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Employment relationship and platform work: Global trends and case of Kazakhstan

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The global response to the phenomenon of platform work has various forms and approaches. The general trend is that numerous court cases are succeeded by legislative initiatives. It is obviously that platform workers no more cannot be considered as a pure entrepreneur or self-employed persons. Due to the control of "hidden algorithms" they fall under the power of the gig company more than ordinary independent contractors. The case of Kazakhstan confirms this approach and proceeds from the special regime of the platform labour within the scope of employment regulation. However, we should seek a balance between social and economic function of labour law. Traditional construction of employment relationship cannot be entirely applied to the platform workers. Nevertheless, it is crucial to ensure decent labour conditions for them. The solution of the problem is enforcement of presumption of employment based on flexible regulatory policy to this form of employment. For example, Kazakhstan's response to the platform work challenges is based on distinction between location-based and web-based platform work depending on the degree of employer's power. The hidden algorithmic control of location-based platforms is a core element in a set of proofs recognizing employment relationship between gig companies and their workers. At the same time web-based platforms present more autonomy of their workers who can serve as independent contractors or freelancers. The author concludes that the international community shall elaborate well-balanced approach to regulation of employment relationship based on digital platforms.

Keywords: employment relationship, platform work, gig companies, presumption of employment, Kazakhstan, independent contractor, freelancer, technology platform marketplace, hidden algorithms, employment misclassification, location-based platform, web-based platform.

1. Introduction

This paper presents the global trends in searching the ways and approaches to regulation of digital platform work, and in particular the Republic of Kazakhstan's legal response to this phenomenon. In order to ensure both the social protection and economic growth the countries are seeking the balance between interests of "weak" party (platform workers) and business model of gig companies. The traditional construction of employment relationship presumes the employer's power (control) on the one hand, and degree of the workers' integration to the employer's activities on another hand. In this regard the solution shall be differentiated depending on the category of platform and presence and degree of its hidden algorithmic control.

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2. Basic research

2.1. Overview of recent surveys

A plenty of research devoted to platform employment (gig economy labour) has been developed for recent years.

In 2021, the ILO survey findings show that many workers engaged on digital labour platforms face challenges related to regularity of work and income, working conditions, social protection, skills utilization and freedom of association and the right to collective bargaining. Digital labour platforms have the potential to benefit both workers and businesses and through them, society more generally. But they will only fulfil this positive potential and contribute to achieving the Sustainable Development Goals if the work opportunities they provide are decent. This requires in particular ensuring that workers' employment status is correctly classified and is in accordance with national classification systems; ensuring adequate social security benefits for all platform workers, independently from their employment status, by extending and adapting policy and legal frameworks where necessary; ensuring transparency and accountability of algorithms for workers and businesses[1].

In 2021, the Russian University Higher School of Economics issued a report on platform employment which summarized the existing experience in determining and regulating platform employment, including in terms of scope and mechanisms providing platform workers with basic social guarantees. The authors concluded that it cannot be turned platform workers, who are currently predominantly self-employed, into employees, as this kills the innovation economy; at the same time, it is important to create voluntary insurance instruments for the formation of self-employed social package, including voluntary; insurance formats should depend on the degree of inclusion of a person into the platform economy, which can be measured in terms of income generated, or hours of work, or duration of cooperation; priority in the social package should be for people for whom platform employment is the only and full-time (Sinyavskaya, et al., 2021).

According to the report of Cecilia Westerlund, the core content of the key concepts of the "employee" and the "employee" are in principle the same across the Nordic countries. These criteria are in many cases based on case law and doctrine and can be summarised such that employment relationship exists if there exists a contractual relationship regarding personal work that is performed for the sake of another party, whereby this work is subject to monitoring and supervision: (1) the company determines how the work should be performed (sets up a pricing system, establishes requirements for appearance, participates in earnings, creates rules for performing the work etc.); and (2) the work is subject to monitoring and supervision (which is achieved through rating systems and tracking workers, for example) (Westerlund 2022).

