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Regulatory Governance for the Gig Economy[2]

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Abstract

This article explores the possibility of replacing the traditional administrative supervision over the gig industry in favour of regulatory instruments rooted in economy. While regulation in this sense is not uncommon in the Enlish-speaking countries, even outside infrastructural sectors, in continental Europe, administrative supervision of business still prevails. The current approach of states, including administration, legislative authorities and courts, towards the gig economy can be attributed to the misconception expressed in the EU and national court decisions presuming that companies such as Uber, offering an electronic platform, form one entity with thousands of businesses performing services such as Uber drivers. This paper asserts that regulatory authorities with their powers of correcting the anomalies of the market, are better suited for platform-based services. States should use their powers to liberalise doing business, rather than restrict new, inventive forms of business to the detriment of the customers.

Keywords: regulation, supervision, gig economy, Uber, business.

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Regulacja sektorowa dla gospodarki opartej na platformach[3]

Streszczenie

Niniejszy artykuł bada możliwość zastąpienia tradycyjnego nadzoru administracyjnego nad gospodarką typu *gig economy*, w której wykonawcy usług komunikują się z konsumentem przez platformy elektroniczne. Podczas gdy w krajach anglosaskich regulacja sektorowa występuje także poza sektorami infrastrukturalnymi, w Europie kontynentalnej nadal dominuje typowy nadzór administracyjny. Obecny stosunek państwa, w tym administracji, organów legislacyjnych i sądów, do *gig economy* można przypisać błędnemu przekonaniu, wyrażanemu w wyrokach sądowych – i to zarówno na poziomie unijnym, jak i krajowym – że firmy takie jak Uber, oferujące platformę online, tworzą jeden podmiot skupiający tysiące bezpośrednich wykonawców usług, takich jak kierowcy Ubera. Organy regulacyjne z ich kompetencjami do korygowania zaburzeń rynku lepiej odpowiadają wymogom usług platformowych. Państwa powinny wykorzystać swoje uprawnienia do liberalizacji gospodarki, zamiast ograniczać nowe organizacyjne formy biznesu ze szkodą dla konsumentów.

Słowa kluczowe: regulacja, nadzór, gig economy, Uber, biznes.

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Introductory Remarks

This article explores the possibility of departure from the traditional administrative supervision of the gig industry in favour of regulatory instruments rooted in economy. While regulation in this sense is not uncommon in English-speaking countries, even outside infrastructural sectors, in continental Europe, administrative supervision of business still prevails.[4] The current approach of states towards gig economy can be attributed to the misconception expressed in court decisions, both at the EU level and the national one, presuming that companies such as Uber, offering an electronic platform, form one entity with thousands of businesses such as Uber drivers. The concept adopted by courts is excessively formalistic and detached from the way that business is actually done.

The term 'gig economy' denotes forms of employment where work is done by persons considered to be independent contractors in traditional economy. Their work is done without employment in fluid forms. 'The dematerialisation of workplace may occur, because work will be performed on a mobile device (…).'[5] It is frequently perceived as a form of exploitation of those who would be workers under different circumstances.[6] It is convenient, for it provides flexibility for both parties. Due to this quality, it may be beneficial to workers who either are not interested in permanent jobs, or may be under pressure to combine different obligations, such as earning a living elsewhere, or taking care of a child or an elderly. The uncertain status of the performer of the service has made it a subject of interest of the International Labour Organization.[7] In step with courts and the ILO, scholars tend to expand the notion of gig economy to include even sex workers.[8] Contrary to common perception, this form of doing business is not necessarily a domain of

4 For more information on the concept of regulation, see: W. Hoff, *The Guardians of Market Equality*, "The Critique of Law" 2010, 3, pp. 89–105.

5 G.L. Mélypataki, *Dematerialisation of Workplace in Non-Classical Labour Law Relations*, "Zbornik Radova" 2019, 53, p. 672.

6 E.g. R.E. Zietlow, *The New Peonage: Liberty and Precarity for Workers in the Gig Economy*, "Wake Forest Law Review" 2020, 55, pp. 1113–1118.

