The platform economy and social law: Key issues in comparative perspective

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Edited by
Isabelle Daugareilh, Christophe Degryse and Philippe Pochet

Working Paper 2019.10

etui.

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european trade union institute

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Foreword

Isabelle Daugareilh, Christophe Degryse and Philippe Pochet

The topic of the platform economy and its social effects has been the subject of ongoing academic interest and social debate for many years now. Despite the fact that numerous studies have been published, the subject remains difficult to grasp and contextualise due to a lack of accurate and reliable data – in particular in terms of the sector's economic weight and volume of employment. A further difficulty is that the platform economy is a generic term covering many different business models.

For several years now, the European Trade Union Institute (ETUI) has been focusing its research on the digitalisation of the economy and on the platform economy, mainly from a work and employment perspective. What working conditions are platform workers subjected to, how are they trying to organise, what rights do they have, what can they do to uphold them?

For its part, Bordeaux University's Centre for Comparative Labour and Social Security Law (COMPTRASEC) held a European workshop in November 2018 dedicated to a comparative legal approach to the platform economy and the questions it raises in terms of social legislation. Ten countries (Austria, Belgium, France, Italy, the Netherlands, Romania, Spain, Switzerland, the United Kingdom and the United States) representing a wide variety of legal traditions and faced with different levels of digitalisation of the economy were analysed by legal experts for labour and social security affairs: what are the legal conflicts arising from this new business model, how is national jurisprudence evolving, how are the respective players adapting their strategies?

This legal perspective reveals that the platforms are trying to use the gaps and ambiguities in social legislation to arrive at an interpretation in which their business model abrogates all social responsibility towards those working for them. Various court rulings seek to enforce this legislation or instead question the very definition of a worker and an employer. These cases brought to the courts by those involved (very often collective cases) in an attempt to redress the balance of power mean that legislation is set to play a role in renewing the social contract.

The work done in parallel by the ETUI and Comptrasec was destined to merge at some stage. This has since happened, with this publication the result thereof. As readers will see, this project complements the legal approach with a general analysis from a historical perspective, contextualising the evolution of

industrial relations in light of technological developments[1]. This complementary approach enables us to move on from the sterile and often simplistic debates over such questions as: "are robots going to steal our jobs?"; "Are digital platforms on the verge of destroying our social models?"

As such, neither robots nor platforms pose such threats. Looked at from a social perspective, technology cannot be analysed on its own. This always has to be done in conjunction with the business model that uses it. The issue at stake is thus how these technologies are being used by certain business models. This merits a wider debate, to which this publication aims to contribute. This debate needs to be constructive, not just focusing on a certain technology, but also on how it is being used by those managing it and on the threats it poses to society at large. This is also a field necessitating laws, as laws can stake the boundaries of the context in which innovations develop.

The main feature of this publication lies in this complementary approach. The social and legal questions posed by the platformisation of the economy are very similar to those posed by the social transformations of past industrial revolutions; transformations which served as a lever for bygone institutions to establish, step by step, the social models we now enjoy. What is at stake here is the emergence of a renewed social contract. We hope that this novel approach will help readers to better identify the challenges and to highlight the important role of the actors involved.

1. It is not by chance that our two institutions both belong to the international CRIMT project aimed at taking stock of, and as far as possible comparing, institutional innovations in different fields.

Introduction

Christophe Degryse[2]

The recent emergence of the platform economy, symbolised in Europe by the two frontrunners Uber and Deliveroo, is reshaping business and the way it is conducted. As often seen in similar reconfigurations, a certain fuzziness surrounds this emerging business model and its potential impacts on the economy and labour markets. But what exactly is a digital platform, one of the most decisive technology-driven developments in recent times? And how is it set to turn upside-down the economic and social world as we currently know it?

In the first section, we will be looking at the link between technological innovation, the transformation of business (and management) models and the evolution of work. While it is obviously not possible to go through the whole history of technological progress and its effects on companies and employment in general in just a few pages, we can take certain points in history to illustrate the historical debates on the transformation of employment in the context of the various industrial revolutions. In doing so, we hypothesise that these debates had certain points in common with today's debates, reports, studies and conferences on the "future of work", the "effects of robotisation", "uberisation" and "digital transformation". A certain common denominator can be seen in the use made of new technologies by the business world, leading us to think that their impacts on labour are predetermined. However, it is above all the economic and industrial usages by companies in a competition context which are predetermined. This historical perspective allows us to identify certain major shifts in business models, culminating in the emergence of the platform economy with its potential – in the view of several authors – to eliminate companies in their current form. A controversial hypothesis, but one reflecting a certain trend common to this new business model, is that its adherents are quitting the field of social relations – built around the traditional company – and positioning themselves directly between the hierarchical firm and the market. In such a "Brave New World", what will be the fate of the social models shaped around the traditional company and its relationship to its workers?

Attempting to answer this question in the second section, we will try to put together the jigsaw puzzle using a comparative legal approach proposed by the University of Bordeaux (Comptrasec) for studying the platform economy, work,

2. The author would like to thank Gérard Valenduc, Ronald Janssen, Philippe Pochet and Laurent Wartel for their comments and the fruitful discussions on a previous version of this text. The author assumes sole responsibility for any remaining errors.

employment and organisations[3]. This second section summarises the contributions of the many authors to the European workshops held by Comptrasec[4] , outlining a striking landscape depicting the legal confrontation between digital platforms on the one hand and social legislation on the other. Taking place in different forms in different countries, this confrontation is illustrated by our case study countries (Austria, Belgium, France, Italy, the Netherlands, Romania, Spain, Switzerland, the United Kingdom and the United States), showing how jurisdictions and social organisations are trying to oppose this social dereliction.

Looking first at **Austria**, Günther Löschnigg shows that new forms of work associated with platforms are questioning the traditional binary view of employment – whether a worker is employed or self-employed. Is this old view suited to understanding these new forms of work? Or do we need to start thinking about extending existing legislation on home-based work, or about adapting the legislation on temporary agency work? While there are many paths worthy of exploration, any path taken needs to come up with a response to the organised irresponsibility of employers in these new business models, threatening the traditional Austrian system of collective labour relations.

