

The legal-labour protection of service providers in the collaborative economy and labour platform cooperatives

A tutela jurídico-laboral do prestador na economia colaborativa e as cooperativas de plataformas de trabalho

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ABSTRACT: This paper reflects on the disruptions that collaborative labour platforms introduce in the context of work relationships. The work providers are engaged as independent contractors and considered freelancers, allowing companies' owners of digital platforms to exonerate themselves from their responsibilities as employers. Labour platforms radicalise the practice of outsourcing. This phenomenon raises the relevant question of whether these providers should be considered dependent and subordinate workers or mere autonomous providers of the digital platform, in which case labour rules shall not apply, therefore leaving the provider less protected. The doctrine has pointed out the cooperative labour platforms as an alternative way to manage collaborative platforms and ensure work providers' protection. Labour cooperative platforms are organisations of an atypical business nature, collectively owned and democratically managed by their members.

KEY WORDS: Collaborative work platform; subordinate work provider; independent work provider; worker protection; labour platform cooperative.

RESUMO: O presente artigo reflete sobre as perturbações que as plataformas de trabalho colaborativo introduzem no contexto das relações de trabalho. Os prestadores de trabalho são contratados como prestadores independentes e considerados freelancers, o que permite aos titulares das empresas de plataformas digitais exonerar-se das suas responsabilidades enquanto empregadores. As plataformas de trabalho radicalizam a prática da subcontratação. Este fenómeno levanta a relevante questão de saber se estes prestadores devem ser considerados trabalhadores dependentes e subordinados ou meros trabalhadores autónomos ao serviço da plataforma digital, caso em que as regras laborais não se aplicarão, o que resultará numa menor proteção do prestador. A doutrina aponta as plataformas cooperativas de trabalho como uma forma alternativa de gerir as plataformas colaborativas e de garantir a proteção dos prestadores de trabalho. As plataformas cooperativas de trabalho são organizações de natureza empresarial atípica, de propriedade coletiva e geridas democraticamente pelos seus membros.

PALAVRAS-CHAVE: Plataforma de trabalho colaborativo; prestador de trabalho subordinado; prestador de trabalho independente; proteção do trabalhador; cooperativa de plataforma de trabalho.

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1. Introduction

The collaborative economy is a business model in which "activities are carried out using platforms that create an open market for the temporary use of goods or services, often provided by private individuals"¹.

This paper aims to reflect on the disruptions that collaborative labour platforms introduce in the scope of labour relations.

In the context of collaborative platforms, the work providers complain about low or no payment, income insecurity, lack of compensation for their capital equipment, health, and safety risks, blurring boundaries between work and private life, and lack of transparency regarding surveillance practices, rating systems, and task or job allocation². The work providers are engaged as independent contractors and considered freelancers, which allows companies' owners of digital platforms to exonerate themselves from their responsibility as employers³. Labour platforms radicalize the practice of outsourcing^{4/5}.

In this regard, the Opinion of the European Committee of the Regions — Collaborative economy and online platforms: a shared view of cities and regions (2017/185/04)⁶, in its Recommendation no. 28, "notes, however, that many forms of work in the collaborative economy appear to lie mid-way between salaried employment and freelance work", which causes relevant questions and difficulties regarding the protection of these workers in terms of working conditions, such as health and safety at work, unemployment benefits, amongst others, also pointing out that "this could give rise to a new category of precarious workers". Recommendation 29 adds that some of these economic business models "have produced strong negative social and employment-related externalities", by particularly exploiting "self-employed" workers.

Regarding platforms, Recommendation no. 34 of this Opinion highlights the need for platform social responsibilities to be more precisely defined, as well as the workers' right to information,

¹ See Communication "A European Agenda for the collaborative economy" (COM/2016/0356 final of 2 June 2016).

² KURT VANDAELE, "Will trade unions survive in the platform economy? Emerging patterns of platform workers' collective voice and representation in Europe", working paper 2018.05, Bruxelles: European Trade Union Institute, ISSN: 1994-4446, pp. 10 e ss, available at <https://www.etui.org/sites/default/files/Working%20Paper%202018.05%20Vandaele%20Trade%20unions%20Platform%20economy%20Web.pdf> (28.02.2021); SACHA GARBEN, "Protecting Workers in the Online Platform Economy: An overview of regulatory and policy developments in the EU", European Agency for Safety and Health at Work, European Risk Observatory, Discussion paper 2017, ISBN: 978-92-9496-642-1, pp. 14 ss., available at <https://osha.europa.eu/en/publications/protecting-workers-online-platform-economy-overview-regulatory-and-policy-developments> (18.02.2021).

³ TREBOR SCHOLZ, *Platform cooperativism. Challenging the corporate sharing economy*. New York, NY: Rosa Luxemburg Foundation, 2016, pp. 7 e ss.

⁴ Outsourcing or externalization consists, in general terms, in the transfer outside the organisation of specific production segments or certain activities related to the main activity so that they can be managed or produced in conditions of cost and profitability that are more advantageous as they allow a reduction of fixed costs or mitigation of economic risks. See FRANCESCA MARTINELLI, SAMUELE BOZZONI, SIMONE CAROLI, FRANCESCA TAMASCELLI & GIUSEPPE GUERINI, "Platform Cooperativism in Italy and in Europe", *CIRIEC Working Papers* 1927 (2019), p. 5; WEBSTER EDWARD, "The Uberisation of work: the challenge of regulating platform capitalism. A commentary", *International Review of Applied Economics*, 34:4, pp. 512-521.

⁵ ALEJANDRA SELMA PENALVA, "Capítulo Decimoquinto – Delimitación de fronteras: diferencias entre trabajo colaborativo y relación laboral no declarada", in ROSALÍA ALFONSO SÁNCHEZ & JULIÁN VALERO TORRIJOS (directors), *Retos Jurídicos de la Economía Colaborativa en el Contexto Digital*, Navarra, Thomson Reuters Aranzadi, 2016, pp. 389-408.

⁶ <https://eur-lex.europa.eu/legal-content/PT/TXT/PDF/?uri=CELEX:52016IR4163&from=ES> (17.02.2021).

consultation within the undertaking and of collective bargaining and action, as enshrined respectively in articles 27 and 28 of the Charter of Fundamental Rights, which must be guaranteed at all times, no matter what the business model is, and in Recommendation no. 35 expects that online platforms become an important tool (and not an obstacle) in guaranteeing respect of the rights of users in this new business model.

The core of all these problems is the legal vagueness of the relationship between the collaborative platform, as an intermediary, and the work providers.

We are thus faced with situations that fall within the so-called "grey zone"⁷ of work.

All these problems generated a doctrinal debate about alternative ways to manage collaborative platforms and ensure work providers' protection, emphasizing collaborative platforms for the provision of transport services. In this specific scope, in Portugal, Law no. 45/2018 of 10 August was published, establishing the legal regime of individual transport and remuneration of passengers in uncharacterised vehicles from an electronic platform.

In this context, this paper aims to respond to the following research objectives:

- 1) What is the legal link between the provider of the activity and the platform? Is he a mere provider who is completely autonomous and, therefore, subject to the terms of the clauses between the parties, protected by the rules of civil law? Or, instead, is it permissible for the interpreter to identify in such cases the existence of an employment relationship or, at the very least, of a relationship to which certain legal-labour rules may be considered applicable?
- 2) Can this platform be configured as a true employer? Or is it merely an intermediary in the relationship established between the provider and the platform user?
- 3) Is there any specific regulation on this matter in Portugal?
- 4) Are cooperative platforms alternative ways to managing collaborative platforms and ensuring the protection and engagement of work providers?

2. The collaborative platforms

The concept of a collaborative platform, which emerged at the end of the first decade of the 21st century, cannot be disconnected from the digital revolution we have witnessed in the last two decades and which has had a profound impact on consumer, labour, production, financing, education, participation and governance relations. In fact, the collaborative economy uses

⁷ ANA LAMBELHO, "The need to review independent worker' protection in the collaborative economy", in MARIA REGINA REDINHA, MARIA RAQUEL GUIMARÃES & FRANCISCO LIBERAL FERNANDES (editors), *The sharing economy: legal problems of a permutations and combinations society*, Cambridge Scholars Publishing, 2019, p. 285. The grey zone identifies the types of work with an indeterminate physiognomy, oscillating between dependent and independent work: even if the worker has an employer-employee relationship, he is an independent contractor with no access to the social protection of an employee. About the concept of "grey zone", see RODRIGO DE LACERDA CARELLI/ BIANCA NEVES BOMFIM CARELLI, "A zona cinzenta de trabalho e emprego, trabalhadores sob demanda em plataformas digitais e trabalhadores portuários avulsos: direitos trabalhistas além da relação de emprego" *Contracampo*, Niterói, vol. 39, n. 2, agosto/novembro 2020, pp. 28-41.

information technology to reduce information asymmetries and transaction costs for goods and services, expanding and deepening collaborative markets⁸.