7 https://www.ilo.org/Search5/search.do?sitelang=en&locale=en_EN&consumercode=ILOHQ_STELLENT_PUBLIC&searchWhat=gig&searchLanguage=en (access:).

8 M. Morston, *Only Employees: Ending the Misclassification of Digital Sex Workers in the Shared and Gig Economy*, "American University Journal of Gender, Social Policy & the Law" 2020, 29, pp. 93–103.

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unskilled labour, for it may include scholars, engineers, lawyers, etc. For the purpose of this paper, only a technology-based model is taken into account, particularly services in a situation where a company offers an application enabling communication between the performer of the service and customers. Apart from Uber, the most prominent examples of the gig economy are delivery companies, such as Deliveroo and City Sprint.

The Judicial Approach to the Novel Business Model

The attitude of courts towards the new way of business operation seems to be one of reluctance. In Aslam and Farrar v. Uber, the plaintiffs, two Uber drivers, sought to establish their legal status as employees instead of, as Uber insisted, independent contractors.[9] While Yaseem Aslam and James Farrar demanded the minimum wage as workers, Uber claimed they were 'partners', as described in the contract which read: 'nothing shall create an employment relationship between Uber and the partner.'[10] The British Employment Appeal Tribunal held that they were workers, although it did not specify what class. Thus, they could be workers (with less privileges, such minimum pay, paid holiday and rest breaks) or employees entitled to additional rights, such as maternity or paternity benefits, redundancy payment during paternal leaves, as well as protection from unfair dismissal after two years of continuous employment. The Court has characterised the nature of their services as 'unmeasured work'. The touchstone by which to measure the status of the drivers was the influence the company had on the drivers. It was held that the drivers are working for Uber when they: 1) remain within their appointed territory, 2) have their Uber application switched on, and 3) when they are ready and willing to accept trips, rather than actually accepting them. Furthermore, Uber was found to be in the transportation business, though for a different reason than declared later by the EU Court. In Asociación Profesional Élite Taxi v Uber Systems Spain SL,[11] the EU Court referred to the EU legislation concerning transportation and electronic services, while the British court was more concerned with the practical relationship between the company and the drivers. It interpreted the term 'worker' as not only an individual with a contract of employment, but also anyone who personally performs work not for a client or customer. This last statement was one

9 Case No. 2202550/2015.

10 Ibidem.

11 C-434/15.

of the weak points of the argument for drivers voluntarily registered as independent enterprises.

Also, one of the functions of the software provided by Uber is informing about potential customers willing to pay for the transportation service. It is no less an information service than using Google Maps, where there is no assumption of a legal relationship between the user and the provider. Furthermore, a part of the electronic service, making a payment, resembles a service provided by banks or institutions, such as Blik or PayPal, with no connotations of employment. Neither performance measurement is unique to gig companies: it is offered by a multitude of rating companies. What only vaguely resembles exercising control over workers in Uber cases is reducing the pay for poor performance. On the other hand, as Uber pointed out, the drivers never have an obligation to switch on the application which makes them different from workers who, regardless of how flexible their time framework, are under an obligation to show up for work.[12] Thus, the Aslam and Farrar decision, made before Brexit, does not fall under the famous Bosman case.[13] The central point of the latter was the obligation of an athlete to work under the direction of another party, the sports club, which included participation in training sessions and games, as designated by the club, which rendered him an employee rather than an entrepreneur. This element has been missing in the case of drivers in the gig economy, for they neither have to switch on the app nor have to accept the trip.

In the Associación Profesional Élite Taxi v Uber Systems Spain SL, the European Court of Justice adopted a similar point of view as that of the British Tribunal, though it was more interested in the interplay between the various pieces of EU legislation, answering the preliminary question submitted by the Commercial Court in Madrid. The pieces of legislation in question were: Directives 98/34/EC, 2001/31/EC, 2006/123/EC and Article 56 TFUE. Similarly to the British Tribunal, the Court held that Uber has exercised predominant influence on drivers by setting up prices, control over the quality of the vehicles and the drivers' conduct, the assessment of which could, under certain circumstances, lead to their exclusion from the service. This observation has led the Court to the conclusion that offering a platform for communication between drivers and customers is an integral part of a transportation service. This, in turn, has placed the problem under legislation providing national authorities with powers to impose administrative restrictions

12 Flexibility as a criterion separating independent contractors from workers is discussed by B. Means, J.A. Seiner, *Navigating the Uber Economy*, "UC Davis Law Review" 2016, 49, pp. 1511–1517.