Céline Wattecamps shows that the debates in **Belgium** are questioning not just the social status of platform workers, but also the role of these platforms as intermediaries and the application of ILO norms with regard to fundamental rights. However, the Belgian government has decided to exempt, up to a certain threshold, the income deriving from a service activity via an approved platform, which some say is tantamount to legalising undeclared work. As for the unions, they have come up with a few tentative initiatives to organise platform workers. By contrast, the SMart cooperative has established a clear presence in this digital field, not without engendering tensions with the unions.

Adopted in **France** in 2016, the El Khomri Act is intended to specifically regulate this form of employment. As explained by Isabelle Daugareilh, this new legislative approach to social security is based on a platform's social responsibility and not on its legal responsibility as an employer. Above all, it does away with the requirements for platform workers to take out private insurance against work-related accidents and occupational diseases. As regards labour law, the Act equates platform workers with self-employed workers,

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3. Organised by Comptrasec on 29-30 November 2018, this European workshop had as its title "The platform economy: work, employment and organisations. Legal perspectives and a comparative approach" (http://comptrasec.u-bordeaux.fr/).

4. Their full contributions are to appear in *Comparative labor law and policy journal*, n°42-3, (December 2019/January 2020). The following authors contributed to the second section of this Working Paper: Günther Löschnigg (U. Gratz, Austria), Céline Wattecamps (UCLouvain, Belgium), Miguel Rodríguez-Piñero Royo (U. Seville, Spain), Kieran Van den Bergh (Comptrasec, U. Bordeaux, United States), Isabelle Daugareilh (Comptrasec, U. Bordeaux, France), Silvia Borelli (U. Ferrara, Italy), Nicola Gundt (U. Maastricht, Netherlands), Felicia Roşioru (U. Bucharest, Romania), Luke Mason (U. Birmingham, UK), Jean-Philippe Dunand and Pascal Mahon (U. Neuchâtel, Switzerland). I would like to take this opportunity to sincerely thank them for their valuable work and their unreserved commitment.

while giving them collective rights very similar to those enjoyed by employees. With freedom of association a human right, irrespective of whether a worker is self-employed or not, platform workers have set up their own unions. However, this has not always opened the door to collective bargaining.

Turning to the **Italian** debate on platform workers, this is marked by Italy's political instability and the difficult labour market situation. Despite several legislative proposals, there is as yet no national legislative framework covering platform workers. Silvia Borelli highlights the commitment of local authorities and unions to ensure that platform workers enjoy certain social rights, explaining why, to date in Italy, the main regulations governing platform workers are the result of collective actions organised by the workers themselves.

In the **Netherlands**, consensus seems to exist solely on the fact that current labour law is not suited to overcome the challenges associated with platform work, explains Nicola Gundt. When deciding on cases involving platform workers, judges are of the opinion that the precise circumstances of each situation need to be taken into account. This is no help in establishing a minimum of clarity, and they are calling for amendments to the labour code. But the legislator does not seem to know what needs to be done. At present, all we have are questions but no answers. In the meanwhile, Dutch workers are reduced to reinventing the principle of mutual solidarity funds (*broodfond*) to help workers in difficulties.

Turning to **Romania**, the situation there is marked by a very specific context: in the aftermath of the crisis, the Romanian social security system was completely reformed, as was the legislation on collective disputes. This has considerably weakened Romanian unions and social dialogue. Felicia Roşioru explains that platform workers are being ignored by the legislator, labour inspectorates and even statistical agencies, and do not enjoy any specific protection. In principle, they could enjoy the legal protection afforded to teleworkers through a law adopted in 2018, but this is conditional on them being accorded employee status. However, platforms continue to handle them as self-employed workers. without any prospect of them improving their working conditions.

In **Spain**, Miguel Rodríguez-Piñero Royo sees platform work quickly gaining ground among the whole population and not just among students or occasional workers. The labour administration (labour and social security inspectorates) has recorded several offences, imposing sanctions on such platforms as Uber for violations of social legislation. This initial administrative phase has been followed by a judicial phase, with the number of rulings handed down by the courts rising quickly. However, the legal doctrine is not evolving in a consistent manner. While Spanish legislation foresees the status of an "economically dependent self-employed" worker, affording a certain protection to such workers, this has not prevented the existence of several collective disputes, as reflected by the establishment of the RidersXDerechos collective for Deliveroo riders or the judicial initiatives of traditional unions. An interesting cross-industry agreement reached in Catalonia could serve as a model.

The first court rulings in **Switzerland** refer to administrative and social security law. As elsewhere, the legal classification of a worker as an employee or as self-employed plays a decisive role in whether a worker has access to certain forms of protection. The Swiss Federal Court has not however yet had the occasion to rule in this matter. But even if there are not yet any real collective disputes, a set of demands related to the digitalisation of the economy has been drafted, as well as a first collective agreement between a union and an employers' organisation in the logistics sector. A model for platforms to follow?

Looking at the **United Kingdom**, the response of labour law to the questions posed by the gig economy is characteristic of the trends in employment policy seen in the country over the past few decades: general acceptance of industrial change and its potential for deregulating the labour market. According to Luke Mason, the "anaemic response of the legislator" has resulted in the courts being mobilised, in line with their traditional role in labour law matters. This undoubtedly circumvents the potential trap of a one-off definition of platform work which would soon be doomed to obsolescence through the further development of practices in the sector. Nevertheless, in addition to judicial prowess, platform workers themselves and unions need to take action in order to have an impact on this process.

Last but not least, the situation in the **United States** is characterised by legal uncertainty and insecurity. According to Kieran Van den Bergh, the various legislative levels constitute a hindrance to a consistent solution, while the lack of any political will to remedy the problem does not point to any solution in the short term. The legal battles, the so-called class actions, have not come up with a consistent response. Nevertheless, drivers are doing their best to organise themselves, with certain local initiatives giving rise to hopes that a more understandable legal solution could emerge in the not too distant future.

The completed jigsaw puzzle which emerges from this comparative approach highlights what is at stake: the impact of the digital transformation on the very foundations of labour and social security law in its current form.

Section 1
Technological disruption, social dereliction?