The collaborative economy relies on business models where three main types of actors can be identified: 1) the service providers - who can be individuals offering services (products, skills, time) for free or against payment, or service providers acting professionally; 2) the users of those services; and 3) the collaborative platforms that connect supply and demand in real-time, facilitating transactions⁹.

The collaborative platforms thus emerge as a business model that aims to reconcile a collaborative dimension with an economic dimension¹⁰.

The ownership of collaborative platforms will vary depending on the final agents participating in it, the functions performed by the platform, how the ownership is controlled, and the distribution of financial results. We can then find platforms ranging from private capitalist platforms to cooperative and social economy platforms.

There is no doctrinal consensus on the definition of collaborative economy¹, largely because we are faced with a reality being shaped with blurred borderlines. However, there is a common denominator in all business models that we included in this collaborative economy concept: "collaboration", i.e., a set of principles guiding this business model that may be called "collaborative principles". The collaborative economy departs from traditional economic models based on the culture of ownership. In fact, at its genesis, the collaborative economy is based on a culture of collaboration in the production or sharing of resources, which aspires to their optimization and sustainable development¹¹.

The collaborative economy is a vast and heterogeneous economic model, based on a community of people who can access goods and services by lending, renting, trading, buying, or selling them, mainly on the basis of concrete needs and not so much on the profitability of financial results, i.e., making profit¹².

This is a business model that essentially aims at democratising products and services¹³.

The European Commission, in its Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Upgrading the Single Market: more opportunities for people and business (COM/2015/0550 final)"¹⁴, points out several advantages to the collaborative economy: greater choice and lower prices for

⁸ ROSALÍA ALFONSO SÁNCHEZ/ FRANCISCO JAVIER BURILLO SÁNCHEZ, "Capítulo Primero - La Economía llamada «Colaborativa»", in ROSALÍA ALFONSO SÁNCHEZ & JULIÁN VALERO TORRIJOS (directors), *Retos Jurídicos de la Economía Colaborativa en el Contexto Digital*, Navarra, Thomson Reuters Aranzadi, 2016, pp. 49-72.

⁹ VÍCTOR MANUEL SÁNCHEZ TORNEL/ MACARENA PERONA GUILLAMÓN, "Capítulo Tercero - La tecnología como instrumento de la Economía Colaborativa", in ROSALÍA ALFONSO SÁNCHEZ & JULIÁN VALERO TORRIJOS (directores), *Retos Jurídicos de la Economía Colaborativa en el Contexto Digital*, cit., pp. 95-117.

¹⁰ PABLO FERNÁNDEZ CARBALLO-CALERO, "El ánimo de lucro y la profesionalidad en el ámbito de la economía colaborativa", *CIRIEC-España, Revista de Economía Pública, Social y Cooperativa*, 34, 2019, pp. 307-342.

¹¹ CARLOS JAVIER CORRECHER MATO, "Consumo colaborativo y entidades sin fines lucrativos: aspectos fiscales", *CIRIEC-España, Revista de Economía Pública, Social y Cooperativa*, 31, 2017, pp. 253-279.

¹² JOSÉ MANUEL SASTRE-CENTENO/ MARIA ELENA INGLADA-GALIANA, "La economía colaborativa: un nuevo modelo económico", *CIRIEC-España, Revista de Economía Pública, Social y Cooperativa*, 94, 2018, pp. 219-250.

¹³ PABLO FERNÁNDEZ CARBALLO-CALERO, *op. cit.*

¹⁴ <https://eur-lex.europa.eu/legal-content/PT/TXT/PDF/?uri=CELEX:52015DC0550&from=EN> (24.02.2021).

consumers; growth opportunities for innovative start-ups and existing European enterprises, both in their home country and across borders; it also increases employment and benefits workers by allowing more flexible working hours, from non-professional micro-jobs to part-time entrepreneurship; resources can be used more efficiently, thereby increasing productivity and sustainability.

In turn, the European Parliament resolution of 15 June 2017 on a European Agenda for the collaborative economy (2017/2003(INI))¹⁵, in its General consideration no. 5, agrees that the collaborative economy "generates new and interesting entrepreneurial opportunities, jobs and growth, and frequently plays an important role in making the economic system not only more efficient, but also socially and environmentally sustainable, allowing for a better allocation of resources and assets that are otherwise under-used, and thus contributing to the transition towards a circular economy". It also acknowledges in General consideration no. 6 that the collaborative economy "can have a significant impact on long-established regulated business models in many strategic sectors such as transportation, accommodation, the restaurant industry, services, retail and finance; understands the challenges linked to having different legal standards for similar economic actors; believes that the collaborative economy empowers consumers, offers new job opportunities and has the potential to facilitate tax compliance, but stresses nevertheless the importance of ensuring a high level of consumer protection, of fully upholding workers' rights and of ensuring tax compliance; recognises that the collaborative economy affects both urban and rural environments".

However, as already outlined, some problems have been identified in collaborative platforms, namely regarding social and employment issues, which are the object of our study.

3. The legal qualification of the link between the provider and the collaborative platform

First subject to legal review under the North American legal system, the issue of the legal qualification of the relationship between the provider and the platform quickly invaded the legal system of several Member States of the European Union, raising questions that are still far from being settled.

As can be seen, this is not an innocent question and the answer will prove decisive as regards the position of each of the parties in this relationship and thus the rights and duties that will integrate their legal sphere.

In our analysis, we will keep in mind the case law and doctrine that have become accessible on the matter, without forgetting the recently introduced Law no. 45/2018 of 10 August, the first legal act under the Portuguese legal system addressing this new reality, by regulating the

¹⁵ https://www.europarl.europa.eu/doceo/document/A-8-2017-0195_PT.html (24.02.2021).

legal framework for individual transport and remuneration of passengers in uncharacterized vehicles from an electronic platform.

3.1. Subordinate work *versus* autonomous work

The problem that this new business model raises is, above all, a complex problem of legal qualification¹⁶, which requires an approach to the notion of the employment contract and the classic distinction between autonomous work and subordinate work.

We would like to recall that qualification entails the real will of the parties and not the declared will. It is the factual reality that determines the legal qualification and not the opposite; that is, the real will of the parties must be taken into account, as reflected in the way the contractual bond is established, instead of the declared will at the time of the completion of the legal agreement¹⁷. The latter often aims to create an apparent autonomy on fraudulent grounds in order to evade the application of the statutory labour system¹⁸.

As Pedro Furtado Martins states¹⁹, "once the carrying out of a subordinate work activity in return for a payment is ascertained, we are talking about an employment contract and not a contract for services, regardless of the designation chosen by the parties to reference the contract and the mutual agreement of the parties to exclude the labour regime", as in the words of João Leal Amado "Contracts are what they are, not what the parties say they are" which is "a general principle of Law that applies in the field of labour law"²⁰.

The key element for the qualification of the contract entered into is the legal subordination, which translates into "the worker adopting a subordinate position so as to comply with the orders, rules or guidelines of the employer, within the limits of the contract and the rules governing it"²¹. There will be an employment agreement when the worker is willing to perform an activity that the beneficiary can manage and articulate with the other production factors, in accordance with the intended purpose. By contrast, in a contract for services, the activity is

¹⁶ JOÃO MOREIRA DIAS, "A Lei 'Uber' – Uma solução insuficiente? Notas sobre o vínculo dos Motoristas", *Notícias CIELO Laboral*, 2020, n.º 2, available at http://www.cielolaboral.com/wp-content/uploads/2020/02/moreira_noticias_cielo_n2_2020.pdf (20.01.2021).

¹⁷ JÚLIO GOMES, *Direito do Trabalho*, Relações Individuais de Trabalho, vol. I, Coimbra Editora, Coimbra, 2007, pp. 138 ss. According to MIGUEL RODRIGUEZ-PIÑERO ROYO, "La voluntad de las partes en la calificación del contrato de trabajo", *Relaciones Laborales*, 1996, II, p. 40, "the judge should not be bound by the declared will of the parties that does not correspond to the reality, and should investigate the real intention that is deduced from the effective development of the labour relationship", prevailing, in case of discrepancy, the real will that is revealed in the way the work is performed. In case law, considering the *nomen iuris* to be irrelevant, see, among many others, the Judgment of the Lisbon Court of Appeal of 14-10-1998, Case no. 0044224 (DINIS ROLDÃO), the Judgment of the Supreme Court of Justice of 09-01-2002, Case no. 01S881 (DINIZ NUNES), available at www.dqgsi.pt, and the Judgment of the Supreme Court of Justice of 15-02-2005, *CJ (STJ)*, 2005, I, p. 244.