The report of the NGO "Worker Info Exchange" shows the interrelation between labour and data rights of platform workers. The current situation for precarious workers in the gig economy is a dual challenge. Employment law and institutions of enforcement have been slow to tackle abuses of platform employers. Data protection law offers tools to

[1] Digital platforms and the world of work in G20 countries: Status and Policy Action. Report prepared for the Employment Working Group under Italian G20 Presidency (June 2021). Available at: https://www.ilo.org/wcmsp5/groups/public/---dgreports/---ddg_p/documents/publication/wcms_829963.pdf (accessed: 10.05.2022).

protect the rights of individuals, however, there has not yet been adequate legal protection for digital rights at work, for individuals or the collective as represented by their trade unions. When workers can better control their data, they will be better able to control their destiny at work. Worker status as a bottom rung classification still falls short for gig workers because it offers no protection from unfair dismissal. Failure to pay for waiting time as working time enables platforms to take advantage of the immediacy of availability to drive up customer response time while driving down worker earnings[2].

The most recent research of platform work is a monograph of Eva Kocher "Digital work platforms at the interface of labour law: regulating market organizers" where the scholar explores the conceptual questions involved in searching for the link between employee classification and the rights and obligations ensue from such classification; it demonstrates how the very compatibility problems encountered in classification exercises contain the clue to consistent regulation (Kocher 2022). If we understand digital work platforms as market organisers, we can address in their function as such, while at the same time accounting for the fact that they exert power comparable to that of an employer. There is no single regulatory model to be applied across diverse legal orders. It might also be thought as part of a broader debate on law and political economy. It must take into account the relationship between a variety of regulatory domains, ranging from labour law and social security law to constitutional law (Kocher et al., 2022).

Summarizing all the cited surveys it can be clearly seen that lack of sufficient legal measures of regulation of platform work leads to vulnerability of basic rights. Platform workers shall enjoy social guarantees and decent work conditions as well as digital rights. The most considerable indicator for due employment classification of platform workers is algorithm of control and monitoring which can be recognized as an employer's power (subordination).

2.2. The legislative and social partners' initiatives across the globe

The general trend is that numerous court cases are succeeded by legislative initiatives.

Countries have adopted various approaches to the classification of platform workers, often arising from litigation, which fall along a spectrum between very broad and very narrow approaches to employment status. These include: (i) classifying them as employees, often based on the amount of control exercised by the platform, as was observed in the case of Uber taxi drivers in France and Glovo delivery workers in Spain; (ii) adopting an intermediate category in order to extend labour protection, which was upheld in the UK where the majority of the Court held that the claimant drivers were "workers", a category that entitled them to minimum wage and paid leave; (iii) creating a de facto intermediate category to ensure that they obtain certain benefits, as was observed in the case of China wherein certain workplace injury compensation was provided to workers; (iv) classifying them as independent contractors, often based on the degree of their flexibility and autonomy, as in the case of Australia, Brazil and California (USA)[3].

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[2] Managed by Bots: Data-Driven Exploitation in the Gig Economy. Worker Info Exchange (December 2021). Available at: https://www.workerinfoexchange.org/wie-report-managed-by-bots (accessed: 10.05.2022).

[3] Digital platforms and the world of work in G20 countries: Status and Policy Action. Report prepared for the Employment Working Group under Italian G20 Presidency (2021). P. 23. Available at: https://www.

The first inter-state response is the EU initiative on platform work launched 24 February 2021 by the European Commission (the first-phase consultation of European social partners, EU action to address the challenges related to working conditions in platform work)[4]. This initiative demonstrates the benchmark of diverging positions of social partners on the approaches and material scope of an initiative.

For example, employer organisations argue that it is not appropriate to introduce one-size-fits-all rules. They recognise that there is a need for action, but that this should generally be taken at national level and within the framework of the various national systems for social and industrial relations. The determination of status should be done on a case-by-case basis at national level in order to respect the different Member State models. Trade unions point out that EU action should cover both online and on-location platforms; regarding employment status, trade unions would like to see the introduction of a rebuttable presumption of employment status with a reversal of the burden of proof[5].

As a result of negotiations, on December 9, 2021, the European Commission proposed a new EU Directive to guarantee labour rights in the digital economy. At its core, it aims to establish a rebuttable presumption of an employment relationship between workers and the platforms, thereby shifting the burden of proof from worker to employer. This means that a platform should be considered an employer unless the digital labour platform can prove the opposite (Voet 2022).

The proposed Directive seeks to ensure that people working through digital labour platforms are granted the legal employment status that corresponds to their actual work arrangements. It provides a list of control criteria to determine whether the platform is an "employer". If the platform meets at least two of those criteria, it is legally presumed to be an employer. The people working through them would therefore enjoy the labour and social rights that come with the status of "worker". For those being reclassified as workers, this means the right to a minimum wage (where it exists), collective bargaining, working time and health protection, the right to paid leave or improved access to protection against work accidents, unemployment and sickness benefits, as well as contributory old-age pensions[6].

