



## **Gender Equality in Virtual Work II.: Regulatory Suggestions**

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This article focuses on gender equality in virtual work, taking special account of the regulatory challenges. It contributes to broader debates on the workers' situation in the sharing economy in two ways. Firstly, it makes an inaugural attempt to evaluate the implications of the new forms of work in the sharing economy for female virtual workers, looking at the issue of equal treatment. Secondly, it offers preliminary suggestions regarding a future regulation to improve equality between genders in virtual work.

This is the second part of a paper on gender equality in virtual work. The first part (published in the 2018/1 issue of the Hungarian Labour Law E-Journal) defined 'virtual work', classified its two basic forms and emphasised the specific traits of this form of work to demonstrate the need of special protection against discrimination. Subsequently, it identified the possible beneficial and adverse implications of virtual work for female workers and gender equality.

This second part firstly provides a summary of the gender equality law of the European Union that serves as a point of reference when speaking about antidiscrimination law. Section 2 offers three normative perspectives and suggestions as to how to enhance gender equality in virtual work. Finally, the paper concludes.

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## 1. Gender Equality Law of the European Union as a Point of Reference

### 1.1. *The regulatory framework*

This part addresses the question whether the European Union law can give any guidance on how to support gender equality in virtual work. Even if this question will be probably answered in the negative, the paper makes use of the EU rules and terminology as a point of reference. The paper applies the term ‘equal treatment of men and women’ to virtual workers in the sense as understood in the European Union law.

The European Union law declared the principle of equal pay for male and female workers for equal work or work of equal value already in the Treaty of Rome in 1957 (now Art. 157 TFEU).<sup>1</sup> This rule has a broad personal scope due to the autonomous European definition of ‘worker’, which covers all those persons who provide services during a given time for and under the direction of another in return for remuneration.<sup>2</sup> This is a much broader definition than the usual national understandings of an employee and could easily cover a significant part of virtual workers.

In addition, EU law regulates the principle of equal treatment between men and women in three Directives. The Directive 2006/54/EC<sup>3</sup> addresses the matters of employment and occupation, Directive 2010/41/EU<sup>4</sup> applies to persons engaged in an activity in a self-employed capacity and Directive 2004/113/EC<sup>5</sup> deals with the access to and supply of goods and services. The respective Directives differentiate between direct and indirect discrimination as the two major forms of discrimination. ‘Direct discrimination’ materialises in an adverse treatment on grounds of sex, whereby it needs a (hypothetical) person in comparable situation. ‘Indirect discrimination’ means an apparently neutral provision, criterion or practice that “would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary”<sup>6</sup> For both categories, it is indifferent, whether discrimination is intentional or not. What matters is that a measure treats the person adversely eventually. Therefore, this paper does not address the question, whether discrimination in virtual work is intentional. Furthermore, all three Directives equate harassment and sexual harassment with discrimination. The Directive 2006/54/EC regarding

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<sup>1</sup> Consolidated version of the Treaty on the Functioning of the European Union, 2012/C 326/01.

<sup>2</sup> Established case law of the Court of Justice of the European Union since its judgment *Lawrie-Blum* of 3.7.1986, C-66/85.

<sup>3</sup> Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

<sup>4</sup> Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC.

<sup>5</sup> Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

<sup>6</sup> Art. 2 b) Directive 2004/113/EC; Article 2 (1) b) Directive 2006/54/EC; Article 3 b) Directive 2010/41/EU.

employment and occupation declares also the instruction to discriminate against persons on grounds of sex as a form of discrimination.<sup>7</sup>

In case of virtual work, the two major forms of discrimination, namely direct and indirect discrimination are relevant. Bad ratings based on gender constitute direct discrimination, if a woman receives worse rating based on gender than a man would have who made a comparable performance of work. Hence, in the relationship between client and worker, gender-related differences in the evaluation of work performance are directly discriminatory. On the other hand, if platform-based companies use discriminatory ratings for the supervision of workers and making managerial decisions, this practice implies indirect discrimination. Ratings can be seen as apparently neutral criterion of workers' evaluation, which ultimately disadvantage women. Therefore, in the relation between platform-based company and worker, the use of ratings can result in indirect discrimination of workers.

### *1.2. The Personal Scope of Gender Equality Law in the EU*

As Countouris and Freedland emphasise, in most EU Member States the personal scope of gender equality law is limited to a narrow concept of employees, while a large percentage of the labour market participants are excluded from this protection.<sup>8</sup> They criticise the exclusion of those economic actors who are clients or customers from the scope of gender equality law and call for the expansion of gender equality law beyond the narrow scope of employment.

