Global Workplace Law & Policy

The changing meaning of 'asset', 'undertaking' and 'establishment' in the digital workplace

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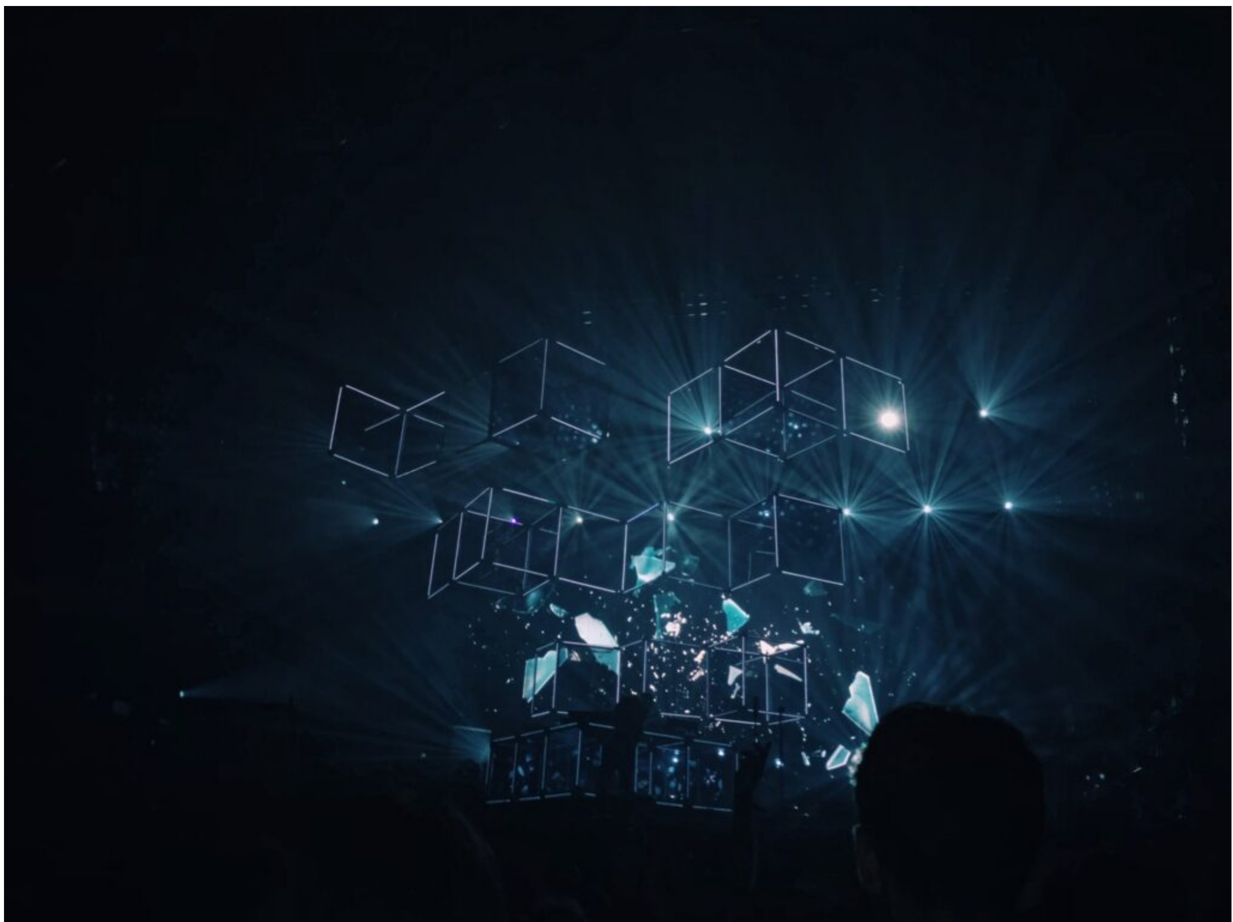

The increasing and pervasive use of digital technology in the workplace is accompanied by a growing perception that the current regulatory and definitional frameworks used by legal systems to allocate obligations and protections in labour relations are becoming obsolete and inadequate.

The rarefaction of labour law notions

This inadequacy is evident in the diminishing significance of crucial labour law notions. Regardless of the level of automation of work processes, when labour is performed through digital infrastructure, workers take on roles akin to on-demand content creators, operating in dispersed and fragmented ways. Work-management digital platforms often handle tasks such as customer

assignments, complaint management, human resources and payment processing, either entirely or partially. Needless to say, this business model differs greatly from the prevailing organisational structure at the time labour laws were established.

Labour law systems define their scope of application through normative concepts like 'subordinated worker', 'asset', 'establishment' and 'undertaking'. Historically, these concepts have been associated with physical aspects of work performance and the workplace. However, they struggle to capture the increasingly fluid and intangible nature of work in digital and dispersed environments. While much has been written about the evolving definition of a 'worker', this blog post highlights the growing rarefaction of those legal notions which relate to the reality of businesses and which are crucial for effectively implementing the rights of workers under EU labour law.

Assets

Assets refer to the instruments and tools necessary for a business to operate. In traditional firms, this definition is relatively straightforward. For example, in an urban transport company, the assets would be the buses or trams used for the service. Then there are cases, such as the cleaning sector, where the contribution of assets is quite marginal and the business can be defined as 'labour intensive' because the service is mainly provided by human labour.

