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EMPLOYMENT USING INFORMATION TECHNOLOGY – SELF-EMPLOYMENT OR EMPLOYMENT[1]

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Abstract: In the study, the authors show that with the spread of informatics, many new forms of work and entrepreneurship which move at the border of enterprise, self-employment and employment have emerged and appeared in the world of work through digital platforms. The study analyzes which of these forms are more entrepreneurial and which are more employment like.

Keywords: *self-employment, dependent work, freelance work, casual work, long-term entrepreneurship / assignment, atypical employment, instruction and control by the employer*

The world of work, current employment and entrepreneurial relationships are being significantly transformed by informatics and robotics. With robotics, a significant number of workers will lose their jobs, however, with information technology, the number of jobs and job opportunities may increase.[2] Since the lack of opportunities for employment, entrepreneurship and work, i.e. unemployment and the associated loss of income, can lead to serious tensions beyond certain social dimensions, it does matter whether public employment and economic policy can effectively address this issue. This issue seems to be successfully addressed by the use of information technology and the new forms of employment and entrepreneurship that have emerged as a result of the use of IT platforms. It is therefore appropriate to deal with platform entrepreneurship and employment.

In this form of employment and work, the determination of the performance of tasks and the identity of those who require it, and the bringing of the consumer requesting the service, i.e. the customer, with the legal entity prepared to provide the service, the mediation takes place via a digital platform, online, using information technology. There is a fairly large amount of legal sociological and legal dogmatic literature on digital employment through platform mediation, both foreign and domestic. Two comprehensive dissertations on foreign literature of mainly Anglo-Saxon origin: Tamás Gyulavari's academic doctoral dissertation, already in manu-

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[2] HAJDU, Jozsef: The future of work. The impact of robotics on the labor market. In: *Law, information, competitiveness.*; GYULAVARI, Tamas: Uber drivers and their peers: employees or self-employed? *Journal of Law*, No. 2019/3, 104–108.

script, but not published, and Ildiko Racz's monograph entitled "The Impact of Digitalization on Some Basic Institutions of Labor Law", awaiting her doctoral defence, which describes and elaborates in detail the related foreign literature.[3] In addition, several other studies deal with legal transactions established through results-oriented and service-providing digital platforms from a taxonomic-dogmatic perspective.[4] By adopting foreign legal literature, the Hungarian literature here distinguishes two types of these legal transactions. One of them is the so-called "crowdwork", the other is the application-based work.

The authors point out that in the case of crowdwork, the tasks are performed exclusively through an online platform. The platform or its operator sets a task and the person who solves it, i.e. provides the result expected by the platform, is remunerated, the amount of which he communicates in advance. The platform may reward only one of the best solvers, but it may reward several solvers, too. Therefore, it is a unilateral tender-type legal transaction aimed at presenting a result that can be achieved through work, and which was treated as a unilateral transaction related to work by the Hungarian private law practice and literature based on customary law before Act IV of the 1959 on the Civil Code, and which was named an award after the codification of the Civil Code of 1959 and later the Civil Code of 2012 replacing that of 1959.[5] Consequently, Hungarian case law should deal with crowdwork-type legal transactions as an award according to Article 6:228 of the Civil Code of 2012 (new Civil Code).

The situation is different for application-based work. Application-based work is a three-sided legal transaction, where a customer who needs a certain service electronically searches for an online platform in order to bring him together with a person

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[3] Published parts of GYULAVARI's dissertation: Internet work in Hungarian law – Regulation instead of prohibition? *Pro Futuro*, 2018/3; The European Court and the Gordian knot: the Uber app or the taxi company? *Labor Law*, 2018/3; Making work occasional and regulating casual work. *Hungarian Labour Law, E-magazine*, 2018/1; Hakni economy on the horizon: the concept and peculiarities of Internet work. *Iustum Aequum Salutare*, 2019/1; Uber drivers and their peers: employees or self-employed? *Journal of Law*, 2019/2; RACZ, Ildiko: *The Impact of Digitization on Some Basic Institutions of Labour Law*. Gaspar Karolyi Reformed University, Faculty of Law, Doctoral School, Version prepared for workshop discussion, Budapest, 2020.

