performed by the EU principle of equal pay, as first enshrined in Article 119 of the Treaty of Rome. Its economic aim, recognized by the ECJ as early as the 1970s, was seeking to “avoid a situation in which undertakings established in states which have actually implemented the principle of equal pay suffer a competitive disadvantage in intra-community competition as compared with undertakings established in states which have not yet eliminated discrimination against women workers as regards pay.”<sup>49</sup>

The second dimension of the EU equal treatment principle arguably offers a more conventional analytical standpoint for labor and equality lawyers involved with the regulation of work relations in the sharing economy. EU anti-discrimination law is enshrined in a number of both primary (i.e., Treaty-based) and secondary (i.e., contained in Directives) sources that clearly characterize this area of regulation as a key facet of Social Europe. Within the functioning of the EU’s internal market, these provisions may well have retained a dual economic and social aim, but, expanding on a point made by the Court of Justice in respect of “EU equal pay” legislation, it is arguable that “the economic aim [...] is secondary to the social aim pursued by the same provision.”<sup>50</sup> These provisions range from rules on equal pay for work of equal value and the prohibition of discrimination between men and women,<sup>51</sup> to Directives prohibiting disparate treatment on racial grounds<sup>52</sup> and a range of other protected characteristics.<sup>53</sup> The personal scope of application and internal architecture of these directives varies considerably from instrument to directives. But it is fair to say that the main anti-discrimination Directives have been designed with a view of guaranteeing a very wide coverage of their protective provisions, including in the employment context. So, for instance, the personal scope definitions applicable

<sup>46</sup> See C. Barnard, *The Substantive Law of the EU: The Four Freedoms* (2016).

<sup>47</sup> See G. Davies, Between Market Access and Discrimination: Free Movement as a Right to Fair Conditions of Competition, in *Research Handbook on the Law of the EU’s Internal Market* 13 (P. Koutrakos and J. Snell eds., 2017).

<sup>48</sup> Cf. European Commission, *A European Agenda for the Collaborative Economy*, COM(2016)356 final, esp. 3–7.

<sup>49</sup> Case 43/75, *Defrenne v. Sabena*, para. 9.

<sup>50</sup> Case C-270/97, *Deutsche Post AG v. Elisabeth Sievers*, Para 57.

<sup>51</sup> Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), [2006] OJ L 204/23; Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, [2004] OJ L 373/37; and Directive 2010/41/EU of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, [2010] OJ L 180/1. For reasons of convenience, in the remainder of this document, these instruments will be occasionally referred to as “the Recast Directive,” “the Goods and Services Directive,” and “the Self-Employed Directive,” respectively.

<sup>52</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22.

<sup>53</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16. Cf. E. Ellis and P. Watson, *EU Anti-Discrimination Law* (2012); N. Countouris and M. Freedland, *The Personal Scope of the EU Sex Equality Directives* (2012).

to the equal treatment provisions contained in Article 14 of Directive 2006/54, and Article 3(1) of Directives 2000/43 and 2000/78, are framed as being applicable “in relation to: (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion.” This is a very broad personal scope of application that should arguably benefit workers in the sharing economy regardless of their employment status being that of an employee or a self-employed person.

Thirdly, the principles of equal treatment and non-discrimination have also been recognized as general principles of EU law, with a now substantial body of CJEU pronouncements confirming their nature in the context of cases of sex, age, and race discrimination.<sup>54</sup> Equality and non-discrimination between men and women are of course also recognized by Articles 21 and 23 of the Charter of Fundamental Rights of the EU, further consolidating their status as general and fundamental principles of EU law.<sup>55</sup> This status is of paramount importance when assessing the legal effects of non-discrimination that, as other general principles, are applicable in horizontal situations between private parties and requires national judges “when applying provisions of national law, to interpret those provisions in such a way that they may be applied in a manner that is consistent with the [Equality Directives] or, if such an interpretation is not possible, to disapply, where necessary, any provision of national law that is contrary to the general principle prohibiting discrimination.”<sup>56</sup>