¹⁸ PEDRO ROMANO MARTINEZ, *Direito do trabalho*, 9.ª ed., Almedina, Coimbra, 2019, pp. 315 e ss. JOANA NUNES VICENTE, *A fuga à relação de trabalho (típica) em torno da simulação e da fraude à lei*, Coimbra Editora, Coimbra, 2008, pp. 61 ss.

¹⁹ "A crise do contrato de trabalho", *Revista de Direito e de Estudos Sociais*, 1997, n.º 4, p. 343, nota 8.

²⁰ "O contrato de trabalho entre a presunção legal de laboralidade e o presumível desacerto legislativo", *Temas Laborais Luso-Brasileiros*, Coimbra Editora, Coimbra, 2007, p. 12, and *Contrato de Trabalho, Noções Básicas*, 3.ª ed., Almedina, Coimbra, 2019, p. 63. With the same opinion, JOÃO DE CASTRO MENDES, *Direito civil – Teoria geral*, vol. III, Lisboa, 1979, p. 353, by stating that "the deal is what it is, not what the party or parties said it is".

²¹ ANTÓNIO MONTEIRO FERNANDES, *Direito do Trabalho*, 20.ª ed., Almedina, Coimbra, 2020, p. 130.

performed autonomously, and the provider is only required to deliver the result of such work to the creditor²².

At this point, the difficulty of the interpreter's task arises precisely at the moment of confirming the existence of legal subordination in the activity performed by the provider within the collaborative economy phenomenon.

Legal subordination "is the reverse side of the employer's directive power"²³, insofar as it legally emerges by reference to the employer's power of direction, which allows the employer to shape, through orders and instructions, the way the employee performs the work²⁴. Under the terms of article 97 of the CT, "the employer is responsible for establishing the terms under which the work must be performed, within the limits of the contract and the rules governing it", and the employee is forced to comply with them, by virtue of the provisions of article 128(1)(e) of the same law²⁵.

This will be the basic criterion to identify an employment contract and thus distinguish it from situations where we are dealing with an autonomous employment relationship. Where there is evidence of legal subordination in the performance of the service, we shall have an employment contract. Otherwise, the transaction in question will be some form of service contract (since the service provider is not, in principle, subject to orders or instructions from the counterparty as to how to perform the service).

On the other hand, it should also be noted that legal subordination does not have to be present in all the worker's acts, and may be merely potential, i.e., legal subordination applies whenever the employer has the power to give orders or instructions, whether or not that power is actually exercised²⁶.

It should be added that legal subordination involves degrees of materialisation that vary greatly in intensity, depending, namely, on the production organisation and sector, the contracted activity, the specialisation, and qualification of the worker. The technical, economic, and social changes undergone in the last decades using new technologies and organisational models have discarded rigid and authoritarian corporate integration schemes and thus significantly mitigated the visibility of the employer's power of direction²⁷. Furthermore, there is a widespread phenomenon characterised by an unbridled attempt by service creditors to

²² MARIA DO ROSÁRIO PALMA RAMALHO, "Delimitação do contrato de trabalho e presunção de laboralidade", in *Actas do Congresso de Direito do Trabalho Direito Do Trabalho + Crise = Crise Do Direito Do Trabalho?*, CATARINA DE OLIVEIRA CARVALHO & JÚLIO GOMES (coordination), Coimbra Editora, Coimbra, 2011, p. 279.

²³ See, JOÃO LEAL AMADO, *Contrato de Trabalho*, cit., p. 61.

²⁴ For the purposes of legal subordination, the possibility of giving orders is enough, that is, the worker, by virtue of the contract entered into, places himself under the authority of the employer with regard to the manner of performing the agreed activity.

²⁵ According to the aforementioned article, "the worker must comply with the orders and instructions of the employer concerning the execution and discipline of the work, as well as safety and health at work, which are not contrary to his rights or guarantees".

²⁶ JÚLIO GOMES, *op. cit.*, p. 124. As JOAQUIM DE SOUSA RIBEIRO explains, "only when the power to issue orders is legally forbidden will the existence of an employment contract have to be excluded" - "As fronteiras justas e a (falsa) presunção de laboralidade do art. 12.º do Código do Trabalho", in *Nos 20 anos do Código das Sociedades Comerciais - Homenagem aos Profs. doutores A. Ferrer Correia, Orlando de Carvalho e Vasco Lobo Xavier*, Coimbra Editora, Coimbra, 2007, p. 941.

²⁷ ALAIN SUPLOT, *Transformações do trabalho e futuro do direito do trabalho na Europa*, Coimbra editora, Coimbra, 2003, pp. 30 ss.

benefit from the advantages of a labour relationship without being afforded the formal status of employer²⁸, masking real subordinate employment relationships behind apparent contracts for services, using increasingly rich and complex mechanisms to depart from a regime that is, as is we all know, more protective to workers²⁹.

Given this scenario, how can we assign this criterion of legal subordination the necessary distinctive effectiveness as an identifier of subordinate work situations?

3.2. The indicative method of article 12 of the Labour Code

In view of the above mentioned difficulty, and in order to facilitate the task of the judge (and, to a certain extent, of the worker), the legislator created an indicative method, consolidated in a presumption of employment, enshrined in art. 12 of the CT, shifting from subsumption to the legal type to an approximate approach thereto³⁰.

Under the terms of no. 1 of this provision, as amended by the 2009 revision of the Code³¹, "an employment contract is presumed to exist when, in the relationship between the person providing an activity and one or more parties who benefit from it, some of the following characteristics are present: the activity is performed in a place owned or determined by the beneficiary of the activity; the work equipment and tools used belong to the beneficiary of the activity; the activity provider observes the start and end times determined by the beneficiary of the activity; a certain amount of money is paid at certain intervals to the activity provider in return for the activity; and the activity provider performs management or managerial functions in the company's organizational structure".

As we can see, the law selects a set of elements that help the interpreter to identify legal subordination³², and the verification of some (in principle, two) is enough to presume the

²⁸ MARIA REGINA REDINHA, *A relação laboral fragmentada – Estudo sobre o trabalho temporário*, Coimbra Editora, Coimbra, 1995, pp. 79 e ss.

²⁹ JOANA NUNES VICENTE, *A fuga à relação de trabalho (atípica): em torno da simulação e da fraude à lei*, Coimbra Editora, Coimbra, 2008, pp. 1 e ss. Analyzing the problem specifically at the virtual platforms level, see, from the same author, «Implicações sociais e jurídico-laborais da prestação de serviços através de plataforma virtuais – breves notas», in *A Reforma Trabalhista: Reflexos da Reforma Trabalhista no Direito do Trabalho, no Direito Processual do Trabalho e no Direito Previdenciário*, São Paulo: LTr, 2018, pp. 88-89.

³⁰ See, for example, the ruling of the Supreme Court of Justice of 04-05-2011 (FERNANDES DA SILVA), case no. 3304/06.5TTLSB.S1, available at www.dgsi.pt: "Given the evident difficulty in identifying the factual elements that make up legal subordination - embodied in the power to conform the provision, guidance, direction and supervision of the work activity itself, with the corresponding disciplinary power - the distinction is made by the typological method and the qualification required is deduced from the indicative facts, using an approximation judgment"; or the Judgment of the Supreme Court of Justice of 05-03-2013 (GONÇALVES ROCHA), case no. 3247/06.2TTLSB.L1.S1, available at www.dgsi.pt: "Because the issue of contractual qualification is, in certain real-life situations, extremely complex and because this qualification is not always achieved by analysing and interpreting the will of the parties, the characterisation of the contract should be assessed using the indicative method or the typological approach".

³¹ On the various changes in wording undergone by the article under analysis since the 2003 Code, when this presumption was established, until the current version, see JOÃO LEAL AMADO, *Contrato de Trabalho, cit.*, pp. 65-71.

³² The use of other indicia, called external negotiating indicia, has been admitted to aid the interpreter's task, namely, exclusivity in the provision of the work, if, in accordance with what was agreed between the parties, there will be an admissibility of o substitutes (something that is not characteristic of an employment contract which is an *intuitu personae* contract), if the worker is unionized for the rendering of that service, what is his/her

existence of an employment contract, while it is up to the counterparty to prove the opposite. Thus, "when it has been proven, for example, that the activity is performed in a place owned by the beneficiary and following a schedule determined by the latter, or that the work tools belong to the beneficiary of the activity, who pays a certain amount of compensation to the provider, the law presumes the existence of an employment contract". However, this does not preclude the opposing party from claiming the parties did not enter into any employment contract, since this presumption is rebuttable (or *juris tantum*), as set under the terms of article 350 of the Civil Code. The main advantage of establishing a presumption in this matter, especially from the worker's point of view, lies in the fact that once sufficient indicia for its verification are verified, it is legally presumed that an employment contract exists, and the burden of proof lies with the counterparty, i.e. the duty to provide evidence in opposition to the presumption. This means that failure to prove that the existing relationship is a genuine provision of autonomous work, the presumption shall prevail, and the agreement shall be qualified as an employment contract.