Christophe Degryse

> "If, as a result of legislation or judicial decisions, we are required to classify Drivers as employees (...), we would incur significant additional expenses for compensating Drivers, potentially including expenses associated with the application of wage and hour laws (...), employee benefits, social security contributions, taxes, and penalties. (...) Any such reclassification would require us to fundamentally change our business model."
>
> (Uber, April 2019)

Introduction

For more than 200 years, the same questions have cropped up over and over again: what is the future of work in a world constantly being transformed by technological innovation? What fate does this technological change hold in store for workers and their jobs in factories and offices? How is this change transforming skills needs: which skills will be obsolete tomorrow, which will become indispensable? Last but not least, will mankind live a better or worse life tomorrow?

Such questions – to which there is no one single answer – surface again and again at each technological milestone. New inventions, new manufacturing processes, new business models, new ways of organising work, new professions and new forms of employment, from the first Industrial Revolution in England to the present day. With the progress seen in the field of robotics, the rapid advance of artificial intelligence, the omnipresence of the Internet and social media and the emergence of new business models, the "future of work" is again at the centre of debates.

These debates relate on the one hand to a new phase of man-machine interaction. Like the then new, and difficult, interaction between craftsmen and steam looms in the early 19th century, we are now seeing a new interaction between workers, whether blue-collars, white-collars or self-employed, and artificial intelligence and robotics. Put in a nutshell, machines first replaced muscles (human strength), then fingers (precision), and are now starting to replace the brain (human reasoning). White-collar robots are now joining the army of blue-collar robots (Baldwin 2019). What will be the new ways of living and working together?

On the other hand, the global outreach of the Internet, social media, smartphones and mobile applications are great drivers of the platform economy. What we are now seeing is a new business model based on digital

platforms and their algorithms which can, in a surprising analogy, be seen as "invisible engines" (Evans *et al.* 2006) driving the "21st-century factories" (Open Society Foundation 2015: 11), i.e. virtual factories.

Can such an analogy help us understand, from a historical perspective, what is currently happening to work and employment in this new industrial revolution, the "digital revolution"? It is a good idea to briefly review a few key points of socio-industrial history, looking at questions posed by witnesses of early industrialisation. Unable to look at this question in any great detail within the bounds of this study, the goal here is not to piece together the history of the firm over the last few centuries, but to show that certain – sometimes ambivalent – trends underlie the evolution of these technologies and above all their usage, the resultant management choices and their impacts on labour markets. Examples include the upskilling of certain workers, but also the deskilling of others; better ergonomics and ways of making work easier, but also work intensification and the concomitant rise of stress and burnout; greater (alleged) autonomy in how work is performed, but also the risk of loss of control and a loss of ownership over/identification with one's work; and finally the smiling labour market winners, but also the downcast losers: those whose jobs have been made obsolete by technological progress (Eurofound 2017). In the 21st century, algorithms, networks and artificial intelligence are giving rise to new business models perpetuating these underlying trends common to our industrial world.

Following the analogy of platforms and their algorithms as the "invisible engines" driving these virtual factories, we will try to pinpoint the main social challenges, the least of which is the tendency for the physical embodiment of the "employer" to dissolve into thin air. This will in turn allow us – in the second section – to confront the hypotheses developed here with the legal and social developments caused by the emergence of the platform economy in nine European Union states and in the US.

1. Industry and employment

1.1 A bit of background

It would be wrong to think that the first Industrial Revolution in England (in the late 18th and early 19th century) took place within a few years of the arrival of the first steam-driven machines in factories. Indeed, it took several decades, and even centuries, for the phenomenon to take hold and, above all, it did not take place without conflicts and impassioned discussions.

Two parallel developments helped speed up industrialisation. First, the decisive progress of science in the 17th, 18th and 19th centuries. In the late 17th and early 18th century, major developments occurred in the fields of optics and mechanics (Newton, Huygens, Fresnel, etc.). Between 1752 and the end of the 19th century, scientists progressively uncovered the secrets of electricity and electromagnetic fields (Franklin, Priestley, Volta, Œrsted, Watt, Faraday, Joule, Maxwell, etc.).

Second, in the wake of the Enlightenment, a "new" discipline emerged in the late 18th century, economics, personified by such thinkers as Adam Smith and his magnum opus *The Wealth of Nations* (1776), Jean-Baptiste Say and his *Treatise of Political Economy* (1803), David Ricardo and his *Principles of Political Economy and Taxation* (1817), and Karl Marx and his *Capital* (1867). They all introduced new perspectives to economic analysis, greatly determining the orientations of the industrial revolution gripping their respective countries.

These two parallel developments – scientific-technological and politico-economic – were to progressively shape the Industrial Revolution, in a context of colonisation offering major markets for the products manufactured. The first decisive inventions occurred in the second half of the 18th century and allowed the creation of the first industrial machines: the spinning machine (1764-1771), the development of a new process for refining cast iron (pudding, 1778), the mechanical loom (1785-1790), the steam engine (1790), the paper machine (1799). These inventions not only revolutionised production processes but also the geography of work, as witnessed by the progressive development of industrial centres (Sombart 1898). None of this occurred without social unrest.

With these innovations being applied to production processes, new economic concepts emerged: scientific progress and the resultant technical inventions needed to be put at the service of the economy and production, with a view to growing the wealth of nations through mechanising production, through the division of labour to boost productivity (Adam Smith's "Pin Factory") and increase production (Say's Law or the "Law of Markets")[5], and the development of international trade (Ricardo's "Law of Comparative Advantages")[6]. This all

5. According to which, supply creates its own demand.

6. The abolition of the *Corn Laws* in 1846 (laws protecting national corn producers through the application of tariffs on imports) triggered an era of free trade in England, pitting urban manufacturers in favour of free trade against farmers and, more generally, rural England.

helped set the technical and theoretical framework: the coast was clear for unbridled entrepreneurship

1.2 More robots, more jobs

The English textile industry in the first half of the 19th century is a striking illustration of how work and social relations of production were transformed by industrialisation. Evoking this history while at the same time keeping in mind the current challenges of robotics and artificial intelligence allows an interesting social perspective on technological transformation. The discovery of steam as a source of power[7] led to the invention of steam looms which in turn greatly transformed manufacturing, production processes and the organisation of work in this sector. As a ricochet effect, these successive transformations sparked a series of political debates on working conditions and the geographical concentration of workers first in workshops and later in factories. As reported by Thompson, "Observers in the 1830s and 1840s were still exclaiming at the novelty of the factory system. (…). The steam-engine had drawn together the population into dense masses and already Gaskell saw in working-class organisations an imperium in imperio[8] of the most obnoxious description." (Thompson 1963). This all resulted in the first sprouts of workers' collective organisations and the progressive establishment of labour law (the first *Factory Acts*) (Sombart 1898).