The equality law of the European Union first focused on 'workers' as a consequence of the ancillary nature of this right to the guarantee of the free movement of workers. The development of anti-discrimination law in its own brought about a cautious extension of its scope beyond the employment relationship. Most explicitly, Article 14 (1) a) of the Directive 2006/54/EC prohibits direct or indirect discrimination on grounds of sex in relation to conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions, and promotion. Here, the anti-discrimination rule applies to self-employed only regarding access to the assignment. Any further steps of the work performance, ie. the exercise of the activity, is not protected against discriminatory behaviour of the service recipients.<sup>9</sup>

Even the comprehensive German commentary literature confesses that the question, how far Article 14 of the Directive covers self-employed persons is not completely explained.<sup>10</sup> Particularly the

<sup>7</sup> Art. 2 (2) b) of Directive 2006/54/EC on equal treatment of men and women in matters of employment and occupation.

<sup>8</sup> N. COUNTOURIS – M. FREEDLAND: 'Work', 'Self-Employment', and Other Personal Work Relations: Who Should be Protected against Sex Discrimination in Europe. *European Gender Equality Law Review*, 2013/2. 15., 18.

<sup>9</sup> Catherine BARNARD – Alysia BLACKHAM: Discrimination and the Self-Employed – The Scope of Protection in an Interconnected Age. In: Hugh COLLINS (ed.): *European Contract Law and the Charter of Fundamental Rights*. 2017. 206.

<sup>10</sup> Jochen MOHR: RL 2006/54/EG Article 2. In: Martin FRANZEN – Inken GALLNER – Hartmut OETKER (eds.): *Kommentar zum europäischen Arbeitsrecht*. 2016. 1699., 1712.

Danosa judgment<sup>11</sup> of the Court of Justice of the EU brought ambiguity, in which the Court required the protection of a pregnant woman independently from her legal status. The protection against dismissal granted to pregnant women under EU law cannot depend on the formal categorisation of their employment relationship under national law.<sup>12</sup> Even so, the Court has not required in general the extension of the personal scope of anti-discrimination rules to self-employed persons, but limited its statement to the protection of all working pregnant women against dismissal based on pregnancy. One should keep in mind, that Directive 2006/56/EC applies the broad definition of worker, which could cover part of the virtual workers. However, the Court of Justice of the EU made early clear in the Allonby judgment that an employee and a self-employed person, who provide services to the same employer are not in a comparable situation.<sup>13</sup> The Allonby judgment had actually two messages. First, it stated, that self-employed persons are not covered by the equal pay principle of the Directive 2006/54/EC. Second, it clarified that a differentiation among self-employed people is possible and the invoked principle applies to those self-employed, who are mainly dependent on one particular client.<sup>14</sup>

The EU Directive 2010/41 extended the application of the principle of equal treatment to self-employed men and women to some extent. Article 2 a) of Directive 2010/41/EU defines self-employed as “all persons pursuing a gainful activity for their own account, under the conditions laid down by national law” leaving much space for specification to the Member States.<sup>15</sup> This can result in different personal scope of protection throughout the Member States. Article 4(1) of the Directive prohibits discrimination on grounds of sex in the public or private sectors, “in relation to the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity.” This rule is not to overrate, as it aims rather at just boosting female self-employment and so it applies the equal treatment principle to the initial access to self-employment, but not to the actual exercise of the activity.<sup>16</sup> In this context, Barnard and Blackham call attention to the pitfalls of the distinction between access and exercise of self-employment. They criticise the fact that self-employed as service provider cannot invoke the Directives to challenge discriminatory decisions made by potential users/clients.<sup>17</sup> This means, that virtual workers cannot invoke EU equality rules, if they have not been selected for an assignment based on their sex or are payed worse than comparable men are.

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<sup>11</sup> The dispute affected the protection against the dismissal of a member of a capital company’s board of directors CJEU 11.11.2010, *Danosa*, C-232/09, par 57–69.

<sup>12</sup> *Ibid.* par 69.

<sup>13</sup> See the CJEU’s restrictive interpretation of the application of the equal payment principle of Art. 157 TFEU on self-employed in: CJEU, 13.01.2004, C-256/01 *Allonby v. Accrington & Rosendale College*, ECLI:EU:C:2004:18, para. 42–50.

<sup>14</sup> *Ibid.* par. 71.

<sup>15</sup> On the different legal solutions of the Member States see: C. BARNARD – A. BLACKHAM: *Self-Employment in EU Member States: The Role for Equality Law*. European Commission. *European Equality Law Review*, 2015/2. 8–10.

<sup>16</sup> *Ibid.* 7.

<sup>17</sup> *Ibid.* 9–10.