13 Case C-415/93 Union Royale Belge des Societes de Football Association v. Jean Marc Bosman and Others.

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comparable to those in urban transportation. However, one element of this reasoning raises doubts as to the possibility of excluding drivers from the service by Uber. The exclusion does not seem to be reserved for economic entities, such as enterprises. It may take place in liberal professions, such as attorneys who, being independent enterprises, may be excluded from the legal profession on various grounds. However, this fact has never sparked the idea that attorneys and their professional associations form one economic entity.

The Administrative Approach

The administrative approach deserves to be presented after jurisprudence, for, although it evolved over time, it was eventually shaped by the example of court decisions, and, to a lesser degree, by political considerations. In general, legislative bodies and governments, central and local, have shown reluctance towards the novel forms of organising business, even if some formally declared willingness to create legislation commensurate with the needs of new technologies, as in the case of the authorities of Chicago. Typically, the authorities made efforts to square a new business model into the old one, coupled with cease and desist letters, additional administrative payments and tailored for the taxi industry subsidizing the taxi industry.[14] One noteworthy exception was the state of Victoria, Australia, where urban transportation services were liberalised to accommodate Uber and similar companies, instead of restricting it in the interested of the taxi industry.[15]

Luckily, however, there is disagreement among the administrative bodies within the same state about the desired policy towards the gigs. The US Federal Trade Commission has supported progressive legislative changes in favour of Uber-like companies, on the grounds that their presence is the product of inventiveness and it contributes to the enhancement of competition, while consumers can benefit from lower prices.[16] The FTC's approach was echoed by antitrust authorities in several countries, including Poland where the President of the Office of Competition and Consumer Protection issued a statement condemning restrictive legislation. It stated that Uber owes its strong position on the market to its technological advantage and that this advantage is not used to eliminate competition. On the contrary, it creates pressure on competitors to improve their services. At the same time, it

14 K. Barglind, *Innovation, Technology, and Transportation: The Need to Address On-Demand Ridesharing and Modernize Outdated Taxi Regulation in the US*, "Wisconsin International Law Journal" 2015, 33, pp. 713–718.

15 Ibidem, pp. 724–725.

16 Ibidem, p. 716.

noticed the need to improve consumer safety.[17] Indirectly, the position of antitrust authorities supports the need to create a specialised regulatory authority, for they emphasise the importance of economic and consumer considerations over administrative ones.

Sectorial Regulation as a Tool for Liberalisation

Putting a regulatory agency in charge of the gig economy, in place of administrative supervision, may be instrumental to the liberalisation of the gig sector. Traditional administration is not oriented towards better functioning of the market or enhancing competition, but towards compliance with the law. Classical bureaucracy is of little use in policing the ever-changing technology- and economy-sensitive areas. By contrast, regulatory authorities owe their existence to the market. Regulatory authorities were created for the first time in the 19th-century England for the railway industry and later for other infrastructural sectors, such as highways, electricity and telecommunications. The features that they have developed: specialisation, independence, consideration for the market dimension of decision-making may be useful in dealing with modern technologies.

In a technology-dependent economy, specialisation is a necessary prerequisite of public administration trusted with the task of overseeing new organisational forms of doing business. Gig companies offer services which by their very nature are traditional, such as transportation of passengers and cargo. What makes them distinct is a new, inventive organisational form coupled with new technology. In the case of Uber, it is both, for the company has created a new model of a relationship with its collaborators, erroneously claimed by courts to be workers. Specialisation on the part of public authorities is required to understand the three elements of operation of this type of enterprise: 1) technology employed in the process of providing services, 2) its organisational form, and 3) its relationship with the market.