At the beginning of the 19th century in London, MPs in the House of Commons expressed their concern over the degradation of employment caused by the arrival of steam looms in the textile mills. Though the Luddite rebellion – the Luddites were known for their smashing of machines seen as stealing their jobs – was crushed in 1812, the cries of craft workers resonated in Westminster. Twenty years later, the House of Commons conducted a survey of 65 factories in the suburbs of Manchester to examine developments in technology and work between 1822 and 1832.

This revealed that numbers of steam looms were continuing to grow; from 2,000 to nearly 10,000 in just ten years (Babbage 1833: 446). This is what we would now call the dissemination of technology. Contrary to what the Luddites feared, however, the survey also showed that total employment in this sector had not decreased but had risen by around 20%, going up from 3,500 to more than 4,200. This survey would therefore seem to confirm what the *Association for Advancing Automation* is saying more than 200 years later: contrary to popular belief, automation creates jobs ("*More robots, more jobs*"[9]), instead of destroying them.

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7. The discovery of steam as a source of energy obviously goes back much further in time, to Hero of Alexandria's aeolipile, invented in 62 AD. Yet its potential was largely ignored until the 18th century.

8. A state in a state.

9. https://www.controleng.com/articles/more-robots-more-jobs-fewer-robots-fewer-jobs/

But the story does not stop there. The survey also revealed a deep-going transformation of employment structures. While traditional weavers were doomed to extinction (their numbers dropped by a factor of three within ten years), numbers of "new" workers increased just as quickly. However, these were no longer male workers, but for the most part women and children, sometimes even younger than nine.

1.3 The future of work

The speed and spread of industrialisation revealed by this survey indirectly reflected a major rise in the investment needed in this technological innovation, as well as a considerable increase in production – Charles Babbage (1833) estimated that a steam-driven machine could do the work of three hand-driven machines at that time. What effects did this have on human labour?

This question was the subject of much political and academic debate at that time. For instance, John Stuart Mill was to say: "It is questionable if all the mechanical inventions yet made have lightened the day's toil of any human being." Karl Marx came up with this unequivocal answer: "That was not their goal." (Marx, Capital, Ch. 15). The new machines completely restructured employment. Experienced and strong craftsmen were no longer needed. Instead, manpower (or perhaps even "childpower") was needed to operate the machines, preferably young children performing the work at minimum cost. Taking a more general perspective, Marx observed: "In so far as machinery dispenses with muscular power, it becomes a means of employing labourers of slight muscular strength, and those whose bodily development is incomplete, but whose limbs are all the more supple. The labour of women and children was, therefore, the first thing sought for by capitalists who used machinery." (Marx, Ch 15.3 A)[10].

This transformation of work was described by many observers of that time. In a debate in the British Parliament on the draft Factory Act in March 1844, Lord Ashley observed: "The tendency of the various improvements in machinery is to supersede the employment of adult males, and substitute in its place, the labour of children and females."[11] Strength, experience and costly know-how were no longer needed. All that was now needed were small hands to operate the machines. It was this evolution which gave birth to the new laws aimed at protecting workers (the *Factory Acts*), first targeting children in the textile sector, and later more generally workers in all industries (Sombart 1898).

10. See also Andrew Ure (1835: 23) "It is, in fact, the constant aim and tendency of every improvement in machinery to supersede human labour altogether, or to diminish its cost, by substituting the industry of women and children for that of men; or that of ordinary labourers, for trained artisans."

11. api.parliament.uk/historic-hansard/commons/1844/mar/15/hours-of-labour-in-factories#column_1088

In addition to the question of working conditions, we also have that of the displacement of jobs. Sometimes with a certain form of contempt, the Luddites were described as people who smashed machines, rejected progress and thought that, by destroying the machines, they could keep their jobs. These attacks on machines and mechanisation took place not only in the English textile industry, but also in clock-making companies (Japy[12]) and in agriculture (Hobsbawm 2006). In all cases, these were not organised movements, but actions taken under specific circumstances[13]. In a recent study, Acemoglu and Restrepo (2018) emphasised that "Though these workers often appear in history books as misguided, there was nothing misguided about their economic fears. They were quite right that they were going to be displaced".

In addition to this fear of being substituted by a machine, protests were directed "against the hoarding of value by ever more greedy intermediaries" (Réverchon 2017). Such protests were observed elsewhere, particularly in Lyon (France), where the revolts of the *canuts* in the 1830s were less about the introduction of the steam engine as such than about the pay cuts imposed by the entrepreneurs (Rude 2007).

Another effect of industrialisation was the intensification and pace of work. And it was not just the foreman dictating a higher pace: the machines themselves set a pace in line with the return on investment desired by their owners. A machine was therefore not there to help a craftsman perform his work, as would have been the case with a tool honed to perfection, but was designed to be operated by a worker to produce the volume of products needed to make the employer's production cycle profitable. The effects on work were already observed by Robert Owen in the early 19th century: "Since the general introduction of expensive machinery, human nature has been forced far beyond its average strength." (Owen 1817).

Though this issue of the need for productivity is of fundamental importance, insufficient account is sometimes taken of it in debates. For its owner, a machine constitutes a substantial investment, often financed by credits requiring a period of amortisation and a constant return. As stated by Ashworth, an English cotton manufacturer in the 19th century: "When a labourer lays down his spade, he renders useless, for that period, a capital worth eighteen pence. When one of our people leaves the mill, he renders useless a capital that has cost £100,000."[14] For financial reasons, a machine thus tends to discipline and intensify the work of the person operating it. And when laws were voted in to reduce the working hours of children in the textile industry, manufacturers increased the speed of the machines to compensate for the loss of production and to maintain the amortisation cycle. Through

12. https://www.contrepoints.org/2016/03/13/240632-les-japy-lempire-horloger-des-rois-de-la-quincaillerie

13. Hobsbawm showed for example that, among printers, the adoption of the mechanical printing press after 1825 did not cause any hostility. What did cause such was the revolution in composition, as this "bore the seed for a general degradation for the workers".

