Adapt or perish : recent developments on social protection in the EU under a gig deal of pressure

# ADAPT OR PERISH: RECENT DEVELOPMENTS ON SOCIAL PROTECTION IN THE EU UNDER A *GIG* DEAL OF PRESSURE*

Ane Aranguiz°

Bartłomiej Bednarowicz•

Abstract

*In times of the so-called gig economy, access to an adequate level of social protection should not depend on whether or not a person is working on a standard employment contract. Access to social protection for non-standard forms of labour and self-employment is, as a matter of fact, one of the main themes being discussed at the moment within the debates surrounding the European Pillar of Social Rights. This article aims at assessing the recent initiatives at the EU level that have the objective of ensuring access to social protection for all and both granting and enforcing transparent and predictable working conditions for workers. Accordingly, this contribution first sheds some light on the discussion on non-standard forms of labour and the problematics surrounding the emergence of new forms of labour to later analyse the new EU initiatives, in particular, the proposal for a Recommendation on access to social protection for workers and the self-employed. It concludes by welcoming the recent position of the EU with regard to such challenges, yet emphasising also the need to do more.*

Key words: gig economy – non-standard employment – social protection – European Pillar of Social Rights

1. INTRODUCTION: NEW PARADIGMS OF WORK - THE MORE NON-STANDARD (AND DIGITAL) THE MERRIER

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° PhD Researcher (FWO Fellow) at the Faculty of Law of the University of Antwerp (Belgium). The author can be contacted at: ane.fernandezdearanguiz@uantwerpen.be

• PhD Researcher at the Faculty of Law of the University of Antwerp (Belgium). The author can be contacted at: bartlomiej.bednarowicz@uantwerpen.be

Undistorted labour markets with high employment rates cannot be facilitated without access to social protection as it is imperative for the overall sustainable growth of the economy and social safety of the workforce. Yet, the new labour market patterns, which have drastically changed over the course of years, pose nowadays a great challenge for the policy makers to guarantee the sufficient access to social protection for the workforce, especially for the self-employed persons.[1] The ongoing process of changing the current paradigms of work results chiefly from the overall tendency to reduce the corollary cost of labour, as social protection seems to be treated more as a *bonus* rather than as a *standard* that is normally linked with employment. Indeed, non-standard forms of employment do offer opportunities for workers to either enter or remain in the labour market, however, the majority of the workforce is at risk of being trapped in insecure and unpredictable employment conditions.[2] On top of that, the continuing process of digitalisation facilitates access to services performed by individuals by means of technology like Internet platforms or mobile applications. More and more often, labour is treated like a *commodity* in which traditional workers are being replaced with the notion of *invisible workers* by creating an illusion that the algorithms commission, intermediate and carry out all the work.[3] New forms of work such as crowdwork, on-demand work and other forms of intermittent work are simply becoming predominant and in essence, they obscure the traditional lines of an employment relationship.[4] It is the gig economy which has provided an opportunity to exploit the blurry borderlines of labour law and shortcomings of its concepts in order to maximise profits and minimise the corollary costs of labour such as minimum wage, paid annual leave, maternity and paternity leave or social security.[5] The gig economy therefore is not just a *buzzword*, it is an actual way of working for more and more workers and it can be best described as a task-based model of casual employment of platform-mediated work.[6]

In light of the above, this paper explores the role of new EU initiatives as a response to the new challenges brought along by the new forms of employment. More in particular, this piece

[1] De Stefano V., 'Introduction: Crowdsourcing, the gig-economy and the law', (2016) 37 CLLPJ, p. 463.
[2] Aloisi A., 'The Role of European Institutions in Promoting Decent Work in the "Collaborative Economy"', in Bruglieri M. (ed.), *Multidisciplinary Design of Sharing Services*, (Springer 2018), p. 165.
[3] De Stefano V., 'Labour is not a Technology – Reasserting the Declaration of Philadelphia in Times of Platform-Work and Gig-Economy', IUSLabor 2/2017, pp. 10 ff.
[4] Aloisi A., 'Commoditized workers: Case study research on labor law issues arising from a set of "on-demand/gig economy" platforms', (2016) 37 CLLPJ, p. 658.
[5] Cherry M.A., 'Beyond misclassification: the digital transformation of work', (2016) 37 CLLPJ, pp. 598-602.
[6] Alton L., 'Why the Gig Economy Is The Best And Worst Development For Workers Under 30?', *Forbes*, 24 January 2018.

contemplates the situation of non-standard workers in view of the recently launched European Pillar of Social Rights (EPSR). First, the contribution addresses the challenges and opportunities of non-standard work from the standpoint of the working conditions of the gig workers. Later, the situation of non-standard employment with regard to social protection is discussed in the context of the newly launched Social Fairness Package. Specifically, this part analyses the potential impact of the proposal for a Council Recommendation on access to social protection for workers and self-employed persons. Finally, it is concluded that while these initiatives are to be welcomed as a first step towards addressing contemporary labour law challenges, there is still much more to be done and essentially, there is much room for improvements.

## 2. THE RIGID DICHOTOMY: STANDARD VS NON-STANDARD EMPLOYMENT

Throughout the last decades across the world, labour laws hinged on the eternal dichotomy of a standard employment model, being continuous, full time and part of a subordinate and direct relationship between a worker and an employer.[7] The ILO itself considers four types of non-standard employment: (1) temporary employment, (2) part-time work, (3) temporary agency work and other forms of employment involving multiple parties, (4) disguised employment relationships (bogus or false self-employment) and dependent self-employment (separate, middle category between a worker and a self-employed person). In sum, non-standard employment serves as an umbrella term which places together distinct forms of work which deviate from the standard employment model.[8] Whilst the first three models of non-standard labour have been addressed at EU level with directives 97/81/EC on Part-Time Work, 1999/70/EC on Fixed-Term Work and 2008/104/EC on Temporary Agency Work, yet disguised employment relationships remain unregulated at the EU policy level, but at least they echoed – to a certain extent – in the case law of the Court of Justice. The problem of false self-employment, under EU law is not a dilemma that has arisen in the wake of the gig economy, quite the contrary, it had been already reported and granted some attention in early 2000s.[9] Self-classification as a self-employed person under national law should it be awarded for the

[7] ILO, 'Non-Standard Employment around the World: Understanding challenges, shaping prospects', (2016) International Labour Office – Geneva: ILO, p. 7.
[8] Ibid., p. 9.
[9] Muller F., 'Cross-Border Mobility of "Bogus" Self-Employed Workers: A Lack of Legal Framework Coupled with Protection of Economic Rights', (2014) 5 ELLJ, p. 306.

purpose of disguising an employment relationship, is rendered indecisive in the eyes of EU law. In other words, if self-employed persons are not genuinely self-employed and instead work for and under direction of another person and do not bear any commercial or financial risks, they can be regarded as false self-employed, thus, in essence, as workers. The Court in *FNV* held that despite the legal status of individuals performing services assigned under national law as self-employed, should the market conduct of a service provider be no longer determined independently and, instead, be dependent entirely upon a principal, that status could be lost.[10] It is so especially, if the service provider does not bear any of the financial or commercial risks stemming from the activity of their principal and also, if they operate as an auxiliary within the principal's undertaking.[11] More importantly, the status of a worker is not affected by the fact that the service providers are awarded more independence and flexibility than regular employees, as far as the freedom to choose the time, place and content of their work, is concerned.[12] That prescribed degree of latitude of an individual service provider could appear to be the key to apply the concept of false self-employment in the gig economy.