Of special interest is Directive 2004/113/EC, which lays down a framework for combating discrimination based on sex in access to and supply of goods and services. According to Article 3 sec 1, “this Directive shall apply to all persons who provide goods and services, which are available to the public [...] and which are offered outside the area of private and family life and the transactions carried out in this context.” Section 2 further specifies that “this Directive does not prejudice the individual’s freedom to choose a contractual partner as long as an individual’s choice of contractual partner is not based on that person’s sex.” This indicates a broad personal scope of protection, which also includes the exercise of self-employed activities of virtual workers.<sup>18</sup>

Consequently, selection of the service provider based on a specific gender is prohibited. However, this rule raises uncertainties regarding enforcement, starting with the difficulty to identify potential clients, who made their decision not to choose specific workers due to their gender. Another uncertainty is attached to the fact that the Directive does not cover service offered within the area of private and family life. The application of the equal treatment principle stops at the border of private sphere. This could lead to the exclusion of a great part of virtual work from the equal treatment principle. The Preamble of the Directive is instructive, as it mentions the right to equality and the protection of private and family life in succession.<sup>19</sup> It emphasises that while prohibiting discrimination, it is important to respect fundamental rights and freedoms, including transactions carried out in the private sphere. However, this privacy exception should be understood narrowly and be restricted to cases, where clients for performance of work in family settings select the worker.<sup>20</sup>

Barnard and Blackham speaks for the application of the equality principle to all public offerings of services with one exception. They argue that in a narrow field, if the service recipients take a decision in private, domestic context, the privacy interest has priority over the equality principle.<sup>21</sup> Consequently, EU equality law does not and should not apply to clients/users purchasing service in their home. According to this argument, clients should be allowed to discriminate against virtual workers in all those cases, when the service provision mainly occurs in the domestic sphere.

Barnard and Blackham draw the line of this principle at services provided in a commercial context. Clients acting in the public, as business, cannot discriminate in recruitment. This balance of equality law and private autonomy is to approve at theoretical level, but features two major deficiencies in the context of platform work. First, this argument legitimizes discriminatory behaviour only regarding the assignment of a job, but not as to the job performance. This means that service recipients can refuse virtual workers based on gender, but should not be allowed to rate female workers worse than men based on their gender. Service provision in family settings cannot justify discrimination during or after performing the service.

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<sup>18</sup> Ibid. 10–11.

<sup>19</sup> Points 2 and 3 of the Preamble of the Directive 2004/113/EC.

<sup>20</sup> In line with the arguments of BARNARD–BLACKHAM (2017) op. cit. 214–215.

<sup>21</sup> BARNARD–BLACKHAM (2017) op. cit. 213–215.

Second, most importantly, it does not solve the problem of discrimination of virtual workers due to the difficulty to separate the discriminatory act of clients from those of the platform. Usually, decisions taken are a mixture of clients' and platforms' behaviours. According to Barnard's and Blackham's logic, platforms, which act in public, should observe equality law. This leads back to the problem, whether the platform or the clients make discriminatory decisions. In my mind, labour-based platforms are mostly responsible for making decisions on payment and other terms and conditions, even if clients have influence on them, as well.

Summarised, we can conclude that the EU law contains clear rules on gender equality only regarding non-discriminatory access to labour market opportunities. Following this legal regime, most EU Member States prohibit discrimination against self-employed only regarding access to any employment. Remarkably, a few EU countries expressly extended this protection to the conclusion of contracts between the self-employed and the service recipients.<sup>22</sup> A couple of countries also contain protection against discriminatory terminations of self-employment contracts, which can be seen as complementary to the protection of non-discriminatory access to contracts for services.<sup>23</sup> This practise is rather the exception, though. The situation is more complicated due to the privacy exception, which allows neglecting the equal treatment principle for services offered in private sphere. It is still unsure, what exactly this exception means for the practice.

## 2. Regulatory Suggestions

### 2.1. *Extension of the Equal Treatment Principle to Self-Employed*

#### 2.1.1. Detachment of Equality Law From Labour Law

The integration of virtual workers into labour law evidently brings about the benefit to apply the principle of equal treatment of men and women to virtual workers. In the European labour law systems, this principle is generally accepted, but its application depends on the person's labour law qualification. The personal scope of equality law is often limited to persons qualified as employees or employee-like persons. The equal treatment of men and women beyond the scope of labour law is much more controversial and severely limited by the consideration of other interests. However, the classification of virtual workers as employees or workers or even as persons belonging to the third category is associated with difficulties.

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<sup>22</sup> N. COUNTOURIS – M. FREEDLAND: *The Personal Scope of the EU Sex Equality Directives*. European Commission, 2012. 4.

<sup>23</sup> COUNTOURIS–FREEDLAND (2013) op. cit. 17.

