I would like to divide my talk into three parts. The first part will be dedicated to a methodological insight, that I have gained from my doctoral thesis. The second part is to present some new forms of platform work besides the already known ones. Finally, I will discuss the regulation of the P2B-2019/1150.

1. Anticipated negation of labor law

Last years it has been written and discussed a lot, whether the working people on platforms are employees, independent contractors, „employee-like persons“, dependant contractors or home-workers.1 We know, it is difficult to find clear regulations here, because platforms, business models and conditions are divers in the platform economy. I would like to keep this aspect short and concentrate on another labor law problem. But regarding the question of „Who is an employee?“, I have no major difficulties in affirming that working people are employees on certain platforms.

Platform workers have hardly any creative freedom in carrying out the chosen tasks. In addition, they are bound by time instructions, often they just have two hours to finish a task. This is such a short period of time, that it is ridiculous to suppose a free organization of working time. Furthermore, platform workers are bound by local instructions at a virtual work place. With the obligation to upload their work via an app or via an interface, they are assigned to a virtual work place. This is somehow a local instruction.

After all, platform workers are highly externally controlled. This manifests in the algorithmic management of the platforms. Platform Workers often cannot make any decisions outside of the provided software. They have no influence on the functioning or programming. The organization of work is therefore completely platform-centered. Nevertheless, an app cannot turn a dependent

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production step into an independent one, because someone is physically removed from the value creation chain.

Finally, the low influence of the individual crowd worker is also reflected in the fact that the usage of the platform can be terminated at any time by the platform - basically without giving reasons. Especially the right to dismiss at any time can be seen as the lever to enforce external control.

As you can see the problem is not so much the „concept of employee“ (it is also one major problem, but not the only one), but rather the problem of the lack of an obligation to work. The platform credo is always the same: You can work whenever you want, you decide whether to accept an order, you can cancel it, platforms do not assign tasks, you do not have to handle a certain number of orders, etc. In short, it all boils down to the fact, that there is no obligation to work and therefore no contract of employment. Is this possible? This brings us to a core problem. Does the assignment of tasks even fit into the platform model and furthermore does it fit to the employment relationship?

With the requirement of a concrete assignment of tasks, you would never come within the scope of labor law in a job like micro work. This for the following reason:

Because of their platform business model, platforms will never have to write into an agreement or terms of condition that a certain service or working time is owed. By portioning tasks into micro tasks and publishing them on the app, platforms will never have to give people an employment contract to pursue their core business. The reason for an employment contract is, that every company, every institution, every economic entity in general, has to cope with problems of fluctuation, regardless of what its value creation activity is. So they offer contracts so they can pursue their economical activity. Platforms are not dependant on employment contracts, because they make people work without being obliged to them. Their business model requires no obligation for the workers. Platforms do not have to create schedules or assign tasks in a specific form. Instead, the workers show up on the app and pick up the work, if there is any and go away empty-handed if there is nothing. From the basic idea, it is reminiscent of the so-called zero-hour contracts or work on call (§ 12 TzBfG, Germans Temporary Limitation Act). Within these models employers still must consider to whom and whether they offer a contract. With a platform model this question does not usually arise, because everyone who is registered can do these tasks. This leads to an anticipated negation of labor law.

This means labor law could be levered out, whenever there is a possibility to organize work in a way that people "pick up" the work, do it and deliver it. However, technique cannot eliminate labor
law. A labor law protection linked to the duty to work reaches into the void, where the availability of labor can be established with an app.

How can we deal with that? Honestly, the courts and lawyers in general need to understand that there is an urgent need to interpret the real conditions under which work is done. It sounds so simple, but we really need to have a better look to the lived contract and less on the written contract.

This finding reminds me of the so called „moravec-paradox“ from the robotic research: It is easy to get computers to perform as a grandmaster in chess, but it is difficult to teach them the perception and mobility skills of a one-year-old.

As you can see robotic research and labour law research faces the same problems.

2. New business models

We have observed food delivery services in the last few years, UBER in all variations, cleaning and handicraft services, online platforms where people perform micro tasks.²

The platform production credo is not "just-in-time", but "not-even-mine". The scaling effects of platforms are always beyond their corporate boundaries, they grow as they bring together more people, who need services and others who provide them. The positive network effect provides the desired monopoly. Only one platform should cover the respective needs on both sides.

This shows that in some cases we should increasingly understand work on content platforms like YouTube or Instagram as dependent work as well. It is known to us, that people as influencers on these platforms can gain such a great popularity that Youtube itself and other companies pay them to advertise or place products (for further information: www.fairtube.info). Their activity has digital reach and in the "attention economy" this can generate considerable income through advertising and sponsorship contracts.³ Professional players on gaming platforms can also be placed in a similar category.⁴ On platforms such as YouTube or Instagram, the influencers themselves decide how they organize their activities, but YouTube in particular sets far-reaching guidelines as to what

² So far it is not easy to tell the audience something new. Nevertheless this does not complain completeness.
³ Staab, Philipp: Digitaler Kapitalismus, 2019 Berlin Suhrkamp Verlag.
Rethinking Labour Law in the Digitalisation Era”, 15 & 16 October 2020, Brussels and via Internet

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should not be shown. If it is done nevertheless, this can lead to a so-called demonetarization (www.fairtube.info). This means that the uploaded videos get a worse ranking, thus reaching less interested people or are even completely blocked. This has an impact on the income of the influencers, so that there have been calls for fair conditions on content platforms such as YouTube. The discussion is whether influencers are possibly employees of YouTube, or at least people similar to employees, because they are economically dependent.