### 2.1. PLATFORM-MEDIATED WORK: A DEVIL OF A JOB

In the online reality of platform work, hardly anyone is engaged on an employment contract, self-employment prevails and harsh realities of economics take the lead.[13] Therefore, *casual* workforce is usually hired to perform their services either entirely online or to do tasks which are commissioned online but carried out in the offline reality.[14] Accordingly, there are two types of platform work in the gig economy to be distinguished: crowdwork and on-demand work via apps.[15] Crowdwork is characterised as a distribution of micro-tasks among an indefinite and unknown pool of individuals gathered all together on an online platform.[16] It is mostly present while performing mundane assignments such as data collection, making transcriptions, completing surveys, or even screening and tagging pictures and it is generally

[10] Case C-413/13, *FNV Kunsten Informatie en Media*, ECLI:EU:C:2014:2411, para. 33.
[11] *Ibid*., para. 33
[12] *Ibid*., para. 36.
[13] Valenduc G. and Vendramin P., 'Work in the digital economy: sorting the old from the new', (2016) 3 ETUI Working Paper, p. 34.
[14] Aloisi A., (n 2), pp. 164-165.
[15] De Stefano V., 'The rise of the "just-in-time workforce": On-demand work, crowdwork and labour protection in the "gig-economy"', (2016) 71 Conditions of Work and Employment Series, p. 1.
[16] Eurofound, 'New forms of employment', (Publications Office of the European Union 2015), p. 107.

associated with platforms like Amazon Mechanical Turk, Upwork or Clickworker. Work on-demand via apps on the other hand, entails its execution through the apps managed by firms, which set mandatory quality standards of their services and they are both responsible for the selection and the management of their workforce.[17] The best example are car-hailing apps, such as Uber, Lyft or delivery apps like UberEATS, Deliveroo.

### 2.2. A TALE OF A BROKEN PROMISE: PRECARIOUS DIGITAL WORKING CONDITIONS

The gig economy embraces great, yet somehow not entirely untapped, potential for development, simplicity, convenience and it has surely created new opportunities for the workforce, especially as far reintegration of the workforce, including home-bound, is concerned.[18] However, it also simultaneously generated a considerable amount of challenges which happen to result from the widespread business model of the platforms which prefer to provide their services with the help of an army of individual service providers, who are generally self-employed persons, thus having a significant impact on the overall working conditions and access to social protection. The workforce seems to be *casual* which is closely connected with a considerable rotation among it, since it is chiefly considered to be *a no strings attached* or *hire-and-fire-employment*.[19] On top of that, it is outlined that work in the gig economy leads to demutualisation of risk due to the fact that neither the platform, nor the gig worker has the typical rights and obligations stemming from an employment contract anymore.[20] Quite the contrary, the relationship between the parties is rather of an informal nature that might be ended with a blink of an eye, mostly thanks to or instead, because of the ongoing *algocracy*.[21] The algorithms which process the customers' feedback reflected in the rating systems in essence, can kick the gig worker out from the platform without a right to a recourse, which constitutes a *new digital dismissal*.[22] Furthermore, work assignments in the gig economy are generally split into smaller tasks, often referred to as micro-tasks, which is best described as the never-ending process of fragmentation of work.[23] Moreover, some platforms

[17] De Stefano V., (n 15), p. 1.
[18] Prassl J., *Humans as a Service – The Promise and Perils of Work in the Gig Economy*, (OUP 2018), pp. 24-26.
[19] De Stefano V., (n 15), p. 1
[20] Ibid., p. 2.
[21] Cherry M.A., (n 5), pp. 596-597.
[22] Aloisi A., (n 4), p. 674.
[23] Berg J., 'Income security in the on-demand economy: Findings and policy lessons from a survey of crowdworkers', (2016) 37 CLLPJ, p. 545.

are launching their own catchy names for gigs, like rides, human intelligence tasks (HITs), requests that further obscure the overall picture and customers are no longer being aware that perhaps behind the algorithms, or actually instead – if the algorithms are simply not capable to perform the tasks, it is humans who do work.[24] What is more, especially in the field of transport services, a lot of attention is drawn to the issue of unfair competition since licensed taxi drivers have to compete on the same grounds with non-professional drivers whose skills and vehicles are not subject to the same regulations such as rigid training, due diligence screening, possession of licence and additional accompanying insurance.[25] Tensions arise based on the pricing as non-professional car-hailing operations are significantly cheaper and often more reliable due to the friendly interface of the apps, thus attracting more customers. What is particularly worrying is that the gig workforce can hardly unionise, even in some cases it is prevented from doing so.[26] Consequently, its level of collective rights is extremely low, if not inexistent at all, due to the inequality of bargaining power.[27] It is especially so under EU competition law since, as long as the workforce is recognised as self-employed, it cannot enjoy the exception with regard to collective bargaining agreements falling outside the scope of Art. 101 TFEU.[28] Discrimination on the platforms is also widespread, with biased or bogus reviews and ratings.[29] Overall, the unstable working conditions, difficult predictability of work, low income, shortage of transparency,[30] non-portability of the ratings[31] and insufficient social security guarantees[32] as the majority of the workforce is considered to be self-employed under national laws, mostly for the purposes of the tax advantages and lower social security contributions,[33] convey the picture that work in the gig economy is indeed of *precarious*