The indicative method considers an overall weighting of the indicia, assuming no indicia is decisive and contradictory indicia may be found, that is, coexistence of indicia suggesting the existence of legal subordination and indicia suggesting legal autonomy. Also, the assessment of the indicia contained in article 12(1) of the Labour Code must take account of the specific situation, since the relative weight of each may vary depending on the relational context in which they find themselves.

3.3. Signs of legal subordination and autonomy in the context of the collaborative economy

Taking the paradigmatic case of Uber as an example³³, the main distinctive feature of the new collaborative economy model "has always been the independence and flexibility in service provision, i.e., providing a business opportunity to its partners, where they may, at their sole discretion, choose when and how many hours they want to work", using their own means of work (in this case, cars), being evident that "these drivers have greater freedom compared with the traditional subordinate employment relationships"³⁴. As Nuno Cerejeira Namora points out, "this greater freedom is directly associated with a lower dependency of Uber on drivers, since the business model aims to get the highest possible number of service providers and users, in such a way that recruiting its own employees to comply with the users' demands is

tax and social security scheme, among others - see, in this regard, MARIA DO ROSÁRIO PALMA RAMALHO, *Tratado de Direito do Trabalho, Parte II - Situações Laborais Individuais*, 7.ª ed., Almedina, Coimbra, 2019, pp. 42-50.

³³ Uber is a virtual platform that provides urban transportation services. The Terms and Conditions of this famous platform are available at: https://d1nyezh1ys8wfo.cloudfront.net/static/PDFs/Legal_PDFs/EMEA+New+Terms/Portugal+PT+New.pdf?uclid_id=b6ae5c00-7e13-47ed-94b9-afb2bcb1d838 (last updated on 30th January 2021).

³⁴ NUNO CEREJEIRA NAMORA, *As relações laborais no modelo de organização empresarial de economia colaborativa*, Dissertação para a obtenção do grau de Mestre, Universidade Católica Portuguesa, Escola do Porto, 2017, pp. 16-17.

no longer necessary"³⁵. The remuneration, in these cases, will be entirely variable³⁶, depending on the route to be taken, among other price components, ruling out the applicability of the legal provision requiring the payment of a certain and regular amount, as we have seen. This idea of autonomy is further reinforced by the circumstance that the provider may provide the service if and when he wishes, as well as by the fact that they are not subject to exclusivity clauses, allowing them to perform their activity in more than one company³⁷. In terms of the company marketing policy, the provider is always identified and presented to the outside world as a mere "business partner", an independent worker to whom, therefore, the company refuses to recognise a status of a real subordinate worker³⁸.

Even so, and despite the above, there are several signs of labour that, after all, we can identify in the collaborative economy phenomenon. Let's see.

Regarding the legal nature of a company that, like Uber, uses an electronic platform in the context of the collaborative economy, the important question has been raised of whether such company should be classified as a purely technological company (as it stands in the various litigations on this matter involving the company³⁹) or, instead, as a service provider (in the transport sector, in this case). When asked to assess the issue⁴⁰, the Court of Justice of the European Union, in its judgment of 20 December 2017, considered that the service provided by Uber is not limited to an intermediation service between a professional driver and a client⁴¹, eventually qualifying the company as a service provider⁴². In fact, and in the words of Mariana Leite da Silva "there are few companies today that do not use technology to perform their tasks, but that does not make them - all of them - mere digital companies"⁴³, and a different understanding could lead the interpreter to consider Uber (or any other company with identical mode of operation) as "a mere database", exempting it from "any risk of being held liable for the quality of the services, or for any damages resulting from the activity, or compliance with the rules of the legal system governing the industry"⁴⁴.

In fact, it all depends on the type of platform set up and the way it operates⁴⁵. The fact that the platform subjects the drivers to a series of unilaterally imposed conditions from recruitment

³⁵ *Idem*, *ibidem*.

³⁶ JOANA NUNES VICENTE, «Implicações sociais e jurídico-laborais...», *cit.*, p. 92.

³⁷ MARIANA LEITE DA SILVA, "O estatuto jurídico-laboral do motorista no contexto da atividade de TVDE - em particular, o caso da Uber", *Questões Laborais*, 54, Ano XXVI, jan/jun 2019, p. 177.

³⁸ WEBSTER EDWARD, *op. cit.*, p. 514.

³⁹ As an example, see *O'Connor et al. vs. Uber Technologies Inc. et al.*, case no. C-12-3826 EMC, 11 March 2015; *Mr. Y. Adam et al. vs. Uber Technologies Inc. et al.*, case nos. 2202550/2015 & others, 28 October 2016; and *Barbara Berwick vs. Uber Technologies Inc.*, a Delaware corporation, and *Rasier - CA LLC*, a Delaware limited liability company, case no. CGC-15-546378, 4 June 2015.

⁴⁰ Raised in the context of a dispute between *Asociación Profesional Elite Taxi* and *Uber Systems Spain* in *Juzgado de lo Mercantil n.º 3*, Barcelona, Spain.

⁴¹ Proc. No. C 434/1520, 20/12/2017. This will be the case, for example, with companies such as *BlaBlaCar*, a virtual platform that serves as an intermediary between drivers and passengers to make a trip to the same destination, sharing vehicles and expenses, but without *BlaBlaCar* interfering in the specific terms in which the parties will adjust the price and other conditions of the trip - MARIANA LEITE DA SILVA, *op. cit.*, p. 171.

⁴² The Brazilian case law had already commented on this matter, specifically, the Regional Labour Court of the 3rd Region, 33rd Labour Court of Belo Horizonte-MG, under the scope of case no. 0011359-34-2016.5.03.0112, issued by Judge Márcio Toledo Gonçalves (*Rodrigo Leonardo Silva Ferreira vs. Uber do Brasil Tecnologia, LTDA.*).

⁴³ *Op. cit.*, p. 170.

⁴⁴ NUNO CEREJEIRA NAMORA, *op. cit.*, p. 18.

⁴⁵ About the types of platforms that can be created in the collaborative economy, which the authors divide between crowdfunding and on-demand platforms (as is the case of Uber), where the latter are pointed out as

to actual performance of their services, ranging from the vehicle characteristics (colour, model, engine capacity) to the rules of service and behaviour when dealing with users, to ride cancellation policy⁴⁶, seems to show evidence of legal subordination⁴⁷. In this context, the way Uber pays its drivers deserves a particular note. In fact, Uber is the sole owner of the right to determine how it rewards its drivers, taking into account the distance travelled and the estimated travel time, combined with the (greater or lesser) demand by customers⁴⁸, reserving the right to change the price of the trip at any time, without this possibility ever being attributed to the service provider⁴⁹. The provider is generally denied the ability to make any relevant business decisions, which makes its qualification as an autonomous provider difficult.

Another aspect in favour of the existence of an employment relationship is the very personal nature of the relationship established, making it impossible for the provider to be replaced by others in the provision of his activity⁵⁰. Moreover, we need to determine who takes the risks of business operation - the owner of the digital platform (as seems to be the case with Uber) or the driver⁵¹.

3.4. Para-subordinate worker?

The need to regulate the mentioned "grey areas" of work led the legislator to foresee a legal solution applicable to situations where the work is performed with legal autonomy, even though it is economically dependent on the provider⁵². Through this regime, instead of deciding on the legal classification of such bonds, the legislator assimilated the so-called para-subordinate work⁵³ to the employment contract regime (or part of it).

Although some legal systems have put forward the legal provision, there is no consensus on the way it has been established⁵⁴. In this regard, although in theory it is reasonable to often consider the provider in the context of economic collaboration as a para-subordinate worker⁵⁵,

those where there is more intense control of the platform's performance, RUTH BERINS COLLIER/ V.B. DUBAL/ CHRISTOPHER CARTER, "Labor Platforms and Gig Work: The Failure to Regulate", *IRLE Working Paper* No. 106-17, 2017, pp. 10 e ss., available at <http://irle.berkeley.edu/files/2017/Labor-Platforms-and-Gig-Work.pdf> (21.02.2021).

⁴⁶ CHRISTIAN PATRICK WOO/RICHARD A. BALES, "The Uber Million Dollar Question: Are Uber Drivers Employees or Independent Contractors?", *Mercer L. Rev.*, 461, 2017, pp. 19-20, available at SSRN: <https://ssrn.com/abstract=2759886> (20.01.2021).

⁴⁷ MARIANA LEITE DA SILVA, *op. cit.*, p. 171.

⁴⁸ NUNO CEREJEIRA NAMORA, *op. cit.*, p. 20.

⁴⁹ JOÃO LEAL AMADO/CATARINA GOMES SANTOS, "A Uber e os seus motoristas em Londres: mind the gap!", *Revista de Legislação e Jurisprudência*, 146, no. 4001, pp. 112 and 120.

