Some thoughts on the social law challenges in the sharing economy from a Belgian perspective

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Outline

- Brief overview of the new provisions on the sharing economy introduced in Belgium in July 2016
- Aim of and reasoning behind the new provisions
- Immediate cause for the new provisions: Uber?
- Brief SWOT analysis of the new provisions
- Some thoughts on the social law challenges in the sharing economy from a Belgian perspective
Brief overview of the new provisions

- Introduction of specific rules on the sharing economy in the Programme Act of 1 July 2016
- Mainly provisions with regard to social law (art. 22-23) and fiscal law (art. 35-43)
Brief overview of the new provisions

- The new regalutory system is primarily based on fiscal law
- Conditions
  - online platform licensed (or organised) by the authorities (conditions infra)
  - services provided only to private persons* (not to companies, SE, ...)
  - gross income from said activities $\leq 5000\,\text{€}/\text{year}$
    - specific rules apply
  - if income from said activities $>5000\,\text{€}/\text{year}$
    - general rules apply
Brief overview of the new provisions

- Different sorts of income lead to different fiscal regimes (general rules)
- With regard to activities:
  - income from professional activities
  - “miscellaneous income”
  - income from real estate (rent, sale, etc)
  - income from normal management of private property
  - etc.
Brief overview of the new provisions

- If the conditions are met, the income will not be qualified as income out of professional activities

- Conditions:
  - income $\leq 5000\text{€}/\text{year}$ (indexed; 2017: +/- 5100€)
  - services only provided by and to private persons*
  - supply and demand exclusively via an online platform
  - said platform is licensed or organised by the federal authorities
  - all sums paid through or via said platform
  - services provided $\gg$ normal professional activities of the provider
Brief overview of the new provisions

• Conditions:
  ✓ services only provided by and to private persons*
    • a professional can make use of this regime if the activities performed differ from his normal professional activities (e.g. a painter preparing lunch)
    • a professional can make use of services provided through this regime if these services will not be used for his professional activity
Brief overview of the new provisions

- If all conditions are met:
  - no qualification as professional income
  - specific fiscal law regime (20% taxes due-50% costs=10%)
  - specific social law regime for social security contributions
    - no qualification as SE service provider
    - no need to register as SE
    - no social security contributions as SE
  - specific regime for VAT
    - no need to pay VAT
    - no need for VAT No
Brief overview of the new provisions

- What if said income > 5000€/year?
  - all income from the services provided is deemed to be professional income and will be taxed as such (legal presumption, subject can prove otherwise)
  - service provider deemed a SE service provider:
    - registration as a SE mandatory
    - affiliation with a social security fund for SE mandatory
    - depending on main activity (employee or SE) person will be considered full or part time SE
    - social security contributions as SE due (>< full or part time SE)
Brief overview of the new provisions

- Royal Decree of 12 January 2017: laying out the conditions for a platform to be licensed
  - platform is organised ‘within’ a company or non-profit organisation established in accordance with the legislation of a MS of the EEA
  - or of a 3rd country with international agreement with Belgium on equal treatment of companies and non profit organisations (NPOs)
  - company or organisation’s seat is established in such MS or 3rd country
Brief overview of the new provisions

- company or NPO is registered at Belgian Crossroads Bank for Enterprises or similar registry in EEA MS or said 3rd country

- conditions for members of the board and of management:
  - has not been prohibited to exercise a profession
  - neither bankrupt, unless discharged from bankruptcy or exempted from debts, nor subject to winding-up proceedings or similar proceedings of foreign law
Brief overview of the new provisions

- company or NPO annually draws report on each service provider containing
  - identity of each person that provided services via the platform
  - date of start and end of activities of said person
  - the gross income from said activities
  - where appropriate, gross income of another nature
  - taxes withheld (taxes on wages)
  - where appropriate, the amount and nature of other sums withheld
Brief overview of the new provisions

Licensed platforms:
- ListMinut [www.listminut.be](http://www.listminut.be)
- FLAVR [www.flavr.be](http://www.flavr.be)
- Conceptz [www.klaariskees.be](http://www.klaariskees.be)
- bpost [www.bringr.be](http://www.bringr.be)
- Heetch [www.heetch.com/be](http://www.heetch.com/be)
- PWIIC [www.pwiic.com](http://www.pwiic.com)
- Menu Next Door Limited [www.menunextdoor.be](http://www.menunextdoor.be)
- Branpont [www.bijlesherent.be](http://www.bijlesherent.be)
- Daoust [www.dajobs.be](http://www.dajobs.be)
- Your private butler [www.dajobs.be](http://www.dajobs.be)
- Uber Portier BV [www.ubereats.com](http://www.ubereats.com)
- MY SHERPA [www.mysherpa.be](http://www.mysherpa.be)
Aim and reasoning

- Specific rules for services (not goods) provided by a non-professional* to another non-professional* through the mediation of an electronic platform that is either licensed or organised by the federal government

- E.g. preparation and delivery or take-away of food organised via online platform (+) versus the mere delivery of food purchased elsewhere (-)
Aim and reasoning