### III THE EQUAL TREATMENT PRINCIPLE, THE REGULATION OF THE EU INTERNAL MARKET, AND THE SHARING ECONOMY

The market-based idea of non-discrimination introduced in the opening paragraphs of the previous section may offer a rather unconventional analytical standpoint for equality lawyers to engage with the regulation of the sharing economy. But it remains crucial to a more rounded, and arguably more precise, understanding of the impact of EU anti-discrimination law, broadly understood, on the “sharing economy” for the simple reason that economic operators in the sharing economy are increasingly being viewed – and arguably correctly so – as service providers and, thus, as falling under the various strands of EU law regulating services in general, and services in specific sectors in particular. The nature of the regulatory regime applicable to particular economic actors in the sharing economy is likely to vary depending on the nature of the activities and services they actually perform. Some could be covered by the Services Directive 2006/123, which allows for a considerable degree of intra-market penetration, though it also excludes some types of services from its application.<sup>57</sup> Some could conceivably be seen as amounting to services of temporary work agencies, and as such falling under the more stringent rules contained and allowed by Directive 2008/104, the Temporary Agency Workers Directive.<sup>58</sup> But some services could be seen as amounting to “information society services,” and as such be virtually immune from any national attempt to subject them to stringent regulation, be it by means of authorization regimes or other licensing arrangements.

<sup>54</sup> E.g., Case C-144/04, *Mangold v. Rüdiger Helm*; Case C-236/09, *Association belge des Consommateurs Test-Achats ASBL v. Conseil des ministres*; Case C-555/07, *Küçükdeveci v. Swedex GmbH & Co. KG*; Case C-83/14, *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia*.

<sup>55</sup> Cf. Takis Tridimas, *The General Principles of EU Law* Ch. 2 (2nd ed, 2007).

<sup>56</sup> Case C-441/14, *Dansk Industri v. Estate of Karsten Eigil Rasmussen*, para. 43.

<sup>57</sup> See Article 2, excluding, for instance, transport services and services of temporary work agencies.

<sup>58</sup> Cf. Ratti, *supra* note 15.

In the recent Opinion by Advocate General Szpunar in Case C-434/15, Uber's core business activity was characterized as offering a "traditional transport service," and "it certainly [could] not be considered to be a ride-sharing platform."<sup>59</sup> As such, the Advocate General went on to exclude it from the application of the Electronic Commerce Directive 2000/31 (which only allows for a very minimal level of restriction to activities performed by "information society services"), but rather as falling within the scope of Article 91 TFEU, and thus lawfully subject to the conditions under which non-resident carriers may operate transport services within the Member States (including, in this case, a national requirement to possess the necessary urban transport licenses and authorizations).

An understanding of particular digital platforms as falling under discrete areas of EU services regulation is also crucially important for the purposes of identifying the nature of the legal relationship between the digital service providers and their work and service providers, and thus ascertain the actual obligations arising upon the platform owners in respect of various areas of social and labor law, including discrimination law, vis-à-vis these workers. Once more, AG Szpunar's Opinion in the *Uber Systems Spain SL* case offers some valuable pointers, noting how Uber pervasively controls various aspects of the transport services it offers, including the price of the services, but also "the conduct of drivers by means of the ratings system and, lastly, over possible exclusion from the platform."<sup>60</sup> The AG cautions us from rushing to suggest that this invariably suggests "that Uber's drivers must necessarily be regarded as its employees. The company may very well provide its services through independent traders who act on its behalf as subcontractors."<sup>61</sup> But the AG is clear in asserting that the "indirect control such as that exercised by Uber [...] makes it possible to manage in a way that is just as – if not more – effective than management based on formal orders given by an employer to his employees and direct control over the carrying out of such orders."<sup>62</sup>

So, economic actors in the sharing economy are more likely than not to be seen as service providers of some particular kind, and thus benefit (to a varying degree depending on the nature of the service they offer) from the right "not to be subject to market access or other requirements ... unless they are not discriminatory, necessary to attain a clearly identified public interest objective, and proportionate to achieving this interest."<sup>63</sup> But they are also likely to see the contractual arrangements they establish with the various personal work and service providers they engage, or whose activities they otherwise orchestrate, as subject to a very close scrutiny for the purposes of ascertaining the extent to which they can be located in the employment or self-employment field, and thus, as we are about to see, as covered by anti-discrimination legislation.