[24] De Stefano V., (n 15), pp. 477-478.
[25] Rogers B., 'The Social Costs of Uber', (2015) 22 The University of Chicago Law Review Dialogue, p. 91.
[26] Prassl J. and Risak M., 'Uber, TaskRabbit, and co.: Platforms as employers? Rethinking the legal analysis of crowdwork', (2016) 37 CLLPJ, p. 626.
[27] Rogers B., 'Employment Rights in the Platform Economy', (2016) 10 Harvard Law and Policy Review, p. 495.
[28] Klebe T. and Heuschmid J., 'Collective Regulation of Contingent Work: From Traditional Forms of Contingent Work to Crowdwork - A German Perspective', in Ales E., Deinert O. and Kenner J. (eds.), *Core and Contingent Work in the European Union - A Comparative Analysis*, (Hart Publishing 2017), pp. 202-203. See also: Case C-256/01, *Allonby*, ECLI:EU:C:2004:18; and Case C-413/13, *FNV Kunsten Informatie en Media*, ECLI:EU:C:2014:2411.
[29] On discrimination in the rating mechanisms see: Kullmann M., 'Platform Work, Algorithmic Decision-Making, and EU Gender Equality Law' (2018) 34 ICJCLLIR, pp. 1-21.
[30] Cherry M.A., (n 5), pp. 597-598.
[31] Prassl J., (n 18), pp. 111-113.
[32] Nerinckx S., 'The "Uberization" of the labour market: some thoughts from an employment law perspective on the collaborative economy', (2016) 17 ERA Forum, p. 247.
[33] Cauffman C., 'The Commission's European agenda for the collaborative economy - (Too) platform and service provider friendly?', (2016) 7 Maastricht European Private Law Institute Working Paper, pp. 20-22.

nature.[34] Vulnerable employees, insecure employment and unsupportive entitlements make the employment precarious[35] since the gig workers are presumed to 'provide just-in-time workforce compensated on a pay-as-you-go basis'.[36] In sum, this has further far-reaching consequences as to access to social protection.

## 3. EU INSTITUTIONS FACED WITH THE NEW LABOUR MARKET PATTERNS: A BIT LOST IN THE CROWD

At EU level, the rise of collaborative economy was officially acknowledged only in June 2016, when the European Commission published its communication on a European agenda for the collaborative economy.[37] The document contains an overview of issues that are most likely to be encountered when faced with the offline reality in the collaborative (gig) economy on a number of levels. It aims to provide a non-binding guidance for Member States on how the existing EU rules could apply to the collaborative economy business models. The Commission identified five key issues: market access requirements, liability regimes, protection of users, employment patterns and taxation. In sum, the Commission is concerned about the applicability of the existing legislation, an increasing unclear distinction between consumers and providers, a traditional divide between an employee and a self-employed being broken down, as well as a blurry interplay between provisions on services for both professionals and non-professionals.[38] Moreover, in early-May 2017, the Committee on the Internal Market and Consumer Protection of the European Parliament adopted a draft report on a European Agenda on the Collaborative Economy, taking account of the complexity of the issues and expressing a need to react in order to foster a level playing field at the EU level.[39] Subsequently, the European Parliament adopted a resolution on the topic, calling upon the European Commission for some regulation in that area in order to tackle the legal uncertainty stemming from gig work.[40] What is more, the collaborative economy was also put on the agenda of the proclaimed

[34] Aloisi A., (n 4), p. 653.
[35] Broughton A. et al., 'Precarious Employment in Europe - Part 1: Patterns, Trends and Policy Strategy - Study for the EMPL Committee of the EP', (Publications Office of the European Union 2016), p. 20.
[36] De Stefano V., (n 15), p. 4.
[37] Commission, 'A European agenda for collaborative economy', COM(2016) 356 final.
[38] European Parliamentary Research Service, 'Briefing on A European agenda for collaborative economy', PE 593.510, p. 2.
[39] Committee on the Internal Market and Consumer Protection of the European Parliament, 'Draft report on a European Agenda on the Collaborative Economy', (2016) PE595.756v01.
[40] European Parliament, 'European agenda for the collaborative economy', 2017/2003(INI).

EPSR[41] that serves, in the apt words of the European Commission, as 'a compass for the renewed upwards convergence in social standards in the context of the changing realities of the world of work'.[42] Associated with the EPSR as well, the Commission put forward an accompanying, rather ambitious, proposal repealing Directive 91/533/EC on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, also known as the Written Statement Directive, with the Directive on Transparent and Predictable Working Conditions in the European Union, as the Commissioner in charge of DG Employment, Marianne Thyssen, seems to be particularly committed to combat social and employment exclusion of non-standard workers. In essence, by proposing the new Directive, the Commission is aiming to guarantee that all workers, regardless of the specific working arrangements they are engaged in, should be provided with more thorough and complete information regarding the essential aspects of their work, which are to be received by the worker, in writing, at the latest on the first day when their employment commences, instead of up to two months afterwards as it is now. Workers will also have a right to be informed within a reasonable period in advance when exactly their employment will start, which is especially important for those with very variable working schedules that are to be determined by the employer in cases of on-demand work or zero-hours contracts. Workers ought to also have a right to seek additional employment by having widespread exclusivity clauses prohibited. More importantly, the proposal has a broad personal scope of application. The Commission highlights that it attempts 'to ensure that these rights cover all workers in all forms of work, including those in the most flexible non-standard and new forms of work such as zero-hour contracts, casual work, domestic work, voucher-based work or platform work'.[43] Essentially, the proposal comes also with the targeted provisions on enforcement, to ensure that workers will effectively benefit from these rights. According to the Impact Assessment, the coverage will extend up to 2-3 million workers including amongst them 3% of platform workers.[44] It remains questionable however how those rights will be granted to platform workers, who cannot satisfy the condition of working under the direction of another person, since there is hardly often any entity supervising executed work than just the end user. It seems therefore that the impact assessment might be a bit too optimistic in that sense. On a good note, a simplified

[41] Commission, 'Establishing a European Pillar of Social Rights', COM(2017) 250 final, p. 8.
[42] Commission, 'Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union', COM(2017) 797 final, p. 2.
[43] Ibid., p. 3.
[44] Commission, 'Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union', SWD(2017) 478 final, p. 13.