[4] KUN, Attila: Labor law and digitalisation – systemic challenges and rudimentary EU responses. In: PAL, L. – PETROVICS, Z. (eds.): *Visegrad 15.0 – Edited presentations of the Hungarian labour law conference*. Wolters Kluwer, Budapest, 218; SZEKHELYI, B. Reka: Work provided through digital platforms. *Labour law*, 2019, No. III, 40–45.

[5] VINCZENTI, Gusztav: Legal status of work. Employment and service contract. In: SZLADITS, Karoly (Ed-in-Chief): *Hungarian Private Law*. Volume IV, Special Part of Contract Law. Karoly Grill Publishing House, Budapest, 1942, 659–662; Draft of Private Law of 1928. Articles 1607–1611. + K. 457 E.H. (In: Terffy); Act IV of 1959: IV. Article 592. § (The Labour Code of the Hungarian People's Republic, Standard text and justification, Economic and Legal Publishing House, Budapest, 1959), Act V of 2013 (the new Labour Code) Article 6: 588 §.

who can perform the desired service. In this tripartite legal transaction, the platform, like a broker, acts as an intermediary, who, in an online message to the customer requesting a service online, also acquires a person who undertakes to perform the desired service. From a legal dogmatic point of view, this three-party contract of the "facere" type is a brokerage transaction, in the words of the new Civil Code, an intermediary transaction in which the platform or its operator undertakes to bring the customer together with a person who is able to perform the desired service. A formal professional qualification is not a prerequisite. Anyone can apply to an intermediary platform for the mediation of a service who, despite being secular, is able to perform a service related to a trade and has the necessary hand tools, other work tools, household appliances, means of transport suitable for transporting persons or goods, but is not registered in the official register for this activity as an entrepreneur engaged in a commercial activity. A "registration gate" is opened by the platform for those who request registration from an intermediary platform for the purpose of earning such ancillary income. This is because the platform mediates from among the 'amateur' entrepreneurs in the registration gates in order to perform the requested task for the customers who request it.

The person performing the task included in the order, the "uber", receives the remuneration for his work not from the customer but from the intermediary platform, which pays the "platform worker" after deducting its own costs and benefits. The platform worker is usually self-employed, as he is independent of the platform in terms of employment law. The reason for this is that he has no fixed working hours and, as he is not in a permanent employment relationship with the platform, he can also cancel the platform's job placement addressed to. However, if such a cancellation occurs frequently on his part, or if he often does not respond to the platform request on his own computer or mobile phone, there is a risk that the platform operator will "deactivate" his gate, which essentially means the termination of the cooperation relationship. As it seems so far, there is no fixed termination, which applies to the platform worker, too.

The activity of the platform is essentially an intermediary activity for remuneration according to the rules of civil law.[6] In contrast, the platform worker is also a self-employed person in accordance with civil law as a general rule. At the same time, however, since the platform can call him to work at any time, it is on the part of the platform worker to be available to the platform at any time for his own benefit. This is also an informal expectation from side of the platform. This commitment to co-operation is a loos, permanently and continuously recurring civil law contractor's mediation and acceptance cooperation relationship, similar to when someone turns to the same lawyer for all their cases or always has their clothes made with the same tailor. However, a different trend is emerging as platforms are placing more and more expectations on platform workers. Indeed, the literature shows that platforms prohibit platform workers from establishing a direct relationship with the customer, and

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[6] The Hungarian Labour Code of 1928 (Articles 1602–1606) and VINCZENTI: op. cit. 654–659 uses the terminology of 'broker'.

moreover, they stipulate how the service provider must behave towards customers more than once, which is especially typical for the passenger transport platforms. Following foreign authors, the Hungarian literature also points out that platforms often require "uber" drivers to offer the passenger sweets and/or bottled mineral water and to put the platform's name and contact details on the car, moreover, some platforms even prescribe their "uber" drivers what they have to wear when fulfilling the order. The platforms can and do check the fulfillment of all this electronically on the march.[7]