Having in mind the goal of equal treatment of men and women, this principle should be detached from the employment status and extended to self-employed persons. This claim is very near to Fredman's idea who advocates for 'freestanding social rights' independent from the employment relationship, alleging that treating employment relationship as a privilege is in itself discriminatory.<sup>24</sup> The drawback of the rigid binary division of labour law is that everybody who does not fulfil the requirements of being qualified as an employee necessarily falls into the category of self-employed and as such, falls outside any labour law protection. This had been particularly detrimental to women for a long time.<sup>25</sup> As Fredman points out, the narrow scope of employment, the difficulty to define employee and employer, and the aim to avoid the insider/outsider division clearly speak for the extension of social rights beyond the scope of employment relationship.

Fredman raised the question in the title of her excellent article on the relationship and interaction between equality law and labour law in the UK,<sup>26</sup> whether equality law is part of labour law or an autonomous field. I think it is necessary to raise the same question in the context of the equal treatment regulation of virtual workers. As she emphasises, the right to equal treatment is a human right and as such must not be restricted to employees (or workers), but has to be extended to all persons who perform work in person as virtual workers do.<sup>27</sup> The Directive 2004/113/EC acknowledges the right to "protection against discrimination for all persons" as a universal right recognised in many universal and European human right documents.<sup>28</sup> This human right approach helps to overcome the limited scope of the labour law protection.

In addition, as Fredman puts it, discrimination is an act of power, so it assumes a power relationship irrespective of the legal qualification of the relationship. Platform-based companies and workers are in a hierarchical relationship due to asymmetries of information and the companies' authority to dispose of the fate of the relationship.<sup>29</sup> Since platforms are in a powerful position, it is only appropriate to place the duty on them not to discriminate against their workers. In my opinion, the criterion of having a 'power relationship' creates a lower hurdle than the labour law condition of personal dependency and is more appropriate to constitute the basis for the application of the equal treatment principle.

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<sup>24</sup> S. FREDMAN: Women at Work: The Broken Promise of Flexicurity. *Ind. L. J.*, Vol. 33., No. 4. (2004) 299–319.

<sup>25</sup> S. FREDMAN – J. FUDGE: The Legal Construction of Personal Work Relations and Gender. *Jerusalem Review of Legal Studies*, Vol 7., No. 1. (2013) 112.

<sup>26</sup> S. FREDMAN: Equality Law: Labour Law or an Autonomous Field? In: A. BOGG – C. COSTELLO – A. C. L. DAVIES – J. PRASSL: *The Autonomy of Labour Law*. Oxford, Hart Publishing, 2015. 257–273.

<sup>27</sup> *Ibid.* 258–259.

<sup>28</sup> Point 2 of the Preamble of the Directive 2004/113/EC.

<sup>29</sup> R. CALO – A. ROSENBLAT: The Taking Economy: Uber, Information, and Power. *Colum. L. Rev.*, Vol. 117., 2017. 1623.

### 2.1.2. Extension of Equality Law to Self-Employed

My strong suggestion is to adopt an inclusive approach and extend equality law to self-employed. Alternatively, the option is also conceivable that only those self-employed should fall under the scope of equality law, whose situation is most similar to that of the workers. For the specification of this group, two features are decisive. First, certain countries already differentiate between categories of self-employed based on the fact that some self-employed work mainly for one particular client or for a few of them.<sup>30</sup> This fact indicates that these self-employed are usually economically dependent on the single or a few clients. Another feature for the differentiation is, whether self-employed employ other workers, or perform work as a solo self-employed. Self-employed without own workforce often show a greater resemblance to those protected by labour law than to self-employed with own workers.<sup>31</sup> In my opinion, these two classifications are instructive from the perspective of equality to identify self-employed persons in virtual work who are in need of protection. I suggest that equality law should cover at least those solo self-employed, who perform work for one or a few platform companies.

The material scope of the equal treatment principle should cover engagement (acquiring an assignment), terms and conditions of work (providing it, paying for it, rating it, contacting to the platform and to the client), and termination. Equal opportunity to access to a platform and to become a worker usually does not seem to be problematic; women can participate in virtual work. Most difficult is to guarantee the equal treatment principle regarding terms and conditions of work. Two major issues stare the observer in the face, namely discrimination through ratings and wage gap. As ratings determine virtual workers' basic rights such as the probability to get new assignments, wage level and promotion, any discrimination at this point multiplies. Therefore, it is major issue to draw on this finding and fight against biased ratings by the extension of the equal treatment principle to the terms and conditions of the work performance.