Identifying the main assets of a company is not a mere doctrinal exercise but it is decisive for the application of, for instance, Directive 2001/23/EC on Transfers of (part of) Undertakings. This Directive safeguards the employment rights of workers when they are transferred between firms, with the transfer of the majority of the assets (or personnel in labour intensive firms) being a crucial factor in determining whether a transfer has occurred and whether labour protection applies. When it comes to digital and remote work, such as when a smaller digital business becomes part of a larger platform, it is essential to establish whether digital platforms are labour intensive businesses or if assets play a more prominent role. Therefore, clarifying the nature of business assets is vital: are they the personal laptops used by workers or, as it would be more honest and logical to admit, are they the algorithms, software and data that actually sustain the business? A narrow interpretation that neglects the technological component of the business would fail to implement in full the employment protection rules established in the Directive.

Quite importantly, this view is finding some traction in national jurisprudence on the employment status of platform workers. Among Spanish courts, for instance, it is by now broadly accepted that the means provided by the couriers (smartphone, bike) are residual compared to the digital platforms and the platform brand.

At EU level, while there has not yet been a significant move to adapt the notion of assets to the digital world of work in the labour law field, interesting developments have emerged in EU competition law. In a 2021 competition law guidance note on the enforcement of the EU Merger Regulation, the Commission recognised that, in the digital economy, a firm's market value can also be determined by its ability to accumulate substantial data inventories. Consequently, transactions that concern undertakings which have significant access to data may have a restrictive impact on competition within the internal market. Competition law thus considers data an important business asset with a high capacity to generate competitive potential. It would be timely for a similar interpretation to be introduced in the field of labour law.

Establishment

Another legal concept at risk of losing its meaning in the context of digital remote work is that of ‘establishment’, traditionally defined as ‘the unit to which workers are assigned’.

In EU labour law, information and consultation rights are tied to a minimum quantitative threshold based on the number of workers assigned to or dismissed from a specific establishment. The scope of these rights therefore depends on how broadly this notion is interpreted. This poses a serious problem when considering the context of digital and remote work, which is characterised by geographical dispersion. How can a regulatory concept introduced when work was predominantly conducted in physical locations, such as industrial sites or offices, adapt to the reality of economic processes occurring through digital infrastructure?

To address the erosion of the notion of establishment, and of the labour rights attached to it, a functional reinterpretation is necessary. This can be relatively straightforward for on-location platforms that offer services like food delivery, care, property maintenance work or postal services. Even in the absence of explicitly identifiable premises, work still retains a tangible spatial dimension. In these cases, the actual workplace is frequently the street, allowing for a reinterpretation of the establishment concept based on geographical and topographical criteria, such as cities or specific neighbourhoods. However, this paradigm is hardly applicable to online gig work, where the place of work exists within the digital ecosystem. There, in my view, the departure from the traditional paradigm needs to be more significant as, in order not to empty the existing labour law guarantees, the ‘unit to which workers are assigned’ should be identified within the digital infrastructure through which tasks are distributed, performed and delivered.

Undertaking

Similar questions of interpretation arise in relation to the concept of ‘undertaking’, which is also used to define the scope of information and consultation rights.

In EU labour law the concept is not explicitly defined and is widely understood to coincide with the legal person (company or firm) as defined in its founding statute. However, digital and disintegrated businesses, outsourcing practices, fissured workplaces and dispersed workforces have led to a dilution of this legal concept. As a result, the term ‘undertaking’ no longer captures the expression of economic and contractual power in the labour market, which is now increasingly manifested through networks or ‘galaxies’ of integrated businesses.

Reinterpreting the notion of undertaking is crucial and looking to competition law once again provides insights. Competition law, guided by the principle of effectiveness, extends the notion of undertaking beyond legal status to encompass the entire economic unit, including situations where one firm controls another through ‘organic and functional links’. A purposive approach has been slower to emerge in labour law, but a recent opening occurred in the *Ellinika* judgment on the Transfer of Undertakings Directive. Remarkably, the CJEU ruled that, if an undertaking is dependent on the economic choices made by another, the autonomy between the two can be considered fictitious. I believe that transposing this reasoning to the digital economy could challenge the artificial fragmentation of economic contractors and, in the process, propose a revised notion of undertaking that aligns more closely with reality.

Readjusting the scope of labour law to curb labour market asymmetries

Business strategies based on digital, remote and outsourced labour will continue to exacerbate power asymmetries in the labour market as long as legal systems allow them to do so. Clearly, the currently predominant interpretation of definitional labour law concepts is not conducive to curbing the deregulatory pressures that tech and digital business players are exerting on working conditions.

New tools and new rights are certainly needed, especially in relation to algorithmic management and the use of AI in the workplace. At the same time, it is crucial not to fall for the narrative that digitalisation has transformed the world of work to the extent that reliance on traditional legal concepts has become obsolete. Behind the virtual veil and the myth of autonomy, the power structures and dynamics are in fact the same, if not worse. It is therefore crucial not to relegate the existing social acquis to the glories of the past, but to refocus its scope and allow it to play its fundamental normative role in holding employers accountable for their economic dominance.

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