#### IV EU ANTI-DISCRIMINATION LAW AND THE SHARING ECONOMY

As noted above, at least on paper, EU anti-discrimination law covers in principle a wide range of relationships, including, in some areas, relationship of self-employment, and the existence of a contract of employment may not always be required.<sup>64</sup> However, a number of obstacles do arise from the peculiar judicial understanding by the CJEU of the functioning and operation of anti-discrimination rules, in particular by reference to: the task of identifying a suitable

<sup>59</sup> AG Szpunar Opinion in Case C-434/15, *Asociación Profesional Elite Taxi v. Uber Systems Spain SL*, para. 42.

<sup>60</sup> *Id.* at para. 51.

<sup>61</sup> *Id.* at para. 54.

<sup>62</sup> *Id.* at para. 52.

<sup>63</sup> Cf. European Commission, *supra* note 48, at 3–4.

<sup>64</sup> CJEU, Jan. 13, 2004, C-256/01, *Allonby*, ECLI:EU:C:2004:18, at 71.

comparator to establish disparate treatment; the complexity of the employing entity, which makes it more difficult to identify a “single source” of the discriminatory treatment; and the substantial unavailability of statistical data for the individual claimant in discrimination cases. These situations will be addressed in this section.

The problem of identifying a suitable comparator is a crucial one as far as EU equality and non-discrimination law are concerned. By and large, a comparator is defined as a person in similar circumstances, who is in a different, more beneficial position than the claimant, as a direct consequence of the existence of one of the protected grounds of discrimination. In EU law, some directives require a real comparator to be found, which is clearly not easy. Others cover a wider range of potential comparators, asking the interpreter to consider also “those [conditions] that would apply if they had been recruited directly by that undertaking to occupy the same job.”<sup>65</sup> But the task of identifying a comparator becomes a particularly arduous one when workers are hired under terms of employment that make their work arrangement so peculiar as to become, *de facto*, uniquely singular. The case of *Wippel* is paradigmatic in that sense, as the female claimant was employed under a “contract which stipulates neither the weekly hours of work nor the manner in which working time is to be organized, but it leaves her the choice of whether to accept or refuse the work offered” (in effect a “zero-hours contract”) and was prevented, because of her contract, from comparing herself with a full-time worker because “no full-time worker in the same establishment has the same type of contract or employment relationship.”<sup>66</sup> This is likely to emerge as a major hurdle for workers in the sharing economy, precisely because of the increased potential for fragmentation and variation in contractual terms regulating the provision of tasks, gigs, or rides (think of Uber’s “dynamic pricing model”). But this also brings to the fore a major contradiction and fallacy of the narrow comparator notion embraced by the CJEU: insisting on a requirement for a broad similarity between the terms and conditions of the claimant and her comparators is illogical, if not perverse, because it typically defeats one of the main purposes of anti-discrimination legislation, which is to prevent discriminatory differences in contractual terms and conditions.

This leads to a second difficulty in targeting an anti-discrimination claim. While assessing the existence of a potential comparator, the CJEU has repeatedly insisted on the existence of a single source of discrimination, noting that “where the differences identified in the pay conditions of workers performing equal work or work of equal value cannot be attributed to a single source, there is no body which is responsible for the inequality and which could restore equal treatment.”<sup>67</sup> This restrictive interpretation given by the CJEU in cases such as *Lawrence* and *Allonby* could emerge as a particularly difficult hurdle for crowd-workers and workers on-demand via online apps. We venture to suggest, however, that, in these cases, the online platform (and its owner) ought to be identified as the “source” of discrimination: it is the platform, in practice, that manages the data used by the algorithm and their setting. As opposed to the case of staff agencies acting as intermediaries, in the sharing economy, it is the platform itself that determines unilaterally the conditions of the service provided by the individual. Therefore it should be possible to qualify the platform’s position as a single source in the sense used by the CJEU.<sup>68</sup>

<sup>65</sup> Article 5, Dir. 2008/104. See Gavin Barret, *Shall I Compare Thee To ...? On Article 141 EC and Lawrence*, 35 *Indus. L.J.* 93 (2006).

<sup>66</sup> Case C-313/02, *Wippel*, para. 59–61.