Another aspect of digital platform work is, that people live different identities as content moderators. There are dating platforms that operate their business model by making people pay for every message they send. Users of the platform might think, they write to a nice person. In truth, they write with content moderators, who respond to the most precise instructions by the platform. I do not want to evaluate this model morally - even if it is at least questionable. In terms of labor law, it is interesting to note that these content moderators also receive only a few euros per message they write and are declared as self-employed.5

One last new trend is e-scooters. Love and hate often lie side by side - here too, no moral judgment. However, platform providers are perfecting the "not-even-mine" method. I am familiar with an e-scooter platform, which not only hires platform workers to charge batteries, but also issues complete scooter fleets to the self-employed in a kind of franchise system. These people bear all the risks that can arise with the scooters, as repairs, maintenance, vandalism, liability for personal injury. The scooter company makes high demands on how the work is to be done, what is allowed and what is not, at the same time they think they are neither employer nor franchisor. In their opinion, two business partners come together on an equal level and, moreover, they are only a tech company, since they provide the software.6

I remind of the UBER statement:

“Uber, at its core, is just an app that you download to your smartphone and use to get a nearby Uber driver to come pick you up.”

“UBER is a technology company, not a transportation company, and describes the software it provides as a lead generation platform that can be used to connect businesses that provide transportation with passengers who desire rides.”

5 The newspaper www.taz.de is going to publish an article regarding this business model.

6 The business news magazine www.businessinsider.de is going to publish an article regarding this business model.
I don't know about you, but I don't like to be taken for a fool. And neither does Judge Chen from the Californian Court of Appeal, so he answers:

“Uber is no more a technology company than Yellow Cab is a technology company because it uses CB radios to dispatch taxi cabs, John Deere is a technology company because it uses computers and robots to manufacture lawn mowers, or Domino Sugar is a technology company because it uses modern irrigation techniques to grow its sugar cane. Indeed, very few (if any) firms are not technology companies if one focuses solely on how they create or distribute their products. If, however, the focus is on the substance of what the firm actually does (e.g., sells cab rides, lawn mowers, or sugar), it is clear that Uber is most certainly a transportation company, albeit a technologically sophisticated one.”

3. How can we deal with these things?

It is about interpretation of the new employment relationships within labor law. Labor law can evolve, terms can be interpreted in a new way, the scope of interpretation is wide enough. This is a flaming call for an interpretation of labor law, which fits into digital era. Please, do not leave the field to tech companies who say, law in itself is an antiquated institution. This is a typical narrative à la: „Do not ask permission, ask forgiveness“ or „Move fast, break rules“. This is not humane, this is far beyond humane and not acceptable. We really need to decrypt these narratives.

As far as platforms are concerned, we need more platform-specific regulation. A special platform law passed EU Parliament and council, its full name is P2B-Regulation (in force since July 12, 2020), 2019/1150 on promoting fairness and transparency for business users of online intermediation services.

This regulation already addresses platform-specific problems such as deactivation, data access, ranking, mediation procedures and judicial proceedings by representative organisations or associations. In short, the considerations from the P2B regulation are also relevant for all people working on platforms. But it is not applicable to all, who do work in platform economy. The scope of application refers to small companies or self-employed, who sell their services and goods to consumers. The background to the regulation was, that online intermediation services, which are mostly organized as platforms, offer small and medium-sized companies opportunities to expand their

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7 available at: Murray, Taken for a Ride? Advocate General Szpunar’s Opinion on Uber’s Status, access: 19.10.2020 https://europeanlawblog.eu/2017/06/02/taken-for-a-ride-advocate-general-szpunars-opinion-on-ubers-status/
sales channels and enter new markets. Nevertheless, platform-specific problems are associated with this: power imbalance due to one-sided terms and conditions, multi-layered information asymmetries, lack of complaint channels, deactivation of accounts, etc.

However, the regulation has some difficulties with its scope, so that it does not protect everyone who would need protection.

It would be a big step forward protection for platform workers regardless their labor status, if they could only be deactivated from a platform after a 30-day period and with justification. Similar to the ranking regulated in Art. 5 of the P2B Regulation, the reputation of workers in the platform economy could be more transparent. It would really help platform workers, if an internal complaint management system and an out-of-court mediation system would be set up. These are things that are already being tried by Metal Workers Union IG Metall with voluntary commitments like code of conducts.

It would also be a remarkable protection, if an organisation and associations, who has an interest in representing platform workers, would have the right to take action before national courts to stop or prohibit any non-compliance by online intermediation platforms.

It is not obvious, why small companies should get these rights, when they offer their services/goods to consumers, while all others, who also perform work on platforms do not get these rights.

The reason why the regulation exists at all, namely, the power asymmetry between the contracting parties, is also present in platform work. It makes sense that trade unions can be organizations that exercise a right of action under Art. 14 of the P2B Regulation.

Again: The scope of application must be expanded here.

The advantage of an expansion is, that a set of rules already exists. The legal procedure might be faster.

Special features of reputation could be taken into account in the rules for ranking (Art. 5 2019/1150). Some of the platform-specific problems could be solved at these points. The P2B-regulation also seems to see itself as a "work-in-progress", because according to Art. 18 (1) P2B-Reg., the regulation is to be evaluated by January 13, 2022. That is just 18 months after its enforcement on July 12, 2020.

Thank you for your attention, comments are welcome under: schneider@bergerrechtsanwaelte.de
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