The third element is of particular importance, though it is the most elusive. Forming any administrative policy, be it at the local or national level, requires understanding of the business environment, which is characteristic of antimonopoly and regulatory authorities. Both were brought an ability into existence because of the inability of the traditional forms of governance to comprehend the inner working of the market, including what is in the best interest of the consumer. By comprehension the author does not mean the intellectual capacity of the officials,

[17] *UOKiK zakończył postępowanie w sprawie internetowych platform rezerwacji zakwaterowania*, https://www.uokik.gov.pl/aktualnosci.php?news_id=11993 (access: 11.11.2018).

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but the organisational capacity of bureaucracy to accumulate and process data on a given relevant market. In competition and regulatory law, a market is always relevant because it does not exist as such, but only in a specific context determined by the place, time, market players and the needs of the consumers. A market is always related to a specific good or a service, which in order to delineate a market must not be a substitute for other products.[18] What is and what is not a substitute must be ascertained through an economic or services analysis conducted, according to the principles of economy as well as methodological principles imposed by the law. To accomplish it, public administration must be in possession of an apparatus composed of experts in law and economy. The task is further complicated by the necessity to define the geographical market and the time framework of the analysis. In the case of Uber, there was a dispute over whether the market is local, like taxi urban transportation services, or whether it covers the EU market, for the whole European network of Uber is centrally commanded from the headquarters located in the Netherlands via specialised software. To decide in company favour of one business model or another meant a loss or victory for Uber, which claimed to be a pan-European company on the grounds that its software has served drivers across Europe. Should the European Court agree with this view, the service could be interpreted as an electronic service, and therefore, it would have fallen beyond the reach of national administration – under Directive 2000/31 concerning information society services.[19] Another dimension of analysis, difficult to ascertain without specialisation, is time framework. A reasonable policy must flexibly address issues valid within relatively short time periods of time. Regulatory authorities are well equipped to face this task. They reinspect relevant markets subject to sectorial regulation every two years (on average) in order to determine, for instance, whether the dominant power of an incumbent has been diluted by a new entrant on the market.[20] A similar situation is likely to occur in the gig economy: the dominance of taxi transportation quickly receded when Uber became popular after its inception by Travis Kalanick in 2004.[21] Uber quickly came to be perceived as a threat to

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18 For the notion of substitutability, see Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law, 97/C 372/03), Official Journal of the European Communities C/372/5.

19 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (hereinafter referred to as 'the Directive on Electronic Commerce'), OJ L 178, 17 July 2000, pp. 1–16.

20 In the case of electronic platforms like Uber's the notion of domination can be interpreted to include "digital colonialism", compare A. M. Dominicé, D.H. Haux, *The Decision of the German Federal Court against Facebook: Opportunity to Define Digital Heritage?*, "Santander Art and Culture Law Review" 2020, 2, p. 257.

21 B.P. Matherne, J. O'Toole, *Uber: Aggressive Management for Growth*, "The Case Journal" 2017, 6, pp. 561–562.

the existing status quo and to the rule of law. The new model of urban transportation has turned out to be attractive to the customers for its innovative form of communication and lower prices.[22] It inspired resentment against Uber drivers accused of unfair competition. A distorted view on equality focused one-sidedly on Uber's market share, forgetting about its contribution to the modernisation of the industry. As for the resentment, in some countries, such as Poland, there were street protests of taxi drivers, accompanied by acts of vandalism and physical assaults on Uber drivers.[23] Violent reactions themselves prove that the novel industry should be insulated from political pressure by an independent regulator. The same conclusion can be reached upon analysis of the reaction of politicians passing new laws in order to protect the existing mode of transportation at the expense of technological improvements. More importantly, the new business model did not fit the existing categories of administrative and business law, particularly in the notion of administrative supervision, concerned more with compliance with the law than the freedom of entrepreneurship, effective competition and economic well-being of final customers. Administrative supervision is conducted by politically dependent authorities which not only have a limited knowledge of the market, and may be biased by lobbying or political expediency. It does not need scientific proof that bureaucracies may be driven by an Orwellian desire to control the society, which in the case of technology-dependent organisations, can easily be fuelled by fear of novelty and by the alleged discrimination of the taxi corporations.