⁵⁰ MARIANA LEITE DA SILVA, *op. cit.*, p. 173.

⁵¹ As, otherwise, it seems to happen in the case of companies such as BlaBlaCar, referred to above.

⁵² Problematizing the concept of economic dependence, for the purposes of applying this regime, PEDRO ROMANO MARTÍNEZ, *Direito do Trabalho*, 9.ª ed., Almedina, Coimbra, 2019, pp. 364-365.

⁵³ The notion of parasubordination originated in Italian doctrine - GIUSEPPE SANTORO PASSARELLI, *Il lavoro «parasubordinato»*, Franco Angeli, Milan, 1979.

⁵⁴ European Economic and Social Committee, «Novas tendências do trabalho independente: o caso específico do trabalho autónomo economicamente dependente», *OJ C 18*, 19/1/2011, pp. 44-52.

⁵⁵ This was, in fact, the meaning of the decision taken by the Central London Employment Tribunal, which eventually placed Uber drivers in this "grey area". - Case no. EWCA Civ 2748, *Uber BV and others v. Aslam and others*, available at <https://www.bailii.org/ew/cases/EWCA/Civ/2018/2748.html>.

the relevance and usefulness of this regime will depend, ultimately, on how the assimilation has been legally established.

In the Portuguese legal system, art. 10 of the CT establishes that work performed under these conditions will be subject, not to the entire labour regime, but only to the rules relating to personality rights, equality and non-discrimination and safety and health at work, while art. 4(1)(c) of the Code's Preamble also provides for the extension to accidents at work and occupational illnesses. Although this solution shows a clear positive evolution in the system, it still leaves the service provider quite unprotected with regard to the rest of the legal-labour regime not applicable to him. As a result, this may not be the most suitable legal solution to protect the provider in the context of collaborative economics, insofar as it does not safeguard the provider's position with the desirable extent, especially in cases where the provider performs its activity in ways that show signs of legal subordination, as we have seen.

3.5. Legal-labour framework of the provider

At this point, summing up, we may ask ourselves about the nature of the contractual relationship of the provider who provides services in the context of the collaborative economy phenomenon.

In the Portuguese legal system, the possibility of an on-demand service provider be granted the presumption of employment provided for in article 12 of the Labour Code has been viewed with great reluctance⁵⁶, given the notorious difficulty for the provider to prove the existence of at least two of the indicia therein. As Nuno Cerejeira Namora points out, this is probably due to the fact that "the presumption in force in Portugal is still based on the Fordist system and is not appropriate for the current reality"⁵⁷. As a result, the burden of proof of the existence of a real employment contract will be likely to fall on the provider. The problem seems to lie in the inadequacy of the current indicative method for adapting to current business models⁵⁸, with several authors proposing a move forward to a revision of the indicia incorporating the method for identifying the existence of signs of legal subordination within the scope of an activity⁵⁹, bringing them into line with the notorious technological and organisational evolution we are facing today in labour relationships.

The question of ownership of the tools of work, for example, does not seem to be so relevant in this business model, since the main tool used (the vehicle) can easily be acquired by anyone

⁵⁶ JOANA VASCONCELOS, "Problemas de qualificação do contrato de trabalho. O caso das Relações estabelecidas no contexto da economia on demand entre prestadores independentes (?) de serviços e empresas tecnológicas intermediárias (?) no mercado", online publication of the intervention in VII Colóquio sobre Direito do Trabalho, Supremo Tribunal de Justiça, 2015, available at www.stj.pt/ficheiros/coloquios/coloquios_STJ/VIIColoquio/profdrjoanavasconcelos.pdf. With the same opinion, NUNO CEREJEIRA NAMORA, *op. cit.*, p. 29, and MARIANA LEITE DA SILVA, *op. cit.*, p. 181.

⁵⁷ *Op. cit.*, p. 29.

⁵⁸ JÚLIO GOMES, *op.cit.*, p. 131.

⁵⁹ JÚLIO GOMES, *op. cit.*, p. 131, NUNO CEREJEIRA NAMORA, *op. cit.*, p. 29, e MARIANA LEITE DA SILVA, *op. cit.*, p. 181.

in order to rule out the existence of an employment contract. As for the evidence of the place of work and its determination, it ends up being devalued if we think of the very nature of the function performed by the provider, which presupposes the transportation of a passenger (or goods) from one place to another. Still, it should be borne in mind that it will often be the platform that will define in advance the geographic scope of the provider's operations. Likewise, the freedom offered by this activity model to the provider cannot be taken as determinant in the qualification of the bond, given the possibility of a genuine subordinate worker performing his or her services without a predetermined schedule and without being subject to the maximum limits of the working period⁶⁰. Nevertheless, we should not forget that the apparent freedom of the provider is often nothing more than that. In the case of Uber or similar platforms, there is a strong incentive for the provider to work longer hours and in periods of high demand, especially if this is the provider's only source of income⁶¹, since the compensation will be lower on less profitable days and hours, in addition to the fact that many of the platforms reserve the right to exercise permanent control over the service acceptance rate and even penalise a refusal by deactivating the service for a certain period of time or the account. All this, in our view, ends up limiting the provider's ability to perform the activity, showing real signs of direction and control of service provision by the collaborative platform.

In international case law, although similar difficulties have been identified with regard to traditional methods of assessing the subordinate nature of the service provision in the context of the sharing economy⁶², we can find several decisions recognising the existence of an employment relationship between the driver and Uber, on the basis that there is sufficient evidence to classify the relationship as a genuine employment contract⁶³. Yet this has not been the only direction followed by courts in other countries and we witness a somewhat "fluctuating" jurisprudence wavering between decisions qualifying providers as genuine dependent workers and others giving them the status of mere independent providers⁶⁴. In this regard, we highlight the very recent decision taken by the Supreme Court of the United Kingdom on 19 February 2021⁶⁵, whose panel of judges was unanimous in qualifying the bond between the driver and the Uber platform as a subordinate and dependent employment relationship, basing its conviction on five strong arguments: 1) the fact that the platform

⁶⁰ Think of the worker subject to an exemption from working hours (art. 218 CT).

⁶¹ GUY DAVIDOV, "The status of Uber drivers: a purposive approach", *Hebrew University of Jerusalem Legal Studies Research Paper Series*, No. 17-7, pp. 10-11, available at <http://www.labourlawresearch.net/sites/default/files/papers/The%20status%20of%20Uber%20drivers%20A%20purposive%20approach%20copy.pdf>, REBECA SMITH/ SARAH LEBERSTEIN, "Rights on Demand: Ensuring Workplace Standards and Worker Security in the On-Demand Economy", in *National Employment Law Project*, September 2015, p. 6.

⁶² The O'Connor vs. Uber Technologies decision, cited above, warned about the inadequacy of the factors taken into account in assessing the autonomous or subordinate nature of the service in the sharing economy.

⁶³ See Case Barbara Berwick vs Uber Technologies Inc., cit., the sentence of the Tribunal Regional do Trabalho da 03.ª Região, 33.ª Vara do Trabalho de Belo Horizonte-MG, already cited, to which the decision of the Cour D'Appel de Paris, Pôle 6 - Chambre 2, of 10 January 2019 must be added. In a different sense, in Brazilian case law, see sentence of the Tribunal Regional do Trabalho da 10.ª Região, Vara do Trabalho do Gama, case no. 0001995-46.2016.5.10.0111, of 18 April 2017, by Judge Tamara Gil Kemp.

⁶⁴ For a close look at the (very different) ways in which Spanish, French, US and UK courts have qualified the service relationship between the provider and the collaborative platform, see JOÃO LEAL AMADO/TERESA COELHO MOREIRA, "A lei portuguesa sobre o transporte de passageiros a partir de plataforma eletrónica: sujeitos, relações e presunções", *Labour & Law Issues*, vol. 5, no. 1, 2019, pp. 66-71.

⁶⁵ Case no. EWCA Civ 2748, *Uber BV and others v. Aslam and others*, cit.

unilaterally defines the price of each trip; 2) the imposition of the contractual content by Uber; 3) the fact that the platform restricts the provider's power of choice from the moment he is connected (e.g., by monitoring the freedom to accept a trip request); 4) the exercise of significant power to control how the service is provided by the driver; and 5) the restriction of communications between the driver and passengers, revealing an active stance to prevent them from developing a relationship with each other beyond each trip.

Admitting the existence of an employment relationship in cases such as Uber's, some legal scholars have also proposed not applying the general Labour Law regime, but rather creating a specific regime for providers who perform their activities by means of virtual platforms⁶⁶, which may help the interpreter in this challenging task.

3.6. Law no. 45/2018 of 10 August

In this context, Law no. 45/2018 of 10 August was adopted in the Portuguese legal system, regulating the legal regime of the activity of paid individual passenger transport in uncharacterized vehicles from an electronic platform.