- Cf. parliamentary documents (DOC 54 1875/001 FR/NL)
- Sharing economy = p2p markets, b2b markets and coops
- p2p markets: “mostly (e)platforms where transactions of goods and services are realised between equal parties”
- The platform allows supply and demand to meet
Aim and reasoning

- With regard to income tax: income from transactions via p2p markets -> general rules apply (cf. supra)
  - mere hiring out of goods or real estate: relevant taxes apply
  - provision of capital: ibidem unless capital is used for professional purposes
  - provision of services: does the income qualify as professional income? (nature, frequency of the services provided, level of organisation required, workers employed?, subcontracters hired?, main activity or not?,...)
    - facts
    - professional versus miscellaneous income
Aim and reasoning

- However: government proposed a specific framework for services provided by a non-professional* to another non-professional* via an online platform licensed or organised by the federal state authorities
Aim and reasoning

- To tackle UDW and facilitate monitoring and inspections of services provided via online platforms and the providers thereof
- To stimulate entrepreneurship in the long run
- To allow for private persons to perform limited activities within the sharing economy without excessive administrative burden
- To avoid missing out on the development of the sharing economy
- Legal certainty
- To avoid unfair competition
- To allow citizens to get a feel for a certain profession or activities without taking much entrepreneurial risk
Immediate cause for the new provisions: Uber?

- The study on Uber by the NSSO
  - Commissioned by the State Secretary for the Fight against Social Fraud, Privacy and North Sea
  - August 2015
  - Taxi drivers generally subject to Social Security Scheme for employees - 2 exceptions
    - taxi driver has his own taxi license and owns/leases taxi vehicle (owner/lease)
    - taxi driver is mandataris of a company that owns a taxi license and that owns/leases taxi vehicle
Immediate cause for the new provisions: Uber?

- The study on Uber by the NSSO
  - Q: Is Uber a taxi-service? Are Uber drivers taxi drivers?
  - remark by the NSSO: no actual test performed because NSSO does not have info on Uber drivers
    - during NSSO inspection of Uber Belgium, Uber was not able/willing to provide information on drivers: they referred NSSO to BV Rasier Operations (NL company)
    - Dutch Human Environment and Transport Inspectorate did not reply to information request by NSSO
    - Belgian public prosecutor did not reply/share information
  - NSSO Inspectors cannot use Uber app ’as this could be qualified as “phishing” and incitement’
Immediate cause for the new provisions: Uber?

- The study on Uber by the NSSO
  - Uber is not a taxi service licensed by any of the competent Belgian authorities
  - Uber drivers can most likely not be qualified as employees
  - most taxi drivers in Bxl are SE
  - furthermore, many licensed taxi drivers in Bxl make use of a call centre ~ Uber app
Immediate cause for the new provisions: Uber?

- The study on Uber by the NSSO
  - ‘unfair competition not mainly due to qualification of driver as employee or SE but due to other provisions and regulations applicable to taxi services’
    - nature of the car
    - construction and equipment of the vehicle
    - insurances
    - mandatory medical certificate for licensed taxi driver
    - licenses
    - etc
Immediate cause for the new provisions: Uber?

- The Uber Cases
  - Court of Commerce Brussels 23 September 2015
    - Taxi license needed
  - Court of Commerce 9 June 2016
    - Uber = Taxi service
  - Court of Commerce 16 February 2017
    - System of taxi licences incompatible with article 49 TFEU
Immediate cause for the new provisions: Uber?

- Conclusion of AG Szpunar in case C-434/15 Asociación Profesional Elite TaxivUber Systems Spain SL of 11 May 2017:
  - (1) Article 2(a) of Directive on electronic commerce, read in conjunction with Article 1(2) of Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, must be interpreted as meaning that a service that connects, by means of mobile telephone software, potential passengers with drivers offering individual urban transport on demand, where the provider of the service exerts control over the key conditions governing the supply of transport made within that context, in particular the price, does not constitute an information society service within the meaning of those provisions.
  - (2) Article 58(1) TFEU and Article 2(2)(d) of Directive 2006/123/EC on services in the internal market must be interpreted as meaning that the service described in the preceding point constitutes a transport service for the purposes of those provisions.
Brief SWOT analysis of the new provisions

- **Strengths:**
  - we now have a regulation on online platforms in the sharing economy
  - little administrative burden for service providers
  - very competitive fiscal and social regime
Brief SWOT analysis of the new provisions

- Weaknesses
  - number of licensed platforms
  - cooperation of platforms vital (e.g. information exchange)
  - p2p through platform can become p2p without platform: UDW
  - compatibility with the rest of social and fiscal legislation?
  - when threshold is passed: very little legal certainty!
  - does not regulate the whole of the activities (permits, health and safety, food safety, insurances, …)
  - yet another exceptions regime
Brief SWOT analysis of the new provisions

- **Opportunities**
  - get a view on sharing economy
    - which services provided
    - who provides
    - who makes use of
    - how much money goes round
  - can give sharing economy a boost
  - can provide some extra income
  - can provide introduction to a profession (drive towards SE)
  - etc.
Brief SWOT analysis of the new provisions

- Threats
  - equality and non-discrimination!
  - non-licensed platforms
  - reasoning: why exceptional regime for this kind of activities? why pay normal taxes and social security contributions for other activities?
    - state organised unfair competition?
    - what about other sectors/activities?
    - etc.
Some thoughts on the social law challenges in the sharing economy from a Belgian perspective

- When introducing the proposal, the government stated that the conditions are strict in order to maintain a level playing field and to avoid unfair competition between services provided through an online platform and within the framework of the specific provisions and professional service providers – cf supra question about state organised unfair competition.