and codified EU definition of a worker, as the Commission's proposal foresees that a worker is a natural person who for a certain period of time performs services for and under the direction of another person in return for remuneration, seems like a step in the right direction. It is especially so when it comes to leaving out the element of genuine and effective economic activity to include mostly platform work in form of crowdwork. What has not been addressed in the proposal however, is the relationship of subordination and how to establish its existence. It could be nevertheless inferred that the indicators stemming from the CJEU case law could be applied here, conveying in full the overall concept. Those elements which so far echoed in the EU case law are considered to be: (1) degree of power of management, supervision, margin of discretion in the performance of assigned duties, capability to be dismissed and merely notional general independence;[45] (2) recruitment procedure and nature of the entrusted duties;[46] (3) freedom to choose the time, place and content of the work;[47] (4) extent of rights and duties vested upon the individual.[48] Furthermore, it remains questionable whether this proposed directive could actually apply to all gig workers as it seems like it has a different target group of workers, namely it favours predominantly on-call workers. As suspected however, the proposal underwent some serious modifications in the Council, which under the Bulgarian Presidency, struck down and undercut its most ambitious provisions relating to the introduction of a Union definition of a worker for the purposes of the Directive and the minimum 8 hours per month threshold of coverage. The general approach now, after apparent political discussions at the Coreper level,[49] envisages a reference to the definition of a worker from the law, collective agreements or practice in force in each Member State.[50] The only reference to the case law of the CJEU is to be found in the seventh recital, which wording has been fortunately maintained in the course of negotiations in the Council. It remains therefore hopeful to assume that at least when implementing the Directive, Member States will not apply rules which are liable to jeopardise the achievement of the objectives pursued by it and, therefore, deprive it of its effectiveness.[51] The main aim of the proposal is thus 'to promote more secure and predictable employment while ensuring labour market adaptability and improving living

[45] Case C-232/09, *Danosa*, ECLI:EU:C:2010:674, paras. 41, 47, 49 and 51.
[46] Case C-229/14, *Balkaya*, ECLI:EU:C:2015:455, para. 38.
[47] Case C-413/13, *FNV Kunsten Informatie en Media*, ECLI:EU:C:2014:2411, para. 36.
[48] Case C-116/06, *Kiiski*, ECLI:EU:C:2007:536, para. 25.
[49] Council, 'Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union – General approach', 10054/18 (Brussels, 14 June 2018), p. 4.
[50] Council, 'Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union', 10299/18, (Brussels, 21 June 2018), Art. 1(2).
[51] Case C-393/10, *O'Brien*, ECLI:EU:C:2012:110, para. 35.

and working conditions'.[52] The new provision touching upon the derogation for less than a certain number of hours worked, is drafted in a way to exclude workers who have an employment relationship equal to or less than 5 hours per week on average in a reference period of four weeks.[53] Finally, with regard to the timeframe required to provide the information by the employer to the worker, the Council decided to introduce a two-step approach instead of what the initial proposal accounted for, i.e. information to be provided at the latest on the first day when the employment commences: firstly, a deadline of one calendar week for the most essential and crucial information and secondly, a deadline of one month for the rest of the information.[54] This proposal however is still to be discussed in the next legislative step by the European Parliament which can introduce further amendments.

Nevertheless, the amended proposal still aligns well with the EPSR, being a part thereof, which albeit being a non-binding proclaimed document, could serve as an interpretation tool, a catalyst, for the Court of Justice when addressing preliminary questions stemming from the application of the new Directive taking a form of an 'indirect impact of the EPSR in the (revision of the) existing legal acquis'.[55] In any case nonetheless, basic information rights are far from effectively improving the working conditions but it is certainly a step towards the noble aim, especially by not only recognising but also and reiterating the importance of the EPSR even in the recitals of the proposal.

Interestingly, in late 2017 the Court of Justice presented an early Christmas gift to all interested in the gig economy and delivered the judgment in the *Uber Spain* case. Albeit not an employment law case, it opened the doors to treat Uber as something more rather than a simple matching intermediary. The commercial court in Barcelona made use of Article 267 TFEU and posed a preliminary question to the judges in Luxembourg whether Uber is a transport company or a digital service provider.[56] In May 2017, Advocate General Szpunar issued his opinion in which he came to a realisation that Uber, whilst being an innovative electronic platform, falls nevertheless within the field of transport.[57] In essence, Uber can be therefore required to obtain

[52] Council, 2017/0355 (COD), (n 50), Art. 1(1).
[53] Ibid., Art. 1(3).
[54] Ibid., Art. 4.
[55] Hendrickx F., 'The European Pillar of Social Rights: Interesting times ahead', (2018) 8 ELLJ, p. 191.
[56] Case C-434/15, *Asociación Profesional Elite Taxi v Uber Systems Spain SL*, ECLI:EU:C:2017:981.
[57] Opinion of Advocate General Szpunar in Case C-434/15, *Asociación Profesional Elite Taxi v Uber Systems Spain SL*, ECLI:EU:C:2017:364, para. 61.

the necessary licences and authorisations under national laws.[58] The Court followed his opinion in the judgment, at least in the outcome thereof as Member States are free to act in the field of transport since it is a shared competence which has not yet been exercised at EU level. The true key point from the Court's decision for labour law considerations is that 'Uber determines at least the maximum fare by means of the eponymous application, that the company receives that amount from the client before paying part of it to the non-professional driver of the vehicle, and that it exercises a certain control over the quality of the vehicles, the drivers and their conduct, which can, in some circumstances, result in their exclusion'.[59] In fact, the judges have indeed admitted that Uber 'is more than an intermediation service'.[60] In other words, it seems like the Court, somewhat in between the lines, opened the door to consider Uber as something more than just merely an intermediary service facilitating car-hailing rides between the self-employed drivers and clients by highlighting the typical functions of an employer, which notably Uber has been exercising over its drivers from the beginning. The case could be seen therefore as a big leap of faith for the platform workers, especially those engaged in work on-demand via apps. March 2018 has also marked the return of the prodigal son – Uber, to Barcelona, where it was banished in 2014, this time however, with an UberX service with professional drivers holding valid licenses. In sum, it seems like when put under pressure, Uber can comply with the domestic legal requirements, still operate and play by the rules. The reasoning in the *Uber Spain* case has been also recently confirmed in *Uber France*.[61] The Court has repeated that services of Uber fall within the field of transport under EU law, thus Member States can, even under criminal law, impose sanctions for the organisation of car-hailing services without being authorised to do so.[62]

## 4. WELCOME TO THE DARK SIDE: SOCIAL PROTECTION FOR NON-STANDARD WORKERS

### 4.1. SOCIAL PROTECTION FOR NON-STANDARD WORKERS: UNDER A GIG DEAL OF PRESSURE?

[58] Ibid., paras. 65-66.
[59] Case C-434/15, *Asociación Profesional Elite Taxi v Uber Systems Spain SL*, ECLI:EU:C:2017:981, para. 39.
[60] Ibid., para. 37.
[61] Case C-320/16, *Uber France*, ECLI:EU:C:2018:221.
[62] Ibid., para. 27.