As a result of these constraints, the autonomy and independence of 'uber' drivers and other platform workers are significantly limited. Although the platform worker, unlike the permanent employee, can entrust the work to someone else indefinitely, he does not make use of this "deputy" because he can switch him off and take his place. Therefore, most "de iure" self-employed platform workers are not "de facto" self-employed, but a worker-like person, i.e. self-employed, whose income from their work is often below the minimum wage, as the literature shows.[8] In addition, they are completely vulnerable to recall, and the platform does not pay for call waiting and quasi downtime, however, it stipulates that he cannot be available or take up work elsewhere. This is existentially particularly detrimental for all those whose main source of income is platform work. It is no coincidence that "uber" workers also try to provide themselves with trade union and collective contractual protection, which is also the subject of Ildikó Racz's monograph,[9] and where collective labor institutions would be beneficial.[10]

After everything we have described so far, it is clear that contracts on digital platforms for the electronic presentation of certain work results are of a civil law nature rather than a labor law nature in terms of their origin and legal dogmatic structure. The call for proposals related to the award, the "crowdwork", has clearly civil law content. In contrast, in the case of "work on demand via aps", which includes other application-based work, the platform intermediary activity is legal dogmatically identical to the intermediary contract regulated in the Civil Code. At the same time, the call for work and the referral to the client have similarities with secondment and posting, i.e. delegation and thus the hiring of employees, which means that in the event of a dispute these different legal elements must be taken into account in the assessment. If this can only be done by using analogy legis with the extension beyond fields of law, this can be done without any difficulty, since civil law and labor law are two similar legal fields. However, it would be best if individual and collective labor law institutions were part of civil law, as rejected in both the previous and the current Civil Code.[11]

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[7] RACZ: op. cit. 55–58.

[8] RÁCZ: op. cit. 53.

[9] RACZ, op. cit. 54–55. and 95.

[10] PRUGBERGER, Tamas: The legal status of the senior employee in the developed capitalist states and in Hungary in the light of the legal comparison. In: PAL, Lajos (ed.): Legal status and responsibilities of the senior official (Study Volume). HVG-Orac, 2017, 217–214.

[11] Presentation of debates on the incorporation of collective labour law into industrial law and civil code before 1945: BERKE, Gyula: The collective agreement in Hungarian labour law. *Pecs Labour Law Bulletins*, Monographs 2, pp. 11–67.; Argued in favour of the incorporation of 'individual and collective labour law' into Act 5 of 2013, the new Civil

A central problem in work through a digital platform is the protection of the social and existential interests of those who perform such work, which is increasingly gaining attention. This aspect is also important in the case of "crowdwork" in that the application – award winning type task solution would require the exact specification of the quasi-tender conditions, i.e. what the remuneration conditions are, how many fees and in what amount will be paid to those who fulfill the tender conditions. If this is not done, or if the tender is not clear on these issues, the court shall decide and determine the amount of compensation according to market rates in proportion to the difficulty and duration of the work performed.

In the case of "work on demand via apps" – since it is a contract of employment – there may be relevance under employment law in addition to civil law, which may be an entrepreneurship or an assignment (e.g. administration). Tamás Gyulavari classifies that relationship in his study "Uber and their peers: employees or self-employed" as a civil law undertaking or as an employment relationship with an employment law nature, depending on the extent to which the platform employee used by the platform to perform the task is dependent on the platform. If the dependence on the platform is similar to the employee's dependence on the employer, Gyulavari tends to classify it as an atypical employment relationship, but if the situation is a kind of "gray zone", he tends to treat it as an enterprise.[12] At the same time, he points out that mainly in Australia jobseekers are first employed in the same way as simple employment and casual workers, and if such employment takes place more than once on call and the caller is satisfied with the service based on customer feedback, the series of assignments given to the same person may become permanent.[13] In countries where hiring out workers is a common form, the transformation into an employment relationship can take place into the direction of hiring out workers without further ado. Based on all this, and taking into account that Gyulavari equates the status of the self-employed person with that of the entrepreneur and not with that of the employee, we interpret the "uber" work, if the worker's dependence on the platform is insignificant or cooperative in terms of civil law, as a work relationship, which is a combination of an entrepreneurial and agency contract. According to Gyulavari, the same also applies when the dependency is greater, but the platform worker has