Much was expected from the legislator first intervention in this matter, considered absolutely crucial to clarify, once and for all, the legal status of the provider in the context of the collaborative economy, at various levels, particularly with regard to the qualification of the bond connecting him to the collaborative platform. Unfortunately, this diploma turned a relationship that, in practice, was thought to be simple, into a complex one by introducing a new actor in this scenario: the TVDE operator, understood as a legal entity operating in the field of individual and paid passenger transport (art. 16 of the diploma). This new actor is required to comply with the legal standards pertaining to the activity, including but not limited to labour, safety and health at work and social security legislation (art. 9, no. 2), in addition to being recognised as having an important active role in controlling the limits of the drivers' working time (art. 13), even though in conjunction with the TVDE platforms. According to this new configuration, this activity now has four players: i) the TVDE platform operator; ii) the TVDE operator; iii) the driver/provider; and iv) the user/passenger.

Contrary to what would be desirable, this new regime does not address the nature of the legal bond of the provider, although it ends up assuming that the relationship is necessarily established with the TVDE operator, regardless of the bond. In this context, it will all depend on the interpretative result achieved by virtue of the application of the regime laid down in art. 12 of the CT expressly stated in the diploma (art. 10(10)), and the operator may be configured as a genuine employer or a mere beneficiary of the service, with all the consequences emerging therefrom. This solution seems to rule out the possibility of the bond being established with

⁶⁶ ADRIÁN TODOLÍ SIGNES, "El impacto de la 'Uber Economy' en las Relaciones Laborales: los Efectos de las Plataformas Virtuales en el Contrato de Trabajo", *IUSLabor*, 3, 2015, pp. 7-8.

the platform and thus of the platform being configured as a genuine employer, which seems to us an over-hasty solution. The truth is that "the fact that the law provides for a contract to be entered into with the TVDE operator does not preclude the existence of a relationship with the platform"⁶⁷. Evidence of this can be found on the fact that the driver must still enrol in the platform (art. 10(1)) and is subject to the instructions, rules and other conditions imposed or required by the platforms with regard to the provision of the service, showing the impact of the platforms on the life and activity of the provider. Moreover, it is the platform (and not the operator) that, from the point of view of the service user, emerges as the actual contractual counterparty⁶⁸.

Another aspect that deserves a special note relates to the fact that, in the light of this new regime, the TVDE operator must be a legal person (art. 2), even though the legislator does not specify the legal forms that may apply. Unlike the activity of taxi transport (Decree-Law No. 251/98 of 11 August), which may be carried out by legal entities, in the form of commercial or cooperative companies, or by sole traders, TVDE operators must be legal entities.

Since the relationship between the TVDE operator and the provider may, as already mentioned, show traces of legal subordination, the qualification of this relationship as an employment contract seems to come up against the fact that this legal concept always presupposes that the worker is a natural person (art. 11 CT). Hence, the doctrine identifies in these cases a possible situation of fraudulent evasion of the law, where creating a legal person is required for the provision of a certain service, merely serving as a way to circumvent the labour law in the interest of the companies in the sector, sanctioning it under the terms of art. 294 of the Civil Code⁶⁹. We recall, especially for this case, the concept of substitute businesses⁷⁰, described in the doctrine as those where the parties do not enter into a business deal against the law but there is a clear intention to defraud a mandatory rule. Such businesses will be sanctioned with nullity, by virtue of the application of the aforementioned provision, "neither the intention nor the awareness of defrauding the law being necessary"⁷¹. In such cases, it will be up to the provider to prove the false nature of the aforementioned corporate relationship, as well as to allege and prove the existence of an employment relationship, foreseen as a particularly tough task⁷².

In short, and as we have been explaining, nothing seems to prevent that, once the indicia of legal subordination are verified in the relationship between the service provider and the platform operator, this relationship may be qualified as an employment contract. We believe that it is even possible that such indicia may be verified both in the platform operator and the TVDE operator, and that in such cases the application of the legal regime of plurality of

⁶⁷ JOÃO MOREIRA DIAS, *op. cit.*, p. 3.

⁶⁸ MARIANA LEITE DA SILVA, *op. cit.*, p. 188.

⁶⁹ JOÃO LEAL AMADO & CATARINA GOMES SANTOS, *op. cit.*, pp. 123-124.

⁷⁰ HEINRICH EWALD HÖRSTER/ EVA SÓNIA MOREIRA DA SILVA, *A parte geral do Código Civil português, Teoria geral do direito civil*, Almedina, 2.ª ed., Coimbra, 2019, pp. 592 e ss. In the sense of the above-mentioned need, see the Judgment of the Supremo Tribunal da Justiça of 01.25.2005 (case 04A3915).

⁷¹ See HEINRICH EWALD HÖRSTER, *op. cit.*, p. 522.

⁷² MARIANA LEITE DA SILVA, *op. cit.*, p. 189.

employers (art. 101 CT), an unparalleled concept in the positive law of other legal systems⁷³, should be considered. In our opinion, accepting that both the platform operator and the TVDE operator end up making use of their directive power points to a situation of employer co-ownership⁷⁴. However, this vision encounters an entity "not fitting the usual physiognomy of the employment relationship"⁷⁵, in relation to which the legislator decided to assign strict cumulative requirements, of substantial⁷⁶ and formal⁷⁷ nature, possibly driven by a concern to avoid fraudulent use of labour interposition phenomena and an idea of legal certainty⁷⁸. But does this mean that, outside of this tight framework that the legislator has drawn, other situations of plurality of employers may not arise, especially in the collaborative economy phenomenon that we have identified? Following Júlio Gomes, we are of the opinion that "the possibility of a single employment contract with a plurality of employers must be accepted, even outside the tight framework of article 92 of the Labour Code [now art. 101 of CT]"⁷⁹. Catarina Carvalho also weighs up the importance of these requirements⁸⁰, and Maria do Rosário Palma Ramalho is in favour of the emergence of a case of plurality of employers contrary to the provisions of art. 101 CT, where not "a negotiating and voluntary scope, but a judicial and corrective scope"⁸¹ is established, as would be the case⁸². Joana Vasconcelos also argues that it is "unavoidable" that irregular situations are excluded from the application of this regime, although she does grant the worker involved, by analogy, the right of option provided for in article 101(5) of the CT⁸³, a solution that would still be extremely useful for the service provider in these cases.

4. Labour platform cooperatives

4.1. Background

Many recent studies suggest that labour platform cooperatives can be an alternative workplace model for self-employed workers and freelancers in the context of a collaborative economy,

⁷³ JOANA VASCONCELOS, "Contrato com pluralidade de empregadores", *RDES*, no. 2-4, 2005, p. 283.

⁷⁴ Suggesting this possibility, JOÃO MOREIRA DIAS, *op. cit.*, p. 3.

⁷⁵ CATARINA CARVALHO, "Contrato de trabalho e pluralidade de empregadores", *Questões Laborais*, 2005, ano XII, p. 219.

⁷⁶ Art. 101, no. 1 CT.

⁷⁷ Listed in art. 101, no. 2 CT.

⁷⁸ CATARINA CARVALHO, "Algumas questões sobre a empresa e o Direito do trabalho no novo Código do Trabalho", in *A reforma do Código de Trabalho*, CEJ/IGT, Coimbra Editora, Coimbra, 2004, p. 442.

⁷⁹ *Direito do Trabalho*, ..., cit., p. 220.

⁸⁰ «Contrato de trabalho...», cit., pp. 209 e ss.

⁸¹ *Grupos empresariais e societários. Incidências laborais*, Almedina, Coimbra, 2008, p. 410.

⁸² On the contrary, LUÍS MIGUEL MONTEIRO denies the application of this article to situations outside the respective assumptions, apparently excluding from this regime situations such as the one under analysis, although he recognizes that this "does not imply refusing the joint and several liability of the several employer members of the plural relationship"- "Artigo 110", in PEDRO ROMANO MARTÍNEZ, et. al., *Código do Trabalho Anotado*, 13.^a ed., Almedina, Coimbra, 2020, p. 301.

⁸³ "Contrato com pluralidade de empregadores", cit., pp. 290-292. Under the terms of article 110, no. 5 CT, the violation of the requirements for a situation of plurality of employers gives the employee the right to choose the employer to whom he/she is bound.

giving them the necessary protection⁸⁴. Labour platform cooperatives are digital platforms owned, governed, and controlled by cooperator workers.

As highlighted above, in the collaborative economy, value is generated by the producers of services and platform users. However, this value remains in the hands of the platforms, which, as a rule, are managed by equity companies. The value generated by the service producers and users is converted into profit for the shareholders. Therefore, the term 'platform capitalism' is used to highlight the fact that platforms share neither ownership nor the results with the service producers nor with the users (those who really generate value within them)⁸⁵. A digital platform such as Uber or others are extractive platforms and obtain their wealth by intermediating among consumers and providers through an application. For this reason, every surplus value they produce by improving the technology goes only to the company owners with no effect on consumers and providers⁸⁶.