14. Quoted in Marx, Capital, Book 1, ch. XIII (455).

boosting productivity, machines also allowed owners to boost profitability through the lowering of prices and wages made possible by the drop in the negotiating power of (less-skilled) workers.

Acemoglu and Restrepo (2018: 9) also observe that automation corresponds to a growth in the capital intensity of production, with macroeconomic consequences: "automation necessarily makes the production process more capital intensive and tends to increase productivity more than the wage, as a consequence reducing the share of labour in national income. Intuitively, this is because it entails the substitution of capital for tasks previously performed by labour, thus squeezing labour into a narrower set of tasks".

Throughout the 19th and 20th centuries, industrialisation continued, driven by new technological breakthroughs: the combustion engine transformed workshops into mechanised factories. The scientific management of work propagated by the likes of Frederick Winslow Taylor (Taylorism) and Henry Ford (Fordism) led to the division of labour, with design and execution now separate from each other. With his chronometer, "Taylor wanted to take control of the movements and behaviours (of workers) in order to consequently be in a position, following the introduction of the scientific organisation of work, to enact a recruitment policy replacing skilled and often unionised workers with unskilled workers" (Bouquin 2010). Tasks were broken down into small units, executed by low-skilled – and thus interchangeable – workers: "The man who puts in a bolt does not put on the nut. The man who puts on the nut does not tighten it", according to the well-known quote by Henry Ford (1922: 83). As already expounded by Adam Smith, this division of labour considerably boosted productivity, though at the price of workers no longer identifying themselves with their work. Experience, expertise and know-how were no longer needed. All that was needed was to perform the assigned tasks, with each movement designed, calculated and planned by management and the overriding production system (Head 2014).

Later on, the mechanised factory was transformed into an automated factory (Friedman, Naville, Braverman, see: Stephen Bouquin (2010)). The new effects of industrialisation on labour markets have been described by Georges Friedmann in his *Le travail en miettes* (1956) (translated as *The Anatomy of Work: Labor, Leisure, and the Implications of Automation* (1961)), and also more recently by Andrew Feenberg (2010) and Tim Ingold (2010). The industrialisation, mechanisation and automation of work are leading to a certain de-skilling: mechanisation and automation are helping transform autonomous and skilled work done by humans into the execution of small tasks dictated by a machine. One of the side-effects thereof is the weakening of the bargaining power of lower-skilled workers. Certain people saw this as an advantage: "By being forced to concentrate on one task day in and day out, the detail worker develops a certain dexterity" (Babbage 1833: 447); but he also loses his knowledge of the whole production process and his overall competences.

Feenberg states that the transformation of work involves a lot more than just modifying tasks. He refers to this as the "paradox of action": "When we act technically on an object there seems to be very little feedback to us, certainly nothing proportionate to our impact on the object. But this is an illusion, the illusion of technique. It blinds us to three reciprocities of technical action. These are causal side effects of technology, changes in the meaning of our world and in our own identity." (Feenberg 2010). A form of reciprocity exists between a worker and the subject of his work.[15] We are creating things by technology, and, by creating them, we are creating ourselves. We create a piece of furniture, but in making it we become a joiner. Yet this reciprocity tends to disappear when the machine he is working with gets steadily perfected, requiring less and less skill to operate it. What will these reciprocities of technical action, learning and creativity be in "smart" and automated production processes?

1.4 The ambivalent link between technology and work

Through these various direct and indirect effects on work and employment, the whole ambivalence of technological innovation emerges, tending to make work less exacting, more efficient and productive and increasing its quantity, while at the same time reducing its relative quantity in relation to the level of production – sic "productivity gains" –, modifying its structure, boosting its intensity, and downgrading its quality (de-skilling and "expropriation"). In other words, creating net employment through reducing skilled work for some, while stepping up work intensity for others. In a modern-day adaptation of the above-cited quote of Lord Ashley, it would seem that the "The tendency of the various improvements in machinery …" can be broken down into three distinct aspects: a transformation of the structure of employment, resulting in winners and losers; the degradation of working conditions through work intensification associated with the amortisation cycles of new machines (and nowadays with the optimised operation of algorithms); and finally the de-skilling of workers through the expropriation of their now obsolete skills and know-how, with tasks now being dictated by machines or algorithms.

In the 200 years between the 19th century and the 21st century, the setting has obviously changed (workshops, factories, multinational companies, corporate networks and now platforms), but these trends have something in common: they all act as drivers marginalising workers in production processes without completely eliminating them. There were obviously times in history when these trends were contained, as was the case in the second half of the 20th century. For example, Goldin and Katz (2007) have demonstrated that the second industrial revolution saw workers involved in a race between training and technical progress; a race in their view ultimately won by 20th-century workers, allowing them to get good and properly paid jobs. But obviously it is not technology alone which produces these effects described by contemporary

15. Certain behavioural neuroendocrinologists describe such a cerebral reciprocity, observing that our behaviours shape the structure of our brain just as the structure of our brain shapes our behaviours (see for example the neuroscience works of Jacques Balthazart, ULiège).

authors at each important stage of industrial history but its application to production processes. Done with the aim of boosting productivity and profitability, it is the latter which is leading to the deterioration of working conditions described above. In other words, the history of the link between technology and work reflects that of social relations of production.

What then does the future hold in store for us, given the full-blown development of artificial intelligence, robotics and the platform economy? Will we again see the same transformation effects on the structure of employment, the displacement of work, de-skilling and work intensification? What will be the learning reciprocities when workers interact with smart machines? Will robotics and artificial intelligence improve working conditions? Or will Marx again prove to be right: "that was not their goal"?

Responding to the questions posed by Ashley in 1844, many authors are coming up with disquieting answers (see for instance Richard Baldwin (2019), Antonio Casilli (2019), Martin Ford (2015), Simon Head (2014), Jeremias Prassl (2018), David Weil (2014), etc.). The lives of millions of workers, included skilled workers, are set to be turned upside down by an economic and cultural earthquake caused by the new 21st-century industrial revolution.