Code after 1990: ZLINSZKY, Janos: Proposal to regulate the private employer's contract in the new Civil Code. In: *Civil codification* (Pjk.), No. 2008/1; KISS, György: The new Civil Code and labour law regulations, in particular the individual employment contract. Pjk. No. 2000/1; PRUGBERGER, Tamas: The new Civil Code and labour law regulations, in particular individual and collective employment contracts. Pjk. No. 2000/2; PRUGBERGER, Tamas: Comments on the new Civil Code to the chapter on certain contracts due to the lack of contracts related to services. Pjk. No. 2008/1; PRUGBERGER, Tamas – SZALMA, Jozsef: The employment contract and the new Civil Code. *Economy and Law*, Jozsef SZALMA: Employment contracts and the new Civil Code. *Economy and Law*, No. 10/2012.

[12] GYULAVARI (2019): op. cit. 108–111.

[13] GYULAVARI, Tamas: The European Court of Justice and the Gordian knot: the Uber app or the taxi company? *Labour law*, 2018/3, 8–12.

some room for maneuver vis-à-vis the platform. However, if the dependence on the platform becomes similar to a dependent employment relationship, Gyulavari classifies “work on demand via aps” as atypical employment relationships.[14]

Ildiko Racz’s perception differs from the above described by examining in detail the degree of independence and dependence of the platform worker on the platform; she thinks that the platform legal relationship is related to the platform and also treats the work mediated by the platform as an atypical employment relationship.[15] As for us, we share Racz’s view, pointing out that according to the Anglo-Saxon European and transatlantic legal practice – as described by both Gyulavari and Racz – platform work is treated as an employment relationship by trade unions and partly by judicial practice and social protection is provided for platform workers. Based on this approach, platform work is regarded as an employment relationship by law in California.[16]

In her Ph.D. dissertation, Ildiko Racz outlines four resolutions for solutions based on foreign literature: 1) classification as an enterprise, 2) treatment of an employment contract as a “sham” agreement (as if it were an employment contract, though it is not), 3) universal labor guarantees in all cases, 4) recognition of an atypical employment model in all cases, i.e. both in an enterprise, and in self-employment.[17] As for us, we take a stand in favor of the latter by saying that whoever works with a platform for a longer period of time, e.g. enter into a contract for a period of half a year and undertake to perform a specified number of tasks per month or per week for its platform, should receive a minimum wage of at least half of the unemployment benefit during the period of availability between calls. An atypical classification as an employment contract would also be an important guarantee, because in this case there would be a written obligation to enter into an employment contract on the part of the platform. Following Prasl and Risak, Szekhelyi has a similar view, when he says that the vast majority of the tasks to be performed by the employer are of an employer like. This has led to the development of a functional employer theory, which is also accepted by Szekhelyi.[18]

Now let us have a look at how platform contracts appeared, developed and were applied in the Hungarian economic life. Similar to Austria, Slovakia, Poland and Romania, Hungary developed the so-called “uber” passenger transport, which appeared in Hungary as an entrepreneurial contract. However, if a freight taxi driver undertook the transport of goods or furniture via platform mediation, a contract of carriage was concluded digitally. It could not be transformed into an employment contract due to the shortness of time, since the Hungarian State banned “uber” passenger and freight transport due to the united protest of the taxi companies. Therefore, there was no time for the development of a digital contract mediation platform in the companies.

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[14] See GYULAVARI (2019): op. cit. 11.

[15] SZEKHELYI: op. cit. 41–42.

[16] RÁCZ: op. cit. 64–65.

[17] RACZ: op. cit. 64–65.

[18] RACZ: op. cit 61.