The upsurge of non-standard forms of employment brings a great deal of new challenges, *inter alia*, to guarantee access to social protection systems. Because social protection systems in the EU were envisaged at a time when full-time indefinite contracts were the rule and not the exception, they were (and still are) designed to protect those with a standard contract.[63] This has drastically changed over the years and currently only 60% of the employment contracts are full-time and open-ended, leaving almost 40% out of the standard social protection scheme's equation, social protections systems are no longer fit for purpose.[64] The segmentation of the workforce results in an increasing number of atypical workers who struggle to access to a vast number of social transfers like, *inter alia*, unemployment, sickness, health-care, maternity, paternity or parental benefits, pensions, work-related sickness or accidents or other sort of social protection measures.[65] In fact, a recent survey to two micro-tasks platforms showed that roughly 40% of the workers' main work was crowdwork and that only less than 10% levied social security contributions.[66]

As current social protection systems are designed for a traditional approach to the employment relationship, new forms of labour fall into the gaps of the current *aquis* on access to social protection, which increases risks of poverty and social exclusion among the affected individuals and their families who are left out from accessing the welfare system based on their employment status. Not only do these gaps hinder the current situation of non-standard forms of work, but also jeopardise future opportunities due to the loss of entitlements or lack of transferability. Since those working in the gig economy are typically classified as self-employed persons, they are usually not covered by the social security schemes.[67]

Non-standard workers, therefore, receive a differential coverage of social protection and employment related services based on their contract status.[68] This differential treatment besides

[63] Commission, 'Impact Assessment Accompanying the document Proposal for a Council recommendation on access to social protection for workers and the self-employed', SWD(2018) 71 final, pp. 1-12.
[64] Commission, 'Proposal for a Council Recommendation on access to social protection for workers and the self-employed', COM(2018) 132 final, p. 3.
[65] Commission, 'Establishing the European Pillar of Social Rights', SWD(2017) 206, pp. 3-6.
[66] ILO, 'Strengthening social protection for the future of work', (2017); Berg J., (n 23), p. 19.
[67] COM(2018) 132 final, (n 64), pp.1-4.
[68] Matsaganis M., Özdemir E., Ward T. and Zavakou A., 'Non-standard employment and access to social security benefits', Research note 8/2015, Commission; Commission, 'Work stream 'future of work and welfare systems'. Hearing 3: Future of Welfare systems' (Commission June 2016) < http://ec.europa.eu/social/BlobServlet?docId=15965&langId=en> Accessed on 29 June 2018; Opinion of the

being considered unfair and inefficient, has dreadful implications, for individuals and their families but also for the labour market and the welfare systems of Member States.[69] At the individual level, non-standard workers and their families endure grater economic uncertainty and enjoy less entitlements to social security. Moreover, non-standard workers are almost three times as likely of being at risk of poverty and social exclusion as compared to standard workers.[70] Both economic uncertainty and poverty are indicators of precarious employment, faced mostly by atypical workers.[71] As far of the consequences for the labour market are concerned, the differentiated coverage increases labour segmentation, which at the same time is linked with increase of unemployment and lower quality of skills.[72] Lastly, gaps in the social protection systems weaken the welfare state because less people levy contributions. Therefore, on the one hand the number of contributors is proportionately reduced, and on the other, more people have to be protected by the safety nets of last resort.[73]

### 4.2.THE SOCIAL FAIRNESS PACKAGE: A FAIR START FOR ALL?

In an attempt to tackle these issues and filling in the gaps of the current social protection systems of the Member States, the Commission recently launched the Social Fairness Package,[74] which includes a proposal for a Council Recommendation on access to social protection of workers,[75] a proposal for a Regulation for the establishment of the European

EESC on the changing nature of employment relationships and its impact on maintaining a living wage' [2016] OJ C 303.

[69] Commission, 'Analytical Document Accompanying on Second Phase Consultation of Social Partners under Article 154 TFEU on a possible action addressing the challenges of access to social protection for people in all forms of employment in the framework of the European Pillar of Social Rights', SWD(2017) 381, pp. 51-53.

[70] Ibid., p. 53.

[71] European Parliament, 'Precarious Employment in Europe. Part 1: Patterns, Trends and Policy Strategy', (2016) p. 23.

[72] SWD(2017) 381,(n 69), p. 55.

[73] Ibid., p. 56.

[74]Commission, 'Commission adopts proposals for a European Labour Authority and for access to social protection', (Press release, 13 March 2018), IP/18/1624.

[75] COM(2018) 132 final, (n 64).

Labour Authority[76] and a Communication on the monitoring on the implementation of the EPSR.[77]

This Social Fairness Package was adopted within the broader framework of the EPSR,[78] launched in April 2017 after a two-phase consultation process that started in 2016 and was interinstitutionally proclaimed by the Commission, the Council and the Parliament later in November 2017 at the Social Summit of Gutenberg for fair jobs and growth.[79] The initiative of the EPSR was a response to a much broader debate on the future of Europe which is reflected on the Commission's White Paper of 2017. This document deals with the question of how to strengthen and modernise the European social model in modern times with challenges brought by new technologies, globalization and demographic ageing among others.[80] In sum, the EPSR consists of 20 principles – or rights –[81] grouped in three categories on equal opportunities and access to the labour market, fair working conditions and social protection and inclusion. Part of the last group is Principle 12 which states that 'regardless of the type and duration of their employment relationship, workers, and, under comparable conditions, the self-employed, have the right to adequate social protection.[82] The EPSR transforms the call for a replacement income set in the Council Recommendation 92/442/EEC into a right as part of ensuring

[76] While the proposal for a Recommendation – further analysed below – aims at facilitating a fair access to social protection for everyone who is engaged in work, regardless of the status awarded by the national laws, the European Labour Authority (ELA) foresees helping individuals, entrepreneurs and national administrations to ensure fair labour mobility by striving for three-fold policy objectives. Firstly, to provide accurate information to all the parties on opportunities for jobs, apprenticeships, mobility schemes, recruitments, trainings and guidance on rights and obligations to reside, work, operate from another Member State. Secondly, it aims at strengthening the cooperation between the national labour authorities by providing a platform for monitoring the adequate application of EU cross-border rules. Finally, it is supposed to be able to promote and facilitate mediation in cases of cross-border disputes. For the proposal, see: Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing a European Labour Authority', COM(2018) 131 final.

[77] Commission, 'Monitoring the implementation of the European Pillar of Social Rights', COM(2018) 130 final.

[78] Commission, 'Recommendation of 26.4.2017 on the European Pillar of Social Rights', C(2017) 2600 final.

[79] Council, 'Proposal for an Interinstitutional Proclamation on the European Pillar of Social Rights' (Brussels 20 October 2017) 13129/17.

[80] Commission, 'White Paper on the Future of Europe. Reflections and scenarios for the EU 27 by 2025', COM(2017)2015.