2. The platform economy: key issues

According to what evolutionist economists are saying, it would seem that the platform economy is bringing us into a new techno-economic paradigm (Valenduc 2018). Since the second half of the 20th century, the way has been paved for the emergence of a new and decisive phase in the relationship between industry and work. While the first phase of this relationship pushed industrial mechanisation and automation to its climax, creating huge industrial conglomerates and factories concentrating tens of millions of workers throughout the so-called "industrialised" world[16], the arrival of ICT is triggering a profound but different transformation, this time giving industry a new perspective practically free of geographic constraints.

2.1 Contextual elements

Several interrelated developments are set to influence this new transformation of business, management strategies and employment: the core role of ICT in how companies function, and the deregulation (and growing volatility) of capital markets.

To better understand the importance of this upsurge of new technologies in transforming the post-war economic model, we should remember that large

16. The role of wars is not considered here, though it is clear that the two world wars in particular played a major role in furthering industrialisation. Many of today's major industrial companies owe their power to the wars of the 20th century.

corporations invested relatively little outside their frontiers in the 1950s and 1960s. The only reasons to do so were to produce for the local markets associated with their investments, or to conduct operations related to the natural resources of the foreign countries (mainly agriculture and oil). At that time, cross-border ICT was still at an "extremely rudimentary stage" in these companies (Dunning 2009: 50).

Though obviously not the only factor influencing the development of MNCs in search of markets, resources and production efficiency, ICT played a key role. The fact that multinationals went through a major development phase beginning in the 1970s and continuing into the 1980s was no coincidence. The new information and communication technologies helped transform the structure of their transnational operations, allowing them to seamlessly manage, control and coordinate their operations, while also contributing to an explosion in transnational mergers and acquisitions, major growth in subcontracting, and an international division of labour (Dunning 2009: 59). The creation of integrated R&D networks is further driving the internationalisation of their operations (Cantwell 2009: 430). Last but not least, "Internationalisation through the MNE, and the corporate development and application of ICT, have become intertwined in a new era of innovative capitalism" (Cantwell 2009: 437).

The development of ICT is allowing companies to grow beyond national borders, giving birth to increasingly powerful multinationals with worldwide operations coordinated and controlled by computers and networks. Getting larger and larger and employing huge numbers of employees, these multinationals now dominate the industrial landscape. They are structured in divisions: production, transport, marketing, innovation… The coordination of production processes and these complex functions is at the core of their operations, with corporate management playing a key role.

But management boards are not completely independent: they are slaves of the money markets. Investors have won the battle for the control of companies, forcing them to increasingly focus on short-term profitability[17]. The power wielded by investment funds (BlackRock, Fidelity, Vanguard, etc.), now the largest shareholders of these companies, is enormous. As described by Weil, they have little patience with badly-performing companies, in turn increasing

17. On the subject of the growing role of money markets, Weil (2014) and other authors describe the changes in the ownership structure of companies intent of industrialising. Through growing and using more and more machines, such companies needed increasing amounts of capital. The family savings of a cottage-based textile workshop were superseded by new forms of financing what was to become a factory, via the money markets. This had the effect of progressively separating company ownership (investors and shareholders) from company management, i.e. those tasked with actually running the company. In the 1930s, the question was "who will take control of the company, its management or its investors?" (Berle and Means 1933). We now know that it is the investors who have won the match, imposing their profitability rates on company managers and not hesitating to replace them when they are deemed not to be up to the task.

volatility – through acquisitions and divestments –, all in pursuit of ever-increasing shareholder value. The price: restructuring measures, the closing-down of operations, etc.

In this new context, companies are once again redefining their frontiers, progressively outsourcing all operations not belonging to their core business. At the end of the 20th century, the theory of the network firm coordinated by the market rather than a management hierarchy emerged, creating global value chains and generalising the phenomenon of external service provision. Subcontracting, value chains, the coordination of subordinate companies: so many management strategies, all of them with the social consequence of workplace atomisation (Weil 2014). They are redesigning the division of labour, this time between what has to be done within the boundaries of the firm and what can be entrusted to the market. All operations not at the core of a firm's profitability are outsourced. A far cry from the 20th-century "big business" model covering hundreds of thousands of employees, companies are now becoming coordination centres using resources in a completely flexible manner (Veltz 2017), controlling chains of subcontractors, franchisees, freelancers, crowdworkers and subordinate companies in all four corners of the globe to produce goods and services via service contracts. "This is Adam Smith's Pin Factory, but on a global scale" (Veltz 2017).

Looked at from this perspective, workers are no longer in-house technicians, drivers or operators but external service providers[18] performing their work within the company without belonging to it, without knowing their colleagues, without having any say in the organisation of the work, without knowing either the HR manager or the head of the department for which they are working, without contact to union representatives, without discussing things with their peers over a cup of coffee. Although they work for the firm, they only have a marginal role. All this has consequences in terms of working conditions, including pay and job stability, but also in terms of a sense of belonging, of pride in working for this or that company, or even company loyalty (a fast-disappearing sentiment). Workers are becoming anonymous dogsbodies, replacing the former all-rounder whom everyone knew and rubbed shoulders with in the corridors of companies. This all serves to illustrate workplace atomisation. In the name of managerial choice, an unskilled or semi-skilled worker in a stable job is replaced by a precarious, poorly paid, anonymous worker. Always a one-way street, this reflects the marginalisation of human work in this "fissured" economy.

Yet it is exactly this model which digitalisation is allowing to expand considerably, via what is known as the platform economy. Excellently described by Weil, it is the "fissuring" of workplaces that is creating the environment needed for the full-blown development and extension of the platform economy. This

18. As a French unionist from a big transnational group told me in 2018: "If a door handle gets broken, there is nobody in the company who can repair or replace it; we need to call in the 'facility manager' in charge of maintenance to get it repaired. And if repairing door handles does not feature in the contract, that can get quite expensive …"

fissuring is taking root in and drawing sustenance from a terrain characterised by labour markets fissured by new technologies and the associated managerial and financial strategies.