### 2.1.3. Consideration of Privacy and Personal Preferences

Opponents of the expansion of the equal treatment principle to self-employed persons could argue that the adoption of the equal treatment principle to the realm of civil law relationships excessively limits the autonomy of the parties as well as the freedom of contract. Autonomy and privacy can call for allowing clients' discriminatory preferences by law.<sup>32</sup>

<sup>30</sup> C. BARNARD – A. BLACKHAM: *Self-Employed – The implementation of Directive 2010/41 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity*. European Commission, 2015. 3–4.

<sup>31</sup> To the distinction see J. FUDGE: *Self-employment, Women, and Precarious Work: The Scope of Labour Protection*. In: J. FUDGE – R. OWENS (eds.): *Precarious Work, Women, and the New Economy*. Hart Publishing, 2006. 209–211.

<sup>32</sup> K. T. BARTLETT – M. GULATI: *Discrimination by Customers*. *Iowa L. Rev.*, Vol. 102. N. 223. 2016. 238–241.

The challenge is to consider and weigh the equal treatment principle against private autonomy and interests in privacy,<sup>33</sup> without falling into the trap of a sharp dichotomy between family as private (intimate) sphere and market as commercial (public) sphere.<sup>34</sup> The sharing economy very often includes “intimate transactions,”<sup>35</sup> since the place of service provision is often the home of the client (in cases of work on-demand) or the worker (crowdworker). However, excluding virtual work from the scope of equality law with the argument that the work is performed at the workers’ or clients’ home would just put the long debate of the false dichotomy of private and public work in a new light. Fudge and Owens pointed out that the separated regulation of home as private sphere from the market as public sphere put an everlasting burden on women.<sup>36</sup> Eventually, the legislator has to weigh the different competing values and set priorities.<sup>37</sup> The presented opinion of Barnard and Blackham on the limited scope of equality law presents one possible solution with certain weak points for virtual work.

The trouble regarding the application of the equal right principle in the context of private relationships between clients/users and service providers cannot be denied. Service searchers are usually free to choose between service providers. Their choice is based on preferences, which can disadvantage male or female service providers. Obviously, not all preferences create a discrimination. If women prefer female gynaecologists or female divorce lawyers in the hope that they understand them better, these preferences in the choice do not discriminate against men.<sup>38</sup> One could easily bring similar arguments, why a woman is preferred for babysitting or a man is selected for certain handyman activities. The selection criterion is in both cases the assumption that representatives of a certain gender have better soft or hard skills needed for the job concerned. This is, of course, not always the case. The point is, in my opinion, that even if we accept the clients’ freedom to select a service provider based on gender for the performance of a work within the private sphere, this biased choice is limited to the assignment of the work. Arguments such as private life, autonomy and freedom do not justify discriminatory behaviour once the worker has been engaged. This means that clients are not allowed to treat virtual workers discriminatory as to their working conditions, i.e. ratings, paying, etc. The arguments of intimacy and privacy cannot legitimize discriminatory ratings, algorithms and other terms and conditions of virtual work.

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<sup>33</sup> N. SCHOENBAUM: Gender and the Sharing Economy. *Fordham Urban Law Journal*, Vol. 43., N. 4. (2016) 42–46.

<sup>34</sup> This distinction criticised by, e.g.: F. E. OLSEN: The Family and the Market: A Study of Ideology and Legal Reform. *Harv. L. Rev.*, Vol. 96, No. 7 (May, 1983) 1497. 1499–1528.; D. L. RHODE: *Justice and Gender – Sex Discrimination and the Law*. Rev. ed. Harvard University Press, 1991. 125–131.; SCHOENBAUM (2016) op. cit. 28.

<sup>35</sup> Expression used by Schoenbaum, see SCHOENBAUM (2016) op. cit. 7.

<sup>36</sup> J. FUDGE – R. OWENS: *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms*. In: FUDGE–OWENS (eds., 2006) op. cit. 3. 12–15., 21.

<sup>37</sup> BARTLETT–GULATI (2016) op. cit. 241.

<sup>38</sup> Examples mentioned by Schoenbaum, see SCHOENBAUM (2016) op. cit. 14.

## 2.2. Proactive and Transparent Equality Management of the Sharing Firms

Companies of the sharing economy should actively undertake measures to ensure that clients/users do not discriminate against workers, based on gender.<sup>39</sup> In my opinion, platform-based companies have powerful instruments to thwart adverse treatment by setting their internal and external rules and by programming their algorithms. Platforms have the necessary information on workers' profiles, rates and pay, and feedback scores, so they are in the best position to counteract discrimination.<sup>40</sup> The precise database and monitoring system allow the companies to monitor clients/users regarding their potentially discriminatory behaviour and channel their behaviour.