[81] See more on the discussion principles and rights: De Schutter O. and Demine P., 'The Two Constitutions of Europe: Integrating Social Rights in the New Economic Architecture of the Union', CRIDHO Working Paper 2016/2, pp. 27 ff; Garben S., 'The European Pillar of Social Rights: Effectively Addressing Displacement?' (2018) 9(1) *EuConst*, p. 226; Hendrickx F., 'European Labour Law and the millennium shift: from post to Pillar' (2018), in Hendrickx F. and De Stefano V. (eds.), *Game Changers in Labour Law: Shaping the Future of Work*, (Kluwer Law International 2018), Ch. 3.

[82] C(2017) 2600 final, (n 78), p. 8.

worker's standard of living.[83] Principle 12, as well as the other provisions under the social protection title, apply to all workers, regardless of the type and duration of their employment relationship and under comparable circumstances also to self-employed persons. The principle applies to a 'whole range of non-standard contracts'.[84] The inclusion of a right to adequate social protection for workers that is regardless of the type and duration of their employment relationship and that includes the self-employed, is perhaps the most significant change included in the EPSR, as compared to the first outline presented by the Commission.[85]

#### 4.2.1. THE PROPOSAL ON ACCESS TO SOCIAL PROTECTION: FOR RICHER AND POORER, IN SICKNESS AND IN HEALTH?

The proposal for a Recommendation on access to social protection for workers and the self-employed is the result of several stakeholder consultations including, a two-step consultation with the European social partners following Art. 154 TFEU – according to which the social partners are to be consulted on the direction of possible EU action on the social field – , targeted hearings with the key stakeholders and the representatives of Member States within the Social Protection Committee (SPC) and an open public consultation.[86] Regarding the social partners consultation, the management and labour strongly disagreed on the content of the initiative and on how to tackle the issue of access to social protection, therefore, they did not enter into negotiations to reach an agreement under Art. 155 TFEU.[87] In the absence of an initiative agreed by the social partners, the Commission announced its proposal for a Council Recommendation on 13 March 2018. The Recommendation aims at increasing income security, reducing precariousness, fighting poverty, reducing unfair competition and creating more resilient economic structures. The Proposal covers on the one hand the right to access social protection schemes and on the other, the right to build-up and take-up social protection entitlements. More in particular, it has the aim of guaranteeing formal and effective coverage,

[83] Commission, 'Monitoring the Implementation of the European Pillar of Social Rights', SWD(2018) 67 final, pp. 59-60.
[84] Ibid., pp. 59-61.
[85] Commission, 'Launching a consultation on a European Pillar of Social Rights', COM(2016) 127 final; C(2017) 2600 final, (n 78), p. 12; Sabato S. and Vanhercke B., 'Towards a European Pillar of Social Rights: From preliminary outline to a Commission Recommendation', in Vanhercke B., Sabato S. and Bouget B. (eds.), *Social policy in the European Union: State of play 2017*', (ETUI/OSE 2017), p. 89.
[86] COM(2018) 132 final, (n 64), pp. 9-10.
[87] See for more detailed information on the two-stage consultation of the social partners: EESC, 'Implementing the European Pillar of Social Rights: what is needed to guarantee a positive social impact', (2018), pp. 3-5.

adequacy and transferability of social protection and transparency of social protection entitlements both for workers and the self-employed persons regardless of whether or not they are transitioning between either status, or qualify as being both a worker and a self-employed person.[88] However, the Recommendation leaves room for Member States to decide on adopting different rules between workers and the self-employed persons.[89] In particular, the Recommendation foresees differentiation with regard to unemployment benefits. While Member States have to ensure formal coverage on mandatory basis for unemployment benefits in the case of workers, in the case of the self-employed people this is only on voluntary basis (Art. 9). According to the Commission, it is more difficult to evaluate and control unemployment risks in self-employment, and because this is linked to the entrepreneurial risk, Member States are left more discretion in the design of the unemployment scheme for the self-employed people.[90]

In relation to the branches covered by the Proposal, it applies to benefits of unemployment, sickness or health related, maternity or equivalent paternity, invalidity, old-age and occupational accident or disease related. Furthermore, Art. 7 of the Proposal provides a number of definitions to clarify various vague concepts alongside the text such as 'worker', 'adequate', 'effective coverage', 'formal coverage' and 'social protection'.[91]

#### 4.2.1.1. FOR RICHER AND IN HEALTH

Overall, this initiative should be given a cautious welcome. At the very least, this Proposal acknowledges the fact that current social protection systems are no longer fit for purpose and that substantial changes need to be incorporated for future-proofing welfare states.[92] Especially when read together with other initiatives such as the proposal for a Directive on Transparent and Predictable Working Conditions, the ELA and a future proposal for a European Social Security Number,[93] it seems that the adequate steps are finally being taken at the EU level to address the challenges coming by the hand of increasingly segmented, mobile, modern economies. Moreover, we should welcome the language of the Recommendation, which is

[88] COM(2018) 132 final, (n 64), Art. 5.
[89] Ibid., Art. 6.
[90] Ibid., p. 11.
[91] Ibid., Art. 7.
[92] Ibid., Rec. 12.
[93] Commission, 'Inception Impact Assessment on a European Social Security Number' (2017), (2017)5862503.

linked to the idea of a life in dignity – in particular when referring to adequacy – as opposed to the financing of social security systems (also referred to however), meaning that there is a renewed emphasis on the well-being of workers and on the social aspects instead of on the economic and financial aspects of social protection. There is a clear connection made between the proposal and the objectives of the Union (Art. 3 TEU) in that access to social protection for all is seen as a 'cornerstone' of the social model of the EU and necessary for a sustainable social market economy.[94] The proposal is also seen as fulfilling the fundamental right to social security and social assistance under Art. 34 of the EU Charter.[95] What is more, different from the EPSR, which only applies to the Eurozone, the legal initiatives that are emanating from it, such as this proposal on social protection, the ELA or the proposal for Directive on Transparent and Predictable Working Conditions, have a broader personal scope that includes the EU as a whole. Such measures could to some extent prevent a 'two-speed' Europe between the Eurozone and the rest of Member States.[96]

#### 4.2.1.2. FOR POORER AND IN SICKNESS

However, the Proposal offers ample room for criticism. For once, the concept of worker as defined in the proposal might still not be suitable for a number of individuals whose contractual (or not) relations do not fit in this definition of a 'natural person who for a certain period of time performs services for and under the direction of another person in return for remuneration.'[97] Note that this is the same definition that was provided by the Commission in the proposal for a Directive on Transparent and Predictable Working Conditions, showing coherence in those initiatives that emanate from the EPSR.[98] Yet, the Council did not take on board such a definition of worker in its general approach,[99] so it remains to be seen what will happen with the proposal for a Recommendation itself. In any case, according to Art. 7 of the proposal for a Council Recommendation on access to social protection, in order to qualify as a worker, a person needs to work 'under the direction' of another person, what is often difficult to establish in the gig economy as it has been discussed above. There is certain convergence of