2.2 The birth of the "platform"

From a technological perspective, the pivotal development of microprocessors in the 1970s was followed in the 1980s and 1990s by a further decisive innovation: the Internet and its exponential expansion around the turn of the century – from 5 million users in 1991 to more than 4 billion today. This spread of the Internet went hand in hand with a multitude of other innovations to form, under Schumpeter's theory (1935), the "cluster": the networks, smartphones, tablets, the Internet of Things, mobile apps, the social media, etc. This new cluster of innovations also helped modify business models and production processes, while at the same time creating "new entrepreneurs". In particular, a new business model emerged: that of the platform economy. Applying the Coase theorem, a digital platform is located somewhere between a "firm" and a "market" (Coase 1937). Incidentally, this is how such platforms often present themselves: as *marketplaces* rather than as companies.

This is the reason why it is interesting to look closer at the emergence of this new business model. Before its arrival as an economic concept (the "platform economy"), a "platform" was a generic term used in the IT field in reference to an operating system, a web server or application, an execution or development environment. A software platform was "a technology (…) that can be deployed in a vast range of industries for a great multitude of purposes" (Evans *et al.* 2006: 3). Evans refers to these digital platforms as "invisible engines" set to transform industry. In a book written before the global upsurge of Uber or Airbnb and in the infancy of the iPhone, Evans described this technology based on microprocessors and networks and, above all, how it could be used to "create value and profits" (Evans *et al.* 2006).

The term "platform" has progressively found its way into economics. The platform economy can be characterised as a (virtual) technological meeting place bringing together groups of people who, in one way or another, need each other: for example application developers and end users (as was initially done by Windows, Linux or MacOS). A digital platform as such does not produce anything, does not sell anything, does not buy anything. It is like a shopping mall, offering spaces where different users – or "participants" (Parker *et al.* 2016) – can meet up: programmers and users, buyers and sellers, lessees and lessors, lenders and borrowers, entrepreneurs and workers … The sectors and businesses likely to be platformed are growing continually. Parker provides an edifying overview: from agriculture to computer operating systems, via social media, education, energy, finance, healthcare, gaming, local services, logistics, media, retail, delivery, transportation, tourism … (Parker *et al.* 2016).

One of the reasons for the success of this model is that platform use is often free or nearly free of charge. "Multisided platform economics shows that it may

make sense for firms to charge very low prices to one or more groups or even to pay them to take the product. And that is what multisided businesses do." (Evans *et al.* 2006: 59). And all of this thanks to the omnipresence of advertisers, a factor helping to considerably reduce what economists call transaction costs. Last but not least, the more users a platform has, the more it will be useful for its users. Economists refer to this as the *network effect* (cf. Parker *et al.* 2016), an effect that nearly always ends with monopolistic or oligopolistic platforms.

2.3 Between a firm and a marketplace

But the specific feature interesting us most of all in the context of this study is linked to the transformation of companies caused by the new "invisible engines": the algorithms driving the platform economy. As already stated above, the theoretical foundations of the "nature of the firm" were laid by Ronald Coase in 1937. According to him, in a context of competition, a company, as a meeting place for suppliers and buyers, compares and juggles transaction costs in its production processes. Such comparisons help a company to decide whether to buy certain products or services from the market or to produce them itself. However, the new technologies are considerably reducing the transaction costs of what is done outside the firm.

With its reduced (or even zero) transaction costs, the platform economy is increasingly attracting companies, including traditional ones, to these "marketplaces" located between the hierarchical firm and the market. The platforms and their algorithms can be used as easily accessible infrastructures for almost any type of business (services, retail, leisure, manufacturing, etc.) (Kenney and Zysman 2016). With relatively little investment, eBay and Alibaba have become the new global bazaars. Upwork is the new global Place de Grève[19], frequented by people looking for a bit of work. Amazon is the new supermarket; Netflix the new global cinema, etc. Another example highlighting this hybrid between the platform model and the traditional company is to be found in Belgium, where its postal operator, La Poste, has launched a mobile platform (parcify.com) allowing everyone travelling by car in Belgium to earn a bit of money on the side by delivering, on their way to their destination, a La Poste parcel. In the Netherlands, the Abeos temp agency has set up its matchAB platform to bring together buyers and sellers of temporary labour via a mobile app and a few algorithms. Will such apps soon be replacing temp agencies?

Similar to thousands of others, these examples serve to illustrate this growing phenomenon of the platformisation of the economy. It involves not only a few frontrunners like Uber and Deliveroo, but nearly all well-established and new

19. In 12th century Paris, the Place de Grève (now the Place de l'Hôtel de Ville) was a place for unloading goods arriving via the Seine, where day labourers met in the hope of getting a day's work.

companies (banks, insurance companies, retailers, taxi and logistics companies, etc.) and even public services. Companies are increasingly quitting their traditional stamping grounds to become platforms making their profits from an inexpensive invisible engine responsible for the algorithmic coordination and organisation of work performed by others. As the OECD has observed, "if firms increasingly resemble agile networks, they may be able to more easily (re)allocate resources, scale up and down, and enter and exit markets, including internationally. Depending on policy settings, this could affect the broader business environment and market dynamics, as well as the form of the work carried out in future firms and/or markets" (…). This leads to the question: "What broader social issues may arise, for example those affecting redistribution and social benefit policies?" (OECD 2019a).

We are witnessing an earthquake in the business world! In a new and surprising analogy, Kenney affirms that "we are in the midst of a reorganisation of our economy in which the platform owners are seemingly developing power that may be even more formidable than was that of the factory owners in the early industrial revolution" (Kenney and Zysman 2016). Not to be outdone, Parker *et al.* (2016) puts it this way: "Platforms are eating the world". Will this revolution not of production costs but of transaction costs end up purely and simply with the disappearance of the companies as we know them: as structured, organised and hierarchic places bringing together suppliers, buyers and workers? Will platforms replace them in the market? After this fissuring, will we now be seeing the traditional workplace being upturned?

2.4 The disappearance of employment relationships as such?

What will be the effects of this "platformisation" of the economy? We are already starting to see these in the frontrunner companies. As a company, Uber has *de facto* become the world's biggest taxi company, worth more than $120 billion at the beginning of 2019[20], yet without even possessing a single taxi of its own, not spending a cent on maintaining and repairing vehicles, not employing any drivers, not responsible for any accident, and not paying any car insurance. Specialised in online work, Upwork is a company supplying work to millions of people worldwide, yet without being an employer, without being a temp agency, without assuming any responsibility in the relationship between the service provider and the person ordering his services. It boasts that, by 2026, half of the US workforce will be made up of freelancers (Upwork 2017). Upwork *et al.* operate in the *workforce marketplaces*, seeing themselves as economic pioneers[21].