Several equality-enhancing instruments are conceivable. For example, Barzilay and Ben-David suggest that platforms should inform the workers of average hourly rates for certain tasks.<sup>41</sup> This could contribute to the prevention of the previously mentioned phenomenon that women tend to require less money than men for the same job. Regarding bias in ratings, efficient instruments include the careful design of performance evaluation forms and the increase of the reporting burden by requiring the specific reasons for a low rating.<sup>42</sup> Companies should provide transparent guidelines with the detailed aspects of the evaluation.

The reduction of information on workers can be an appropriate method in cases where there is no or just little personal relationship between client/user and worker.<sup>43</sup> While in the traditional labour market there has been a turn that job applicants are not required any more to attach a photo to their CVs or to disclose any personal information on their family life and personal preferences, similar concerns are rarely present in sharing economy. Quite the contrary seems to be true. Sharing economy firms urge workers to publish as much information on themselves as possible. This tendency, which also increases concerns for data protection, favours discriminatory behaviour. Therefore, a major proposal is to limit information on the workers available to the clients and thus reduce the opportunities for discrimination.<sup>44</sup> The limitation of the provision of personal information seems to be an efficient tool to hinder discrimination. Schoenbaum criticized that this is only a short-term prophylactic measure, but does not go to the heart of antidiscrimination law and does not change biased attitudes.<sup>45</sup> Changing the way, how individuals act, but not what they believe, may come too short considering the ultimate

<sup>39</sup> BARTLETT–GULATI (2016) op. cit. 256.; BARNARD–BLACKHAM (2017) op. cit. 217.

<sup>40</sup> A. R. BARZILAY – A. BEN-DAVID: Platform Inequality: Gender in the Gig-Economy. *Seton Hall L. Rev.*, 2017. 430. National Employment Law Project, Policy Brief, June 2017, 5. <http://www.nelp.org/content/uploads/On-Demand-Anti-Discrimination-Protections.pdf> (last visited: 20.12.2017.).

<sup>41</sup> BARZILAY–BEN-DAVID op. cit. 430.

<sup>42</sup> A. ROSENBLAT – K. LEVY – S. BAROCAS – T. HWANG: Discriminating Tastes: Customer Ratings as Vehicles for Bias. *Intelligence and Autonomy*, October 19, 2016. Available at SSRN: <https://ssrn.com/abstract=2858946>, 14.

<sup>43</sup> Ibid.

<sup>44</sup> As also suggested by BARTLETT–GULATI (2016) op. cit. 251–252.

<sup>45</sup> N. SCHOENBAUM: A Modest Proposal? Regulating Customer Discrimination Through the Firm. *Iowa Law Review Online*, Vol. 102., 2017. Available at SSRN: <https://ssrn.com/abstract=2977921>, 107.

goal of equality law. However, at least it helps preventing the individual against the damage caused by the discrimination. Therefore, even if it does not tackle the problem at its roots, it has a positive effect.

The identification of biased ratings is difficult, as evaluation has an inherent subjective content. The impact of personal preferences can be significantly reduced through clear and gender-neutral ratings criteria. Several scholars suggested the implementation of a statistical filtering technique in order to exclude discriminatory ratings.<sup>46</sup> Although the specific design of such filtering criteria is debatable, mechanisms are certainly available for an effective protection against unfair ratings. The most accepted methods to make ratings bias-sensitive are to exclude or attribute lower weight to presumed discriminatory ratings or adjust the results of specific workers upwards if they belong to a group, which is systematically discriminated against.<sup>47</sup>

Additionally, the design and operation of algorithms should be made transparent. Transparency is the only way to prevent sharing economy firms from abusing their position of possessing much information and data on clients/users and workers. The clear asymmetry of data and information between the platform-based companies and the workers causes a massive risk of power abuse. This information asymmetry and the non-public function of algorithms hinder the application of the equal treatment principle.<sup>48</sup> Transparency requires making the functions of algorithms accessible to state control.

As Schoenbaum emphasises, a large part of virtual work occurs in the clients'/users' or workers' private places, which counteracts transparency and benefits biased preferences.<sup>49</sup> Performing work at home or in public spaces in a private relationship enhances the chances for discrimination. The personal connection in the private sphere makes the relation between client/user and worker more prone to biased behaviour. To counteract this risk Rosenblat and her colleagues suggest the establishment and public disclosure of baseline statistics about ratings and workers' demographic characteristics in the context of protected status.<sup>50</sup> The private nature of choices in the rankings without the pressure to observe expected social norms benefit discriminating behaviour.<sup>51</sup> Public disclosure of possible discriminatory ratings should bring about public pressure to change such practises.