However, in the discourse about a policy appropriate for the gig economy, the most misunderstood notion is the notion of enterprise. It is not that modern business law is unfamiliar with intricate corporate structures, multiplied by a variety of jurisdictions whose boundaries they cross. It is rather the lack of clear-cut contours that concerns policy makers. The gig business model resembles co-operation between independent entities rather than a corporation. Even if courts, including the EU court, claim that drivers are Uber's employees, at the economic level they are not. They have become employees because courts have decreed so. Drivers have more operational freedom than workers. It is understandable that courts are driven by the desire to protect drivers, which they perceive as a weaker party to the contract, however, they should try to achieve this noble goal by using different legal instruments without destroying a novel business model. They could do so by giving priority to economic freedom, thus forcing the authorities to liberalise

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22 The term innovation is treated broadly for there is more than 50 definitions of innovation in academic research, see: A. Kuś, *The Importance of Innovation in the Development of Polish Business Gazelles*, "Central European Management Journal" 2020, 1, pp. 35 et seq.

23 E.g.: https://motowahacz.pl/2016/03/uber-ataki-na-kierowcow/ (access: 12.05.2018).

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urban transport instead of locking it up in the corset of outdated legal formulas and practices. Courts should take account of the need to provide freedom for business in choosing its form in a similar way as parties are free to choose or even create a variety of contracts in private law. They should also consider the fact that their eagerness in protecting drivers may create a venue for abuse of the law by them. Their approach has already led to the withdrawal of Uber from certain jurisdictions or to the destruction of its business model by forcibly transforming it into a taxi corporation. Courts and politicians miss the fact that the truly weaker party is the final consumer who is repeatedly made captive by monopolistic practices of the taxi industry. In this respect, the courts and politicians have universally failed by succumbing to the pressure of intellectual fashion and political interest.[24]

Conclusions

The protection of what is perceived by courts as a 'weaker' party in the gig economy does not need artificial rebranding of a loose but purposeful organisational relationship between 'workers' and providers of electronic platforms into one economic entity. The hitherto approach of legislators and judges contradicts economic reality and hampers technological and organisational progress. Taxi drivers themselves are not workers, therefore, Uber drivers and similar worker do not need to be squared into the corset of the outdated concept of employment. The responsibility for paying tribute to modernity lies both with legislators and judges. The first necessity is to create a policy benefiting the entire society rather than interest groups – the alleged workers and taxi industry. Instead of bureaucratising inventive forms of business, they should liberalise their more traditional competitors to let them catch up with the times; 'it can be an opportunity to find creative solutions that balance and re-balance the interests of business and labour.'[25] Judges, on the other hand, by petrifying old business forms, inadvertently delay legislation fitting the age of modern technologies.[26] Courts fail to attach proper weight to the inte-

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24 Thereby confirming the growing detachment of law from values, see: A. Łuszczyński, *Value of Law in Political Thinking*, "Studia Iuridica Lublinensia" 2020, 4, pp. 179–180.

25 R.C. Brown, *Ride-Hailing Drivers as Autonomous Independent Contractors: Let Them Bargain!*, "Washington International Law Journal" 2020, 29, p. 573. For discussion in a similar vein, though from the position accepting gig service providers as workers, see: I. Ostoj, *Rozwój gig economy jako wyzwanie dla sfery regulacji rynku pracy*, "Studia Prawno-Ekonomiczne" 2019, 110, p. 251.

26 Some scholars, however, believe that it is courts that should have more say in determination of gig relations, see e.g.: M.J. Kotkin, *Uberizing Discrimination: Equal Employment and Gig Workers*, "Tennessee Law Review" 2019, 87, p. 120. However, 'judges still cannot answer the foundational question of whether

rests of the general public. The well-being of thousands of drivers should be weighed against the economic interests of millions of consumers, who may benefit from both the inventive forms of carrying out services and lower prices.

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Uber drivers are employees,' according to K. Cunnigham-Parmeter, *Gig-Dependence: Finding the Real Independent-Contractors of Platform Work*, "Northern Illinois University Law Review" 2019, 39, p. 382.

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