The process was as follows. Many people, through their occupations, several in the form of employment, others in the form of entrepreneurship, assignment or free-lance employment, such as material purchasers, insurance and other salesmen, were involved in cases where the agent did not receive reimbursement of car use and travel expenses from the company assigning him, and even if he did, he still placed an advertisement on the Internet, indicating the date on which he was traveling and when he would leave, and how long one could also join him via the electronic network.[19] Similar to the crowdwork discussed earlier, the person posted an offer on the network, the duration of which was not chargeable, but related to the offer or announcement of the provision of a service. Here, the owner of the digital platform announced the possibility of a passenger transport service or freight transport activity to be performed by him. It advertised that in addition to its own goods, it is possible to transport the goods of one or more persons.[20] The latter is similar to black transport in terms of the subject matter and content of the service, but it differs from it in that "black transport" is completely illegal, as the main transport activity is in the framework of a service or employment relationship. Such an activity is therefore not advertised on the Internet, because it is almost certain that a "fallout" will occur. Since advertising on the Internet will definitely come to the attention of the employer sooner or later.[21] As a legal consequence, the employer can legally apply for immediate dismissal, as this constitutes a serious breach of contract. In such a case, there is a risk that, in the event of an accident on the road and for which the driver employed is responsible, the person who traveled with him or the person in whose favor the gray transport took place may bring an action for damages against the driver's employer.

Such a problem may also arise in the case of passenger transport if the employee or civil/public servant travels with his own car on a duty journey which is considered as working time and for which he receives remuneration and salary. In such cases, the person can only undertake the carriage of passengers advertised via a digital platform for the purpose of supplementing his income with the knowledge and consent of his employer. This was permitted based on fair treatment since such travel was often necessary for the person to reach his or her workplace. The time of such travel was classified by the European Court of Justice as standby, and in Hungary in case of standby only 20% of the basic salary is still paid, despite the fact that the European Court of Justice took legal action against employers or their associations initiated by employees in three cases for the workers' protection, and the European Curia ruled that on-call time and standby should be considered as normal working hours.[22] Accordingly, Spain and Germany, which were involved in these lawsuits, laid down the normative requirement that both employees and civil servants should be fully paid for standby and on-call duty, first by means of a decision in principle in the Supreme

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[19] SZEKHELYI: op. cit 45.
[20] Based on the advertisements we could see on the Internet.
[21] Authors' information received from journal editors-in-chief and journalists.
[22] See previous note.

Judicial Decision Forum and then by an amendment to the law.[23] In essence, the Member States of the old economic community in the western part of the European Union have adopted the US's solution of "to portal at portal", according to which whole wages/salaries defined by the collective agreement and the company-work schedule implemented by the works agreement are due for the employees while they stay at work regardless of whether the employee of the given company and/or public institution is on duty or on call or is doing work at his/her workplace according to the order of the employer. In Hungary, on the other hand, in cases of standby and on-call – thanks to the interpretation given by the former President of the Supreme Court's Labor Chamber –, the government is still not obliged to increase wages in accordance with the "to portal at portal" Act, since the European Court of Justice ruled that standby and on-call time should be regarded as normal working time, but only with regard to working hours; the decision did not regulate payment.[24] Therefore, it is legal to pay less on standby and on-call time, i.e. 20% or 40% of the basic salary. That this is not the case is indicated by the common article of Peter Sipka and Marton Zaccaria in the Journal of Law[25], the writings of Marton Leo Zaccaria in the Miskolc Law Review and Gabor T. Fodor in the theoretical journal of the Faculty of Law of the Peter Pazmany Catholic University[26], and Tamas Prugberger's studies on the fact that if the employer closed the company's branches in the countryside, where employees and employees still live[27], i.e. if workers and civil/public servants have to travel to the city centre for materials, data or briefings before starting work, the associated travel time should be considered as standby and the full payment previously required for standby should be paid for the travel time.[28] As a result, feedback shows that employees and civil servants advertise passenger transportation through a digital platform by paying a service fee only if their trip is not paid for by their employer. This is most often the case for travel to and from work by car. In most cases, self-employed persons undertake passenger transport for a fee in a similar situation.

Essentially, the system of digital platform mediation developed from this bottom-up system and its further development. Some platform owners started to act as intermediaries with their digital platform as their main or secondary occupation, mainly

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[23] CJEU, 3rd October 2000, C-303/98, ECLI:EU:C:2000:528, in the Case of *(Simap Case)*; 9th September 2003, C-151/02, ECLI:EU:C:2003:437 *(Jaeger Case).*

[24] See previous note.

[25] RADNAY, Jozsef: Another foreign decision on the calculation of working time exceeding 48 hours a week. *Labor Review*, No. 2006/7–8, 89–90.