The term 'platform cooperativism' emerged in the USA in the context of a movement that advocated a return of the collaborative economy to the root meaning of the adjective 'collaborative' by creating platforms where ownership, results, and responsibility are effectively shared. The cooperative platform would be owned by the producers of services, the users, i.e., those who effectively provide the resources that enable the platform to function, whether in terms of work/services, goods, or as consumers of a product or service.

The organisation of service providers in the form of a cooperative would allow the resolution of most of the disturbances that collaborative labour platforms introduced in the scope of labour relations, as we will now demonstrate.

4.2. Collective ownership and the democratic functioning of labour cooperative platform

The cooperative phenomenon has always combined a strong social aspect with an economic one. The latter expressed in the satisfaction of its members' interests. As early as 1935, George Fauquet highlighted this dual aspect of the cooperative and stated that "in the cooperative institution, a social and an economic element must be distinguished, since it is: 1. an association of persons who recognise, on the one hand, the similarity of certain needs and, on the other hand, the possibility of satisfying them better through a common enterprise than

⁸⁴ ALEJANDRA SELMA PENALVA, "Capítulo Decimoquinto – Delimitación de fronteras: diferencias entre trabajo colaborativo y relación laboral no declarada", in ROSALÍA ALFONSO SÁNCHEZ & JULIÁN VALERO TORRIJOS (directores), *Retos Jurídicos...*, cit., pp. 389-408; HYUNGSIK EUM, "Cooperatives and employment. Contribution of cooperatives to decent work in the changing world of work", *Second Global Report*, CICOPA, 2017, *passim*; G.GAGLIARDI/ F. PSARRA/ R. WINTJE/ K. TREDAFILI/ J. PINEDA MENDOZA/ K. HAALAND/ S. TURKELI/ C. GIOTITSAS/ A. PAZAITIS/ F. NIGLIA, *New Technologies and Digitisation: Opportunities and Challenges for the Social Economy and Social Enterprises*. European Commission, Executive Agency for SMEs, 2020.

⁸⁵ ROSALÍA ALFONSO SANCHEZ, "Economía colaborativa: un nuevo mercado para la economía social", *CIRIEC-España, Revista de Economía Pública, Social y Cooperativa*, 88, 2016, pp. 231-258; WEBSTER EDWARD, op. cit., pp. 512-521.

⁸⁶ See TREBOR SCHOLZ, *Platform cooperativism. Challenging the corporate sharing economy*, cit., *passim*.

individually; 2. and a common enterprise whose particular objective responds precisely to the needs to be satisfied"⁸⁷.

The inseparability of these two elements - social and economic - marks cooperatives' entire legal regime.

Cooperatives are "autonomous legal persons, freely established, with variable capital and membership, which, through the cooperation and mutual assistance of their members, in compliance with the cooperative principles, aim, for a non-profit purpose, to satisfy their economic, social or cultural needs and aspirations" (Article 2(1) of the CCoop).

Therefore, the corporate object of a labour platform cooperative is closely linked to promoting its members' interests, i.e., the satisfaction of their economic, social, and cultural needs.

The only difference between a traditional cooperative and a platform cooperative lies in the fact that the latter's social object takes place through the platform, i.e., through digital technology.

The platform cooperative is a collectively owned enterprise.

In effect, platforms are owned by the service producers, i.e., those who provide the resources (work/services) that allow the platform to function. The platform's shared ownership will allow a more equitable distribution of the value created, which will remain in the hands of the people who generated it and not in the hands of a small group of investors.

The cooperative was created to eliminate the speculative intermediary through the direct assumption by the cooperators of the function of the enterprise, thus transfer the social entity (the cooperative) to the role of a simple instrument of coordination and activation of a particular group (the cooperators) to satisfy the needs of this group in more favourable conditions than would be obtained with the intervention of intermediaries. As Cunha Gonçalves pointed out, cooperatives have the ambition of "freeing workers from the wage-earning scheme for employed persons, from capitalist exploitation, eliminating the boss, since the workers, by joining together and producing in common, appropriate the profit of production and become bosses of themselves".⁸⁸.

Moreover, the platform cooperative is democratically managed by the members. The right to democratic participation derives from the cooperative principle of democratic member control.

The democratic structure of cooperatives is manifested in the prominence of the general assembly, which is qualified as "the supreme organ of the cooperative" (Article 33(1) of the CCoop).

Cooperative governance reflects its mutualistic nature by ensuring that members democratically control the cooperative and can actively participate in policy formulation and

⁸⁷ GEORGE FAUQUET, *O Sector Cooperativo. Ensaio sobre o lugar do homem nas instituições cooperativas e destas na economia* (tradução de F. Pinto), Lisboa, Livros Horizonte, 1980, p. 26.

⁸⁸ LUIZ DA CUNHA GONÇALVES, *Comentário ao Código Comercial português*, volume I, Empreza Editora J. B., Lisboa, 1914, p. 541.

key decision making, based on the rule of "one member, one vote" (art. 40(1) CCoop). This rule is a clear expression that people count more than share capital and that everyone counts the same⁸⁹. It should be noted that the exceptional admission of plural voting is not contrary to the principle of democratic member control. Among other imperative limits surrounding plural voting, this is always a choice made by the cooperative and therefore, under no circumstances does the Portuguese Cooperative Code impose the adoption of plural voting. On the other hand, the bylaws may only establish that the plural vote is assigned to the cooperative member according to his/her activity within the cooperative (Article 41(2) of the CCoop). In addition, in strategic resolutions for the cooperative, each cooperator has only one vote, even if the bylaws provide for a plurality voting (Article 41(4) of the CCoop).

The democratic nature of cooperative governance is also based on the fact that the corporate bodies' members must be cooperative members (Article 29(1) of CCoop), which is an essential right of the members. According to cooperative doctrine, the legislator designed this mechanism to ensure that the members of the cooperative's governing bodies would focus their actions on the objective of promoting the interests of the members. In fact, by allowing the interests of the cooperative members to be directly represented in the management and supervisory bodies, this mechanism has a number of advantage - the members of these bodies benefit from increased experience as a result of their dual role as beneficiary and director, are always aware of the interests of the cooperative members and do not deviate from the primary purpose of the cooperative.⁹⁰.

4.3. The protection of the cooperator worker in labour platform cooperatives

In the labour platform cooperatives, the acquisition and maintenance of the cooperative's membership with work is part of the legal act's content through which the acquisition of the membership operates. Therefore, it is a necessary element for the acquisition of the cooperator status.

The work contribution shall consist of the provision, according to the rules defined by the bylaws, the general meeting, or the administrative body, of the cooperators' professional activity in the context of the cooperative. In this cooperative, the cooperators wish to practice their profession under acceptable and fair working conditions, without depending on external power, public or private, or provide a service under the responsibility of all those who work in the cooperative.

⁸⁹ ANTONIO FICI, "El papel esencial del derecho cooperativo", *CIRIEC-España, Revista jurídica de economía social y cooperativa*, 27, 2015, pp. 13-47.

⁹⁰ HANS-HERMANN MÜNKNER, *Co-operative Principles and Co-operative Law*, 2nd, revised edition, Wien, Zurich, Lit Verlag GmbH & Co. KG, 2015.

There is no subordinate employment contract between the cooperative and the cooperator who works for it, but a business of a distinct and specific nature called a "cooperative employment agreement."⁹¹.

Therefore, cooperator workers are presented as "autonomous producers" or "self-employed entrepreneurs", and, for this reason, the dimensions of cooperator and worker are inseparable. From this perspective, this cooperator worker's position is complex, since the provision of activity he is obliged to has content very close to that of employment, even though its origin is based on a bond of a clear cooperative nature formalized in the acceptance of the bylaws. The economic and social function of the bond between the cooperative and the cooperator worker can only be achieved by providing an overall service (which combines both cooperative and work-related characteristics). There are no two distinct and autonomous relationships between the cooperative and the cooperator worker but a mixed legal transaction. It is not possible to claim to be a member of a worker cooperative by refusing to provide the corresponding work contribution, just as it is not possible to maintain that status by refusing to provide, in the future, the activity to which the worker had committed⁹². This understanding of ours finds support in some of the national jurisprudence dedicated to this matter, from which it results that "while the employment contract is characterized by the elements of legal and economic subordination, the activity developed by worker-partners is based on a relationship of cooperation. For, although the non-member worker and the member worker perform the same activity and are managed by the same natural persons, they intervene in different legal capacities, the former as an employer and the latter as the cooperator who has work distribution functions"⁹³.

Therefore, between the cooperative and the cooperator worker, there are no two distinct and autonomous legal relationships or a dual-status marked by two independent relationships with the cooperative, that is, on the one hand, as cooperator and, on the other hand, as subordinate employee.