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<sup>46</sup> C. DELLAROCAS: Immunizing Online Reputation Reporting Systems Against Unfair Ratings and Discriminatory Behavior. In: *ACM Conference on Electronic Commerce*. 2000. 150–157.; A. WHITBY –A. JØSANG – J. INDULSKA: *Filtering Out Unfair Ratings in Bayesian Reputation Systems*, 2004 available: <https://folk.uio.no/josang/papers/WJ12004-AAMAS.pdf>; C. DELLAROCAS: Mechanisms for coping with unfair ratings and discriminatory behavior in online reputation reporting systems. In: *ICIS '00 Proceedings of the twenty-first international conference on Information systems*. 2000. 520–525.

<sup>47</sup> WHITBY–JØSANG–INDULSKA op. cit. 2.; ROSENBLAT ET AL. op. cit. 13–14.; HEKMAN ET AL.: An Examination of Whether and How Racial and Gender Biases Influence Customer Satisfaction. *Acad. Man. J.*, Vol. 53., No. 2., 258.

<sup>48</sup> ROSENBLAT ET AL. op. cit. 11.

<sup>49</sup> Ibid. 5–13.

<sup>50</sup> Ibid. 12–13.

<sup>51</sup> SCHOENBAUM (2016) op. cit. 16.

### 2.3. Liability of Labour-Based Platforms for Discriminatory Behaviour

Platform-based companies that provide labour as service should be made legally liable as duty holders for observing equal treatment of men and women.<sup>52</sup> Sharing economy firms cannot only monitor whether service recipients treat workers adversely based on a gender bias by negatively rating or by rejecting female or male workers, but could also channel the behaviour of clients/users.<sup>53</sup>

Stone correctly called attention to the fact that the diffuse authority structures and the delegation of managerial decisions to peer groups are not new phenomena, but render it difficult to identify discrimination and make the discriminator legally accountable.<sup>54</sup> In my opinion, the subordinate position of the self-employed from the company constitutes the bases for holding liability. If the company can give orders to the self-employed person, it should be held liable in respect of the equal treatment principle. Algorithms of sharing companies are designed to take clients behaviour into account, which implicitly leads to bias.<sup>55</sup> Clients/users participate in the management through the ratings, however, the decisions are made by platform-based companies. The platform company is responsible for setting up and running the software, so it is obviously in charge of the decisions made in its name. Algorithms actually make statistical discrimination real, when they make decisions based on assumptions how a man or women will behave because of their gender. Firms should be made responsible for considering customers' possibly biased opinion in making decisions.<sup>56</sup> While the discriminatory behaviour occurs by the clients, the platform should prevent it, and eventually should be liable for damages caused by clients/users to the workers. The companies' desire to please their customers involves the consideration and fulfilment of customers' discriminatory preferences.<sup>57</sup> Customers' satisfaction, which often involves the approval of customers' discrimination, makes profit for the companies.<sup>58</sup> In my opinion, the only way to prevent profiting from the support of a discriminatory behaviour is to hold companies liable for discrimination and thus set financial incentives for non-discriminatory behaviour.

In my opinion, firms should be responsible both for the clients' and the platforms' discriminatory behaviour. First, platform-based companies facilitate discrimination by their clients through enabling

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<sup>52</sup> On the debate of the identification of the duty holder in various European states, see: C. BARNARD – A. BLACKHAM: Self-Employment in EU Member States: The Role for Equality Law. European Commission, *European Equality Law Review*, 2015/2. 11.

<sup>53</sup> CALO – ROSENBLAT, op. cit. 1628.; SCHOENBAUM (2016) op. cit. 47.

<sup>54</sup> K. V. W. STONE: *The New Face of Employment Discrimination*. In: FUDGE–OWENS (eds., 2006) op. cit. 243. 246–249.

<sup>55</sup> Anikó HANNÁK – Claudia WAGNER – David GARCIA – Alan MISLOVE – Markus STROHMAIER – Christo WILSON: *Bias in Online Freelance Marketplaces: Evidence from TaskRabbit and Fiverr*. Proceedings of the 20th ACM Conference on Computer-Supported Cooperative Work and Social Computing (CSCW 2017), Portland, OR, February, 2017. 1914.

<sup>56</sup> Also ROSENBLAT ET AL. op. cit. 9.

<sup>57</sup> Wang, *supra* note 40, at L. WANG: When the Customer is King: Employment Discrimination as Customer Service. *Va. J. Soc. Pol'y & L.*, Vol. 23., N. 249. (2016) 253.