In 2021, Spain passed the first legislation to attempt to regulate AI in the area of employment, establishing both worker status for gig workers and the right to be informed about the rules and parameters of the algorithms they are subject to — unleashing a torrent of complaints. This resulted from yet another court case against Glovo that ended up in the Spanish Supreme Court (Luque 2021).

In 2021, the UK Supreme Court also concluded that Uber drivers were party to a transportation service that is "very tightly defined and controlled by Uber" betraying a clear employment relationship, which the company claimed did not exist in its endeavour to (mis)classify the workers as independent contractors. Significantly, evidence of this

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ilo.org/global/about-the-ilo/how-the-ilo-works/multilateral system/g20/reports/WCMS_829963/lang--en/index.htm (accessed: 10.05.2022).

[4] Consultation document. Second-phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work. Brussels, 15.06.2021 C(2021) 4230 final. Available at: https://www.etuc.org/en/document/etuc-reply-second-phase-consultation-social-partners-under-article-154-tfeu-possible (accessed: 10.05.2022).

[5] Ibid, 3.

[6] Commission proposals to improve the working conditions of people working through digital labour platforms. Brussels, 9 December, 2021. Available at: https://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=10120&furtherNews=yes (accessed: 11.05.2022).

relationship comes from the data driven systems rideshare platforms use to manage their workforces[7].

All the identifies cases demonstrates that algorithmic control is a primary indicator of employment relationship between platform and its worker.

Among social partners' initiative we should note the Frankfurt Declaration on Platform-Based Work (2016) and the World Economic Forum Charter of Principles for Good Platform Work (2020).

In December 2016, a network of European and North American unions, labor confederations, and worker organizations issued a call today for transnational cooperation between workers, worker organizations, platform clients, platform operators, and regulators to ensure fair working conditions and worker participation in governance in the growing world of digital labor platforms such as Clickworker, Amazon Mechanical Turk, Jovoto, and Uber[8].

The response to the call of trade unions was given in 2020 when six digital labour platforms have signed the World Economic Forum Charter of Principles for Good Platform Work, which covers issues such as safety and well-being, flexibility, fair conditions, social protection, voice and participation, and data management[9].

The above indicated examples of legislative proposals and non-legal initiatives demonstrate a high level of interest among wide circles of stakeholders and confirm significance of this agenda around the world.

2.3. Kazakhstan's response to the platform work challenges

The situation of platform workers in Kazakhstan is similar to that of many countries, namely somewhat of a lack of legislative regulation.

The first and the only case on platform worker is a case against judicial executor where the Supreme Court of the Republic of Kazakhstan recognized employment relationship between Glovo delivery company and its courier[10]. It is notable that the Supreme Court judges identified several indicators of the existence of a hidden employment relations according to the Labour Code of the Republic of Kazakhstan (article 27), cited the ILO Employment Relationship Recommendation, 2006 (no. 198) as well as foreign practice.

The indicators revealed by the Supreme Court are as follows:

1) remuneration is actually determined by the organization, without the ability to influence its size unilaterally;

2) failure to agree on changes to the contract on the part of the courier (lack of freedom of contract). Moreover, Glovo Kazakhstan LLP has the exclusive right to change the terms of the Agreement at the sole discretion of the company unilaterally;

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[7] Judgment dated 19 February, 2021. Uber BV and others (Appellants) v Aslam and others. [2021] UKSC 5 On appeal from: [2018] EWCA Civ 2748. Available at: https://www.supremecourt.uk/cases/docs/uksc-2019-0029-judgment.pdf (accessed: 11.05.2022).

[8] Frankfurt Paper on Platform-Based Work: Proposals for platform operators, clients, policy makers, workers, and worker organizations (2016). Available at: https://www.igmetall.de/download/20161214_Frankfurt_Paper_on_Platform_Based_Work_EN_b939ef89f7e5f3a639cd6a1a930feffd8f55cecb.pdf (accessed: 14.05.2022).

[9] The Charter of Principles for Good Platform Work (2020). Available at: https://www.weforum.org/reports/the-charter-of-principles-for-good-platform-work (accessed: 14.05.2022).

[10] Resolution of the Judicial Collegium for Administrative Cases of the Supreme Court of the Republic of Kazakhstan dated December 6, 2021 Case №6001-21-00-6ап/19.