In return for the work done, the cooperator worker shall receive periodically, following the bylaws or internal regulations of the cooperative, a part of the annual income of the cooperative, which is provisionally advanced to him/her ("advance withdrawals" of the surplus) and will be accounted for at the end of the financial year when the results, more specifically the surplus, are calculated.

In this regard, with relation to the worker production cooperatives (Decree-Law 309/81, of 16 November), article 9 states that, after determining the surplus, the payments received by members on account thereof" shall be deducted. In turn, the law that regulates service cooperatives (Decree-Law no. 323/81 of 4 December) states in article 9 that the distribution

⁹¹ See DEOLINDA APARÍCIO MEIRA, ANDRÉ ALMEIDA MARTINS, TIAGO PIMENTA FERNANDES, "Regime jurídico das cooperativas de trabalho em Portugal: Estado da arte e linhas de reforma", *CIRIEC-España, Revista jurídica de economía social y cooperativa*, 30, 2017, pp. 199-228.

⁹² DEOLINDA APARÍCIO MEIRA, *O Regime Económico das Cooperativas no Direito Português. O capital social*, Vida Económica, Porto, 2009, pp. 235 - 239.

⁹³ Decision of the Oporto Court of Appeal of 19 September 2011, available at www.dqsi.pt.

of surplus in service cooperatives shall be made "in proportion to the work of each member, according to criteria defined in the bylaws and internal regulations of the cooperative, under article 100 of the CCoop, and after determining the surplus, the members' payments received on their behalf shall be deducted".

These "advance withdrawals" of surpluses do not constitute remuneration, as provided for in general employment law, but rather an advance share of results, more specifically of surpluses.⁹⁴

The surplus is defined as an amount provisionally overpaid by the cooperative members to the cooperative or underpaid by the cooperative to the members in return for their participation in the cooperative activities. The surplus thus results from the cooperative's operations with its members, being generated at their expense, and is "the result of a tacit renunciation by the members of immediate cooperative advantages."⁹⁵

This surplus may be returned to the cooperative members, as provided in Article 100(1) of the CCoop, which states that "the net annual surplus, except for the surplus from transactions with third parties, which remains after any interest payments on capital securities and after the reversion to the various reserves, may be returned to the cooperative members."

In a cooperative labour platform, wealth is not concentrated in a few hands, but is redistributed equally among the worker-providers.

The digital platform became a structural tool of the cooperative that guarantees each working member the autonomous management of his activity while remaining within the protected work boundaries.

4.4. Returning to Law no. 45/2018 of 10 August

Given the above, on a critical note about the legal solution provided in the Portuguese legal system, we are led to conclude that the legislator could have gone further in the way it configured the legal regime of the individual and remunerated passenger transport activity in uncharacterized vehicles by means of an electronic platform. From a legal-labour perspective, the legislator creates an intricate legal regime, setting aside more protective relational configurations of the activity providers.

As we have highlighted, the Law assumes that the provision of this type of transport service is carried out through the articulation and coordination of three distinct actors:

⁹⁴ Considering that this is not a payment, but a participation in the results, see MANUEL GARCÍA JIMÉNEZ, "El estatuto jurídico del socio trabajador desde la perspectiva del derecho del trabajo", in GEMMA FAJARDO GARCIA (director) & MARÍA JOSÉ SENENT VIDAL (coordinator), *Cooperativa de trabajo asociado y estatuto jurídico de sus socios trabajadores, Cooperativa de trabajo asociado y estatuto jurídico de sus socios trabajadores*, Tirant Lo Blanch, Valencia, 2016, pp. 311-313.

⁹⁵ See RUI NAMORADO, *Cooperatividade e Direito Cooperativo*. Estudos e Pareceres, Almedina, Coimbra, 2005, p. 183.

- 1) the drivers;
- 2) transport operators in uncharacterized vehicles by means of an electronic platform (TVDE), which are necessarily legal entities that hire the drivers required to provide the transport service; and
- 3) the electronic platform operators providing intermediation services between users/passengers and the TVDE operators adhering to the platform.

Under the regime laid down in that Law, the driver does not enter into a contract with the electronic platform operator. Still, to carry out the activity he must be registered on the electronic platform.

Law no. 45/2018 does not prevent the articulation between the drivers and the TVDE operator through the cooperative model, i.e., the drivers may organise themselves into a cooperative, which would itself be a TVDE operator. With the cooperative, the drivers would have a “cooperative employment agreement”. The written contract concluded between the driver and the TVDE operator does not have to be an employment contract, other possibilities may be considered, such as the one of an independent driver (Article 10(12)). However, as we have seen, in the work cooperatives, the cooperative workers present themselves as autonomous producers. Therefore, to reinforce our understanding, there is nothing in the law that prevents drivers from establishing a work cooperative instead of concluding a work agreement or any other agreement with the TVDE operator.

However, the Law prevents the TVDE operator from coinciding with the electronic platform operator and thus excludes the possibility of combining in the same legal person, in this case, a labour platform cooperative, the three actors: driver, TVDE operator, and platform operator. Should this solution be legally possible, it would be the cooperative, within the context of which the drivers carry out their activity, which would grant the transport contracts. In other words, the cooperative would provide the service by providing the human and material resources required for the service.

Closing the door to the organisation of the service providers under the concept of a labour platform cooperative, which would itself be the owner of the electronic platform, prevents the service providers from accessing a structure capable of grouping them that we consider to be the most adequate to phenomena of the collaborative economy of this nature, and which we believe to be more protective at a labour-legal level, for the reasons explained above.

Moreover, in an era where the growing use of outsourcing mechanisms is a dangerous threat to the labour status and social stability of a considerable percentage of the workforce, the option for a legal solution that, as seen above, presupposes that the TVDE operator acts as a legal person, seems to justify the fear that this regime may end up having the undesirable effect whereby the platform operator does not formally conclude an employment contract (or of any other nature) with the provider of the activity but, in practice, exercises typical employer powers, particularly with regard to the control of working time and compliance with the

maximum limits provided for (Article 13)⁹⁶. In this context, it is important to highlight that the phenomenon of work outsourcing may lead to a proliferation of companies registered as TVDE operators with the sole purpose of complying with this regulatory framework.

The relational configuration underlying a labour platform cooperative is, in our view, the one that would best protect the interests of the activity providers.

5. Conclusions

With regard to our first research question, we acknowledge the complexity of qualifying the relationship between the provider and the collaborative platform. Therefore, we believe it would be hasty to give an immediate and definitive answer to that question. On the one hand, it seems undeniable that the provider ends up carrying out its activity with autonomy in terms of how the provision is organised, on the other hand, many of the platforms emerging in the collaborative economy sector are based on collaboration models that presuppose a strong interference and control by the platform in terms of how the activity is carried out and remunerated, which raises strong suspicions about a legal subordination that the law and the judge cannot simply ignore. Everything will depend on how each platform has been set up and how it ends up interfering (or not) in the way the provider carries out its activity. In any case, we agree with those who demand a revision or an updating of the indicators of subordination set out in Article 12 of the Labour Code, which has proven to be inadequate to assist the interpreter in the face of such a challenging phenomenon nowadays. Perhaps the ideal solution would involve clarification by the legislator on this matter, namely by creating a specific legal regime on the matter.

As for the second research question, we consider that, in a scenario where the collaborative platform ends up exercising typical employer powers over the provider, it would be admissible to qualify the platform not as a mere intermediary between the provider and the user but rather as a genuine employer.

Within the scope of the third research question, we note that the response of the Portuguese legislator (Law no. 45/2018 of 10 August) unfortunately did not contribute to clarify this issue once and for all. Instead, it became more complex, with the introduction of a new actor (the TVDE operator) in the contractual relationship. Ultimately, given that the legal frame drawn by Portuguese legislator divides the powers of the employer between the TVDE operator and the platform operator, we envisage the possibility of applying the concept of plurality of employers. This solution will undoubtedly favour the provider involved. In any case, our understanding is that the labour cooperative platform is the most appropriate concept of organisation for these providers within the collaborative economy, and the one that best protects them from a legal-labour point of view. The regime provided for in Law no. 45/2018

⁹⁶ See JOÃO LEAL AMADO & TERESA COELHO MOREIRA, *op. cit.*, pp. 73-74.

does not prevent the articulation between drivers and the TVDE operator through the cooperative model. Still, by not admitting the coincidence between the TVDE operator and the platform operator, it prevents the cooperative from being simultaneously the owner of the digital platform itself.

However, the cooperative labour platforms have been pointed out by the doctrine as an alternative workplace model for self-employed workers and freelancers in the context of the collaborative economy, giving them the necessary protection. By definition, cooperative labour platforms are targeted towards membership's logic and democratically governed, with worker-members owning the platform and participating in it.

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