<sup>58</sup> L. FULLER – V. SMITH: Consumers' Reports: Management by Customers in a Changing Economy. *Work, Employment & Society*, Vol. 5., No 1. 1991. 2.

them to make discriminatory decisions in the selection, evaluation or payment of workers.<sup>59</sup> Making firms liable for making discriminatory behaviour possible could mean a negligence liability.<sup>60</sup> The introduction of a negligence liability to firms may be difficult in the US antidiscrimination law, which mainly covers intentional discrimination.<sup>61</sup> However, as indicated earlier, this is not the case in the EU law, which focuses on the impact of a measure independently from its intention. The second form of responsibility concerns those measures and decisions the company make based on the clients' biased behaviour. Any managerial decision resting upon discriminatory choices will perpetuate discrimination, but should not hide behind the veil of ignorance. Platform-based companies cannot argue that they have not known the discrimination in ratings of payment, as they have easy access to these data.

The decision of the Court of Justice of the EU on Uber made easier to make platforms liable for discrimination of virtual workers in EU law context.<sup>62</sup> The Court confirmed that the main component of this platform company is transport service and not pure information society service, since the service offered by Uber is more than an intermediation service. As arguments for this decision, the Court stated that Uber exerts decisive influence over the conditions under which that service is provided, for example, by determining the maximum fare. Furthermore, it exercises control over the quality of the vehicles, the drivers and their conduct.<sup>63</sup> This decision implies that similar platform companies such as Uber determine significant terms and conditions of service provision and thus should be responsible for them.

This strong management and supervision of workers does not characterise all platform-based firms and can serve as an indication for the distinction between different kinds of firms. Some firms, particularly asset-based firms such as Airbnb use ratings only as an information provided for the consumers. To the contrary, many labour-based platform firms make use of the ratings as basis for management decisions.<sup>64</sup> In reality, even labour-based platforms are different regarding the project governance.<sup>65</sup> Some platforms just connect workers and clients, others also aggregate similar tasks, while others provide project governance, as well. The European Commission also differentiates in its Agenda between platforms that provide only information and platforms that provide an underlying service. The last version is realized, if the platform has significant influence and control over the

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<sup>59</sup> See BARTLETT–GULATI (2016) op. cit. 249.

<sup>60</sup> As noted by Schoenbaum, see SCHOENBAUM (2017) op. cit. 102–103.; GWU Law School Public Law Research Paper No. 2017-50; GWU Legal Studies Research Paper No. 2017-50.

<sup>61</sup> Schoenbaum mentions this drawback of the proposal, SCHOENBAUM (2017) op. cit. 103.

<sup>62</sup> Court of Justice of the European Union, *Asociación Profesional Élite Taxi v Uber Systems Spain SL*, C-434/15, 20.12.2017.

<sup>63</sup> *Ibid.* para. 35–40.

<sup>64</sup> ROSENBLAT ET AL. op. cit. 9.

<sup>65</sup> Kaganer et al differentiates between four types of platform: see E. KAGANER – E. CARMEL – R. HIRSCHHEIM – T. OLSEN: *Managing the Human Cloud*. *MIT Sloan Management Rev.*, Vol. 54., No. 2., 2013. 23., 25–27. This categorization borrowed also Wilma B. LIEBMAN – Andrew LYUBARSKY: *Crowdworkers, the Law and the Future of Work: The U.S.* In: B. WAAS – W. B. LIEBMAN – A. LYUBARSKY – K. KEZUKA: *Crowdwork – A Comparative Law Perspective*. Frankfurt am Main, Bund Verlag, 2017. 58–78.

actual service provider by setting the terms and conditions of the service provision.<sup>66</sup> The point is, as long as the platform operates the discriminatory software it should be held liable for this practise.

### 3. Conclusion

The first part of this two-pieces paper provided a first evaluation of the implications of new forms of work in the sharing economy for women in general and gender equality more specifically. It called attention to the fact that the existing ratings systems and algorithms are a hotbed of discrimination. Here, we emphasised that platform-based companies should make the design of algorithms and platforms codes transparent, as well as provide a proactive equality management by using equality-enhancing instruments.

The uncertainties around the determination of the legal status of workers make it difficult and often impossible to provide appropriate protection against discrimination in the framework of labour law. Therefore, the article argues for going beyond the boundaries of labour law and suggests that the principle of equal treatment between men and women should be extended to virtual workers, independently from their labour law status. This extension is not unprecedented, but accompanied with privacy concerns. Service provided in the private sphere of the service recipients could constitute an exception from the equal treatment principle, but only regarding the assignment to a specific task. Privacy, intimacy or personal preferences cannot justify discriminatory treatment during or after the performance of the work through low ratings or low payment for gender or racial reasons.

Finally, platform-based companies should be made liable for facilitating the discriminatory behaviour of their clients against virtual workers through biased ratings. They should be also responsible for using biased ratings in the supervision and management of virtual workers. Both measures fulfil the European law definition of discrimination, which neglect the intention, but focuses on the impact of a decision or measure.

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<sup>66</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – *A European agenda for the collaborative economy*, Brussels, 2.6.2016, COM(2016) 356 final, 5–6.