[94] Ibid., Rec. 7.
[95] COM(2018) 132 final, (n 64), p. 13.
[96] Sabato S. and Vanhercke B., (n 85), p. 82.
[97] COM(2018) 132 final, (n 64), Art. 7; Extensive discussion in: Garben S., Kilpatric C. and Muir E., 'Towards a European Pillar of Social Rights: Upgrading the EU Social Aquis', (2017) College of Europe Policy Brief No. 1/2017.
[98] COM(2017) 797 final (n 42) Art. 2(1)(a).
[99] Council, (n 50), p. 17.

the case law of the Court of Justice with regard to the general definition of 'worker' as applied under Article 45 TFEU, yet if codified, this would improve legal certainty and coherence in its applicability.[100] However, providing a definition that does not adjust to all dynamic labour market is likely to have a negative effect and frankly, might be difficult to formulate after all. Still nonetheless, it might be beneficial to leave further interpretation of the scope of the codified concept of a worker for the CJEU itself on a case-by-case basis. The Court has indeed proven over the course of years in its case law that, at least under Art. 45 TFEU, the autonomous concept of a worker cannot be interpreted narrowly and must be thus given a broad meaning.[101] While at the moment the CJEU is in charge of an active interpretation of what constitutes a worker, a fixed and incomplete definition could lead to the exclusion of a number of individuals whose working status varies from that – potentially – set in a legal instrument. Moreover, a definition of a self-employed person is lacking, thus far failing to provide a response to this problematic under current EU law. Then again, it might as well be true that the dynamism led by the interpretation of the Court of Justice can result in adequately adjusting to the changing realities in the world of work.

The choice of instrument is a different point of concern. Once again, the Commission has chosen to make a proposal for a recommendation, just as it did for the EPSR. A recommendation is meant to suggest the course of action for Member States and while recommendations are designed to aim at the preparation of national legislative measures, they remain non-binding.[102] The objective is, therefore, to trigger change at a national level. The Commission pondered making a proposal for a directive instead, however, 'given the diversity of situations and limitations of legal framework at EU level' it justified the decision to adopt a soft-law instrument on the basis of proportionality and subsidiarity.[103] Yet, the intention of

[100] Garben S., (n 81), pp. 224 ff.

[101] See for example: Case C-138/02, *Collins*, ECLI:EU:C:2004:172, para. 26. In the same vein, see *inter alia*: Foster N., *Foster on EU Law*, (OUP 2006), pp. 336-339; Horspool M. and Humphreys M., *European Union Law - Fourth Edition*, (OUP 2006), pp. 405- 408; Kaczorowska A., *European Union Law*, (Routledge-Cavendish 2009), pp. 615-617; Mortelmans K.J.M., 'The Functioning of the Internal Market: The Freedoms', in Kapteyn P.J.G. *et al*. (eds.), *The Law of the European Union and the European Communities - The Fourth Revised Edition*, (Kluwer Law International 2008), p. 699; Reich N., 'Citizenship and Free Movement', in Reich N., Nordhausen Scholes A. and Scholes J. (eds.), *Understanding EU Internal Market Law*, (Intersentia 2015), pp. 85-86; and Spaventa E., *Free Movement of Persons in the European Union - Barriers to Movement in their Constitutional Context*, (Kluwer Law International 2007), pp. 1-3.

[102] Rasnača Z., 'Bridging the gaps of falling short? The European Pillar of Social Rights and what it can bring to EU-level policymaking', Working Paper ETUI 2017.05.

[103] COM(2018) 132 final, (n 64), pp. 7 ff.

adopting a directive is traceable in references to establishing minimum standards in the field of social protection, for instance, in the objective and scope of the proposal.[104] Not surprisingly, the low legal profile of the instrument has generated some criticism among those calling for a more ambitious initiative taking the form of a framework directive.[105] A framework directive could in fact be adopted under the same legal competences as the current proposal on social security and social protection of workers under Art. 153.1(c) TFEU and using the residual powers to extend the protection to the self-employed persons by virtue of Art. 352 TFEU.[106] The rationale behind opting for a soft-law instrument was thus more of a political decision rather than a problem of lack of competence.[107] Arguably, a binding instrument providing minimum standards would be more effective when tackling the constitutional asymmetries inherent to the EU between the internal market and monetary and economic governance on the one hand, and the social dimension of the EU on the other.[108] While the decision of adopting a non-binding approach is understandable, in particular considering that unanimity requirement under Art. 153.1(c) TFEU, the Commission could have adopted a more substantial and concrete recommendation. For instance, ETUC, which called for a Directive in both the consultation phases, regrets the fact that concrete indicators for the functioning and effectiveness of the principles brought by the Recommendation are lacking.[109]

For now, one of the main concerns about the proposal and the EPSR overall seems to relate to its enforceability. While the Commission foresees to monitor their implementation through already available policy instruments such as the European Semester, the Europe 2020 Strategy,

[104] Ibid., p. 8 and Art. 2.

[105] Polesi G., 'Social protection for all workers – Signs of progress on the Social Pillar', (Social Platform 30 March 2018).

[106] De Baere G. and Gutman K. 'The Basis in EU Constitutional Law for Further Social Integration', in Vandenbroucke F., Barnard C. and De Baere G. (eds.), *A European Social Union after the Crisis*, (CUP 2017), pp. 344-384.

[107] SWD(2017) 381 final, (n 69).

[108] See for example: Garben S., 'The Constitutional (Im)balance between 'the Market' and 'the Social' in the European Union', (2017) 13 EuConst, pp. 23-61; Vanderbroucke F. with Vanhercke B., 'A European Social Union: 10 nuts to crack', (2014) Friends of Europe; Ferrera M., 'Modest Beginnings, Timid Progresses: What's Next for Social Europe?', in Cantillon C., Verschueren H. and Ploscar P. (eds.), *Social Inclusion and Social Protection in the EU: Interactions between Law and Policy*, (Intersentia 2012); Leczykiewicz D., 'Conceptualising Conflict between the Economic and the Social in EU Law after Viking and Laval', in Freeland M. and Prassl J. (eds.), *Viking, Laval and Beyond*, (Hart Publishing 2014).