- Belgian supreme administrative court: the difference will have to be very well motivated to pass the test of equality and non-discrimination.

- Yet another specific regime in social law: instead of simplification of social and fiscal law, yet another exception.
Some thoughts on the social law challenges in the sharing economy from a Belgian perspective

- Sharing economy through online platform is a form of triangular (labour) relations (at least 3 parties involved)
  - furthermore: the new provisions insist on the triangularity of the relations
  - e.g. Deliveroo: making use of the specific regulations on artists via so called Social Bureaus for Artists (payrolling)
  - if introducing yet another set of specific provisions, why not introduce ‘portage salarial’?
  - or, as does Deliveroo, open up the use of the rules for artists to other activities?
  - quid qualification of the electronic platform?
    - invariable of the nature of the services provided?
    - see Conclusion AG Szpunar in C-434/15
Some thoughts on the social law challenges in the sharing economy from a Belgian perspective

- Remaining questions:
  - gross income from services provided via platform > 5000€/year
    - retroactive qualification as a SE
    - what about general rules in such cases?
      - fines
      - interests
      - ...
  - what about the compatibility of these provisions with other legislations
    - on the hiring-out of workers (beware of triangular labour relations)
    - the Act on Employment Relationships
    - consumer protection
    - competition law (internet: very often the winner takes it all)
    - e-commerce
    - ...

IRIS international research institute on social fraud
Some thoughts on the social law challenges in the sharing economy from a Belgian perspective

- EC definition of UDW COM(1998) 219 final:
  - “any paid activities that are lawful as regards their nature but not declared to the public authorities, bearing in mind that differences in the regulatory systems of MSs must be taken into account”

- Quid platforms and service providers that do not declare the paid activities?
  - note: definition mentions paid activities, not income

- Quid Uber Greyball?

- Quid Uber and self driving cars/sharing economy and automation?
  - all social law problems solved?
Some thoughts on the social law challenges in the sharing economy from a Belgian perspective

- History of sharing (economy) and history of the welfare state
- History of online file-sharing at early breakthrough of the internet
  - no loss of quality >> recording a vinyl album on a K7
  - everything seemed for free
  - but was it? limewire, napster, kaza, etc
  - eventually: piratebay
  - effect on prices for cds, dvds
  - eventually: spotify, online music stores etc.
    - many artists unhappy
    - but remember TAFNAP
Some thoughts on the social law challenges in the sharing economy from a Belgian perspective

- Lessons learned from gangmasters hiring out workers second half of 20th century and subcontracting/supply chains in first decades of 21st century?
- Sharing economy: when the low cost model meets the information society?
- Sharing economy: more about sharing or more about economy?
  - what’s in a name versus nomen est omen?
  - might give economy in certain sectors a boost
  - might resolve market failures
  - regulated markets are not ipso facto market failures: sometimes there can be good reasons for the regulation thereof (e.g. market for medication)
  - what is good for the consumer in the short run is not always good for the consumer in the long run
  - compatibility with FMo workers and FMo services?
  - spread precarious employment?
    - on call? zero hours? etc.
    - (minimum) income?
    - qualification SE/employee and collective bargaining? (see also C-413/13, 4 December 2014, FNV Kunsten Informatie en Media v Staat der Nederlanden)
    - does the flexibility work both ways (e.g. Deliveroo) and does it provide security for all parties?
- digital market=global market (e.g. provision of ICT services)
- Sharing economy, digitisation and automation: how to keep the welfare state model viable in an era of (digital) globalisation and automation?
  - globally ‘share’ the world’s riches equitably among people and within populations or ‘winner takes it all’ or...?
Thank you for your attention! Questions?

A blast from the past?

Isaac Asimov’s Three Laws of Robotics

1. A robot may not injure a human being or, through inaction, allow a human being to come to harm.
2. A robot must obey orders given it by human beings except where such orders would conflict with the First Law.
3. A robot must protect its own existence as long as such protection does not conflict with the First or Second Law”.

Isaac Asimov, Runaround, Astounding Science Fiction, 1942

“[Cybernation revolution] results in a system of almost unlimited productive capacity which requires progressively less human labor.

Cybernation is already reorganising the economic and social system to meet its own needs. [. . . ]

It is essential to recognise that the traditional link between jobs and incomes is being broken”.

(Ad Hoc Committee on the Triple Revolution, 1964: 5; cited in: Jan Drahokoupil and Maria Jepsen; The digital economy and its implications for labour. 1. The platform economy, Transfer 2017, Vol. 23(2), 103)