3) high level of integration of the personal participation of couriers in the logistics chain of the organization, indicating the impossibility of its functioning without this element. Moreover, Glovo Kazakhstan LLP acts as an intermediary for the immediate delivery of the ordered products, this function is implemented by couriers. Despite the fact that the contract does not prohibit the Courier from engaging subcontractors, Section 3 of the contract detracts from the Courier's discretion and provides wide discretion to the organization;

4) couriers act in the interests of the organization, according to its instructions and under its control, expressed in the hardware capabilities of the digital Platform and Application through exclusive control of information provided to couriers. In addition, in accordance with paragraph 2 of the said section "GLOVO establishes certain standards for the conduct of business for Couriers". The accepted Order is executed within 60 minutes from the moment of appointment. Fulfillment of the Order, without going beyond the maximum delivery time, is a mandatory condition for the Courier. Failure to comply with this condition entails in its termination;

5) couriers perform work (work function) in a certain specialty and (or) position, thereby realizing the logistics function as the main component (part), for which customers are charged; the courier undertakes to provide the Users with the courier services requested by them within the Orders, while observing the quality criteria of the Services;

6) the couriers do not know the destination and how much they will earn until they accept information from the organization and get to work. The organization also controls the quality and speed of the work of couriers, having an appropriate warning and reward system for this;

7) in fact, the entire portfolio of work is formed on the basis of information from the organization: a certain time and place, the volume and continuity of work.

The above-mentioned reasoning of the court decision has not only academic and research interest, but also has legal significance and consequences.

Since 2022 Kazakhstan introduced some elements of judicial precedent system in a civil procedural legislation. In particular, any court has the right to refer to the legal positions of the higher court set out in the decision when considering similar cases (Article 226 of the Civil Procedural Code of the Republic of Kazakhstan). It means that all other courts in fact will follow the ruling of the Supreme Court as there is high level of subordination.

Simultaneously with court practice the Government of Kazakhstan initiated a bill on the regulation of platform work. The Ministry of Labour and Social Protection developed legislative proposal on the regulation of labor of persons working on the basis of Internet platforms. This project contains the following provisions:

1) supplement the Labor Code with a new chapter "Peculiarities of labor regulation of persons working through a mobile application". The new chapter will regulate the specifics of concluding an employment contract with an employee, the regime and accounting of working hours, the provision of necessary equipment and means, and compensation payments to employees through such online platforms;

2) introduction of the concepts of "platform", "mobile application", "platform operator", "platform contractor" into the Law on Informatization in order to regulate the activities of persons through Internet platforms, similar amendments to the Law on Road Transport (relationship between the Internet platform, the taxi fleet and the taxi driver);

3) maintenance of the individual's right to choose the legal regime: to carry out activities based on an Internet platform as an employee or a platform contractor; in order to

ensure an adequate level of social protection and legalization of incomes of citizens who personally provide their services (without registering as an individual entrepreneur) on such services, it is proposed to introduce a simplified tax regime (with exemptions from certain taxes) and a simple registration procedure;

4) the performance of work within the framework of crowdworking platform, despite its some similarities with online platforms that provide taxi services, food delivery, cleaning services, etc., shall be considered separately. The platform does not control the activities of the customer but determines the conditions for using the service and receives payment for using the platform. The performers themselves on such services independently bear all the risks and responsibilities associated with organizing their own labor process. Therefore, this type of legal relationship cannot be brought under the labor law, and therefore, it is proposed that the relationship between the online crowdworking platform and the contractor be regulated by civil law.

It can be clearly seen that Kazakhstan's approach is based on differentiation of legal regime of two types of platforms: location-based and web-based platforms. Consequently, it presumes labour law and civil law regulation.

3. Conclusion

We believe that regulatory policy to the phenomenon of platform employment shall be rather flexible. It means that the choice of being recognized as an employee should be made initially by platform worker itself, not by default. The proceedings to recognize employment shall be initiated solely by worker, not regulatory bodies. Then it shall meet established conditions of employment relationship based on presumption of employment. And thirdly, platform workers shall enjoy the labour law privileges and guarantees with reasonable exceptions of those which prescribed by labour legislation. It is also crucial to differentiate the categories of platform workers due to legal regimes they may require. In this regard, each jurisdiction needs to elaborate well-balanced approach to regulation of employment relationship based on internet-based or other widespread, technology-based marketplace platform or system.

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