<sup>67</sup> CJEU, Jan. 13, 2004, C-256/01, *Allonby* EU:C:2004:18, at 46, citing CJEU, C-320/00 *Lawrence and Others* EU:C:2002:498, at 18.

<sup>68</sup> Miriam Kullmann, *Platform Work, Gender Equality, and Algorithmic Pay Differences*, paper presented at the LLRN3 Toronto Conference, June 2017, manuscript.

But one last issue comes from the concrete need to render the rights conferred by the treaty and by the relevant directives enforceable. EU anti-discrimination law does not entitle an individual who claims to be discriminated against to have access to all information indicating whether the employer acted correctly and neutrally. Admittedly, as noted in the *Meister* judgment, the refusal to give any information regarding, for instance, the selection process, the conditions of employment, or other data, may be taken into account by the judge in order to establish facts from which discrimination may be inferred.<sup>69</sup> This means that EU legislation does not amend as such the rules provided by the Member States on the burden on proof, which normally put on the claimant the burden to prove the key facts at the base of the claim.<sup>70</sup> While this seems to resolve the asymmetries between the platform and the individual – as the reluctance of the former to make available the huge set of data stored and treated by them is not a procedural obstacle for the claimant’s case to progress, in practice it falls short from imposing a duty on the platform to share the relevant data, and thus, de facto, it may hinder the possibility for the claimant to access the information necessary to both make a claim and, once discrimination is inferred, to actually succeed on the merits of the case.<sup>71</sup>

#### CONCLUSIONS

EU anti-discrimination legislation is often praised as the jewel in the crown of EU social and employment law. Its development is often described as an evolution from formal equality to more substantial forms of equality, aiming at stressing the pivotal role of effectiveness and enforcement of its rules. A further stage in this evolutionary trajectory ought to be what Fredman defines as “transformative equality,” a concept that, among other things, refers to the need to include in the personal scope of the application of discrimination law not only employees or disguised employees, but also those casual and non-standard workers that are normally not protected by labor law.<sup>72</sup> The CJEU has a proud record to defend in this context, for instance by reference to its transformative jurisprudence on the rights of pregnant workers.<sup>73</sup>

But, as noted in the previous section, a number of deficiencies continue to affect the architecture of EU anti-discrimination legislation. If left unaddressed, they are likely to affect in a disproportionately adverse manner those workers offering their services through online platforms, both under crowd-working arrangements and by means of an on-demand performance of tasks. An overarching feature of these arrangements is that of presenting the relationship between work providers, users, and intermediary entities – to use three neutral terms – as particularly fragmented and fissured. This effect is produced through the interposition of digital platforms that seemingly increase the fragmentation that is typical of any outsourcing and subcontracting process. To state the obvious, with their emphasis on tasks, rides, and gigs, as opposed to longer term projects or the offer of mutual commitments in terms of future performance, platforms fragment the more relational aspects of work, defeating the establishment of an employment relationship (even an intermittent and discontinuous one). These platforms also fragment the pool of workers, making the identification of a suitable actual comparator an extremely arduous

<sup>69</sup> CJEU, 19 April 2012, C-415/10, *Meister* ECLI:EU:C:2012:217.

<sup>70</sup> *Id.*

<sup>71</sup> Kullmann, *supra* note 68. Note that the *Meister* claim was eventually rejected by the referring court. See L. Farkas and O. O’Farrell, *Reversion of the Burden of Proof – Practical Dilemmas at the European and National Level* 29 (2015).

<sup>72</sup> Sandra Fredman, *Pasts and Futures: EU Equality Law*, in *Research Handbook on EU Labour Law* 391 (Alan Bogg, Cathryn Costello, and A. C. L. Davies eds., 2017).

<sup>73</sup> CJEU, Nov. 11, 2011, C-232/09, *Danosa v. LKB Lizings SIA* ECLI:EU:C:2010:674.

task, and, at the same time, they fragment the functions and responsibilities of the employing entity, thus by definition creating multiple potential sources of discriminatory treatment and defeating the “single source” requirement. The argument could be made that the architecture of EU anti-discrimination law was already struggling to cope with some of the more traditional forms of distancing and outsourcing. But the manifest complexities brought about by the emergence of new forms of work in the sharing economy are likely to challenge even further these structural weaknesses of EU equality law.