[26] SIPKA, Peter – ZACCARIA, Marton Leo: Do you work and rest? Extension of the concept of working time following a new judgment of the Commission of the European Union, taking into account the Hungarian judicial practice. *Journal of Law*, No. 5, 2016, 449–457.

[27] ZACCARIA, Marton Leo: Conceptual changes in relation to working time in the new Labour Code. *Miskolc Legal Review*, No. 2013/1, 130–142; FODOR, Gabor T.: The Labour Code on the compliance of working and rest time regulations with EU law. *Hungarian Labour Law. E-journal*. No. 2016/2, 21–36.

[28] PRUGBERGER, Tamas: Judging the new domestic regulation of working time and leave from the point of view of employee's interests. *Pro Futuro*, No. 2017/2, 31–47.

in the passenger and freight transport line. They placed advertisements in their circle of acquaintances addressing those who knew that they had a car and were willing to undertake passenger or freight transport with it as their main activity or secondary occupation. If the platform owner was able to organize a business group for such passenger and freight transport, the platform owner started to advertise the platform to bring the customer together with the service provider. This is how the "uber" service was established in the field of passenger and freight transport in Hungary, too. “Uber” passenger platform companies in Western European states were able to build an entire federal network system, which was very much needed to protect their interests and operational capabilities against “taxi” companies. This is because taxi drivers and “taxi” companies do not unduly see competition in “uber” passenger and freight transport. “Taxi companies” engage taxi drivers who transport a person and/or goods in a taxi company’s car, as employed or self-employed, on a permanent basis, or often as subcontractors. In these cases, the taxi company or the headquarters of the “taxi company” provides dispatching services. It picks up orders and immediately forwards them to one of the drivers operating the car. It does the same when drivers, as self-employed, provide “taxi” services in their own car. In this case, however, the drivers receive the assignment from the main contractor dispatcher service. It picks up the order and the dispatcher service directs the taxi that is currently available to the customer. In essence, the “uber” platform, a digital platform owner specializing in passenger and small freight transport, does the same for a much cheaper transport and freight rate than taxi companies.

The “uber” passenger and freight transport system began to spread in Hungary with incredible speed. In almost all cases, companies undertaking passenger and freight transport performed their own passenger and freight transport with their own cars, mostly on a self-employed basis. The fee for the service was communicated by the platforms to the customers. Digital platform chains for passenger and freight transport could not develop in Hungary, in contrast to the “uber” platform systems in Western Europe and the United States, because they only operated for a short time, as taxi drivers and taxi companies’ advocacy organisations were able to achieve that the government stopped the “uber” transport of passengers and goods. However, this shutdown was unfortunate insofar as some taxi companies and individual taxi drivers have formed an informal cartel on certain busy roads, especially those used for taxi passenger transport and have seized roads not allowing there a taxi driver who does not belong to them. Such an informal cartel company dominates Ferihegy Airport, too. By forming a cohesive closed community, they can illegally raise the price of their services by using a fixed price as a basic service. The uber application, with its speed and semi-official nature, could contribute to breaking down the intertwined private taxi rule at the airport.

Because of the ban on uber, the Hungarian digital platform intermediary network is limited to cover childcare of a temporary nature to a greater extent in cases where parents need half-day or multi-hour childcare because they would like to go to the theater or to a concert or just to go and visit friends. Similarly, digital platform mediation in the field of cleaning has appeared since economic companies and private

households are increasingly demanding such services from platforms in Hungary. As these two areas, childcare and cleaning, as well as small-scale repair and installation needs for households, have not been covered in Hungary, digital platform mediation contracts will move from the area of passenger and freight transport to these areas, since these areas are considered as an "economic" gap. The situation is partly similar in Western European states. With this in mind, we can state that digital platform mediation has a role to play in meeting consumers' needs where there is a shortage of legal, industrialized services. The importance of digital platform services as a result of the government's family policy related to the support of large families is rising, since households will need more and more different services, tools and other household appliances that are in short supply, especially both the builder and those who order building services need technical equipment when building houses, and later on families will need services for correcting errors. In doing so, both crowdwork and "work on demand via aps" can be a major help in quickly bridging the current industrial and material shortages, as well as technical parts, tools and other shortages (e.g. building materials).

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