[109] ETUC, 'Position: Proposal for a Council Recommendation on access to social protection for workers and the self-employed' (2018) < https://www.etuc.org/sites/default/files/document/files/etuc_position_-_proposal_for_a_council_recommendation_on_access_to_social_protection_for_workers_and_the_self_employed.pdf> Accessed on 29 June 2018.

of the Open Method of Coordination for Social Protection and Social Inclusion (OMC),[110] neither this proposal nor the Recommendation on the EPSR propose adequate mechanisms of linking the social initiatives to governance tools.[111] In other words, no means are identified by which social policy coordination could be more effectively achieved, therefore failing to address the asymmetries of the Eurozone.[112] Related to this, the proposal lacks any connection to the application of the social scoreboard that was presented together with the EPSR in April 2017.[113] The social scoreboard offers a total of 12 indicators that can be used to analyse the performance *vis-à-vis* between Member States and throughout the years and to monitor convergence between Member States. Among these indicators, a number of them could be used to discuss the performance of Member States in relation with the implementation of the Recommendation, *inter alia*, living conditions and poverty, labour market dynamics, income and the rest of the indicators on the area of social protection. Yet, the Commission does not contemplate how the recommendation will be embedded in the different processes that are already in place, such as the European Semester.[114]

What is also true is the fact that there is an apparent lack of information available with regard to the data collection of social protection for non-standard employment relations.[115] In this regard, the Commission encourages Member States to collect and publish reliable statistics and to reinforce cooperation with Eurostat in order to create indicators on social protection. This initiative could thus be considered as a 'modest beginning' for a more substantial need of change. A reasonable expectation is that the monitoring of the implementation of this Recommendation both in the European Semester and the Social OMC[116] might result in providing the necessary data collection for a more conclusive measure, not only in the particular case of access to social protection but also, for addressing the dynamism of modern labour markets in future instruments – by, for example, including new forms of labour under

[110] SWD(2017) 381 final, (n 69), pp. 5 ff.
[111] Sabato S. and Vanhercke B., (n 85), pp. 80 ff.
[112] Deakin S., 'What Follows Austerity? From Social Pillar to New Deal', in Vanderbroucke F., Barnard C. and De Baere G. (eds.), *A European Social Union after the Crisis,* (CUP 2017), pp. 193-210.
[113] Commission, 'Social Scoreboard and the European Semester: Monitoring EU countries' performance under the European Pillar of Social Rights' 27 April 2017. See more at: < https://composite-indicators.jrc.ec.europa.eu/social-scoreboard > Accessed on 6 June 2018.
[114] COM(2018) 132 final, (n 64), p. 9.
[115] Ibid., p. 10.
[116] Barnard speaks of the 'symbolic value' of Recommendations in this case. See Barnard C., *EU Employment Law,* (OUP 2012), pp. 425-426.

the scope of Regulation 883/2004 –[117] as well as to provide sufficient information as to adopt a more binding initiative at EU level.

## 5. CONCLUSION: ADAPT OR PERISH

The world of work is rapidly changing and developing, new forms of labour are emerging in the wake of digitalisation. This dynamism gives rise to as many possibilities as challenges but the current labour and social systems need to evolve accordingly, in order to respond to the necessities of a highly dynamic, mobile and segmented labour market. The EU institutions have ultimately been confronted with the reality of the speeding labour markets and the impact of this evolution in various aspects related to the well-being of citizens and welfare economies, which as they currently stand, are not ready to confront such dilemmas.

In sum, this paper has discussed some of these opportunities and addressed the particular challenge of access to social protection in the context of the EPSR. At the very least, the EPSR and the initiatives associated with it, reflect that the EU institutions finally acknowledged the problems emerging from the rapid technological progress as there are ongoing legal works and consultations as to how to extend the scope of protection of people engaged in non-standard work on online platforms or via mobile apps. It however remains to be seen what the outcome of those actions would be, but at least there is some political will to widen the ambit of basic guarantees enshrined in employment and social laws by enforcing transparent and predictable working conditions. There is however still a number of open-ended questions. To begin with, it remains to be seen if the proposal for a Recommendation will ultimately be adopted by the Council. Then, there is the question on the enforceability of the EPSR in general and on the Proposal in particular. As opposed to economic or monetary objectives, social objectives lack a sanctioning system. This is one of the reasons why social objectives have rather been overlooked in the current monitoring systems. While the new initiatives do in fact give some flesh to the social objectives, there is still no binding nature to the EPSR or any sanctioning mechanism to guarantee that they will not be subordinated to other objectives monitored

[117] Regulation (EC) No 883/2004 of The European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L 166. Interestingly, the Regulation covers both workers and self-employed persons to be defined by national law yet not middle categories of economically active persons (such as dependent self-employed, e.g. in Italy: *laboro parasubordinato*).

thereby, for example, in the context of the European Semester. Be as it is, there is no guarantee that the EPSR will effectively tackle current asymmetries between the different dimensions of the EU.[118]

Differently, the self-employment model so widely spread in the gig economy seems to have the largest impact on the workforce as, for the most part, it became deprived of labour law protection and corollary social benefits and rights. The pressing question is therefore whether social rights should be granted just predominantly based on the binary division between a worker and a self-employed person, or instead, should be granted to all engaged in genuine economic activities irrespective of their status. One thing has to be emphasised: labour is not a commodity, humans are not a service, it is the platforms which are a service thanks to the people who are working behind the algorithms. The gig workforce is not invisible,[119] the workforce in fact is alive and kicking, yet trapped in a precarious offline reality with no access to social protection, sometimes at all.

In light of the foregoing, access to social protection should be facilitated and granted to all individuals engaged in genuine employment irrespective of whether a person is a worker or a self-employed person, whether engaged in standard or non-standard work or not engaged at all. At EU level, there are available mechanisms which could pave the way towards recognition of the social standards that ought to apply to all. The social standards have to be safeguarded once and for all by highlighting that social protection is not for granted, it is not certainly a bonus to be enjoyed only by an exclusive group of workers. Quite the contrary, it must remain as a normal corollary feature of employment, typical or atypical; otherwise the vulnerable workforce engaged in non-standard work, be it gig or other, will continue to be trapped in the vicious circle of flexibility and precarity. Nevertheless, labour and social laws are not in any case at odds with flexibility since both the laws and flexibility, can coexist in a harmonious way by creating a *social* level playing field for both entrepreneurs and the workforce.[120] Overall, idyllic as it may sound, it is neither daydreaming nor pipe dreaming – it should become the reality, even in the virtual world of gig work, where it seems to some that the current labour and social standards might not apply at all.

[118] Deakin S., (n 112), pp. 209-210.
[119] De Stefano V., (n 15), p. 477.
[120] Prassl J., (n 18), p. 94.