These tech companies are able to operate with a very small permanent workforce but with enormous numbers of self-employed service providers, i.e.

20. https://www.forbes.com/sites/tomtaulli/2018/12/29/uber-ipo-what-can-we-expect/#5239573f5c1f

21. https://www.networksasia.net/article/whats-workforce-marketplace-how-work-will-get-done-future.1500606720

offering "scale without mass" (Brynjolfsson *et al.* 2006). In this sense, they are upturning the labour market and traditional workplaces. Antonio Casilli illustrates how different forms of digital labour (on-demand work, crowdworking, social work in networks) are developing, all characterised by the same process of appropriation, monetisation and automation of human work carried out by those whom he terms the "pieceworkers" (*tâcherons*) of the platforms (Casilli 2019). He also identifies the common denominator of these platforms: those working for them are "underpaid, badly paid, or not paid at all". Work is divided up into small tasks entrusted to a crowd of home-based service providers (the new "cottage industry" of crowdworking), deprived of all bargaining power. Adam Smith's Pin Factory is now becoming, according to Casilli, the clandestine global digital workshop.

As regards the remuneration of "cottage" work, the author of these lines has experimented with the "freelancer" side of Textbroker, a German platform offering text-editing by freelancers for websites and web pages in different languages. One of the texts requested by a customer related to the French government's reforms of worker representation in companies (social and economic councils). The text, edited and delivered to the customer via the platform, consisted of 357 words. The worker was paid €4.64 for the work. Generally speaking, in a (global) labour market characterised by a labour offer exceeding demand for tasks, platforms are able to keep remuneration levels low, as seen in all major platforms: Clickworker, Freelancer, PeoplePerHour, Foulefactory, TaskRabbit, etc.

According to Baudry and Chassagnon (2016), "One of the specific features of crowdworking is the abolition of geographic frontiers. One could even speak of cottage industry offshoring in certain cases." The growing possibilities offered by on-demand work to those whom Baldwin refers to as "telemigrants" – online workers, crowdworkers, freelancers from all four corners of the globe[22] (Baldwin 2019) – are now available to the whole developing world (World Bank 2015), though recent studies show that numbers are beginning to increase in industrialised countries (Pesole *et al.* 2018, OECD 2019b, ILO 2018). Within such a business model, humans are becoming a service (Prassl 2018).

The effects on employment and work resulting from technologies used for boosting productivity and profitability are now re-emerging under the platform economy: a transformation in the structure of jobs and work (the substitution of a skilled and "professional" workforce by low-skilled, casual workers, in many cases amateurs); work intensification, as can be seen among platform workers subject to the automatic controls of the algorithms and the pace of work dictated by them – i.e. *de facto* by an algorithm-driven market (Prassl 2018)[23]; and the elimination of any semblance of work identification through

22. Somewhat riskily, Baldwin draws parallels between telemigrants and European posted workers, with all the debate on social competition that this raises.

23. As rightly observed by Ronald Janssen, the often vaunted "independence" of platform workers *de facto* means that a worker is no longer subject to employer requirements but to market requirements.

the obligation to meet the demands of the platform with regard to how to perform tasks, through the loss of the above-mentioned learning cycle and finally by the weakening or even suppression of workers' bargaining power[24].

2.5 Social dereliction, or the disappearance of the employer

According to certain authors, the platform economy will mean the demise of the firm as we now know it. "If the (transaction) costs of exchanging value in the society at large go down drastically as is happening today, the form and logic of economic entities necessarily need to change! (…) The traditional firm is the more expensive alternative almost by default. (…) Accordingly, a very different kind of management is needed when coordination can be performed without intermediaries with the help of new technologies. Digital transparency makes responsive coordination possible. This is the main difference between Uber and old taxi services. Apps can now do what managers used to do. (…) The Internet is nothing less than an extinction-level event for the traditional firm." (Kilpi 2015).

This radical vision is naturally challenged, in particular by Julia Tomassetti (2016) who writes "Uber does not write the epitaph of the firm". In her mind, such a vision is the result of bedazzlement by Uber's narrative of refusing to see itself as a simple transport company, instead presenting itself as a technology-based brokering service between self-employed workers and customers. If this really was the case, Uber would offer, as a platform, a less costly infrastructure, "open and participative" according to Parker's definition, allowing everyone to create their own pizza delivery service (Tomassetti 2016). But Uber has opted for a closed business model in which it struggles not to be considered a transportation company.

Will the platform replace the firm? Beyond the controversy, the remarkable feature of today's platforms is that algorithms have taken over the functions of

24. These effects caused by the ways technologies are used are also to be found in somewhat unexpected fields : according to researcher Kartini Samon, regional representative for Asia at the NGO "GRAIN", the digitalisation of the economy is set to have a major cultural effect on smallholders in the Global South "This market is increasingly being invested by technology companies outside the agricultural sector, such as Panasonic and Fujitsu, which have developed pilot projects in this area. These projects range from renting devices and machines to detect changes in the weather or to measure pesticides, to setting up real "farmerless farms", such as the one I visited in Hanoi, Vietnam, which is managed by Fujitsu on behalf of a Japanese company. They call it "precision farming" because they claim they can optimize all the parameters (quantity of water, pesticides, etc.). (…) But it is certain that this type of agriculture is a threat not only to the living conditions of small farmers, but also to their culture, their relationship to the land, etc. This was obviously already the case with intensive and mechanized agriculture, but here we are aiming at an agriculture without farmers! An agriculture where an increasing number of decisions are made by machines, based on parameters provided by machines, which leads to a really extreme stage of dehumanization and disconnection between human beings and the earth." (source : https://www.grain.org/en/article/6235-digitalization-of-agriculture-what-are-the-risks-for-farmers-and-populations-in-the-global-south

a traditional company: they coordinate production, match supply and demand, organise, control and appraise the workforce, where necessary even making them "redundant" by disconnecting them. Does such platformisation reflect the first step towards an economic system that, in the words of Arthur Salter at the beginning of the 20th century[25], "works by itself", a system which no longer functions on the basis of "organisations" (i.e. companies) but of "organisms" – or even, according to Kenney's more recent analogy of self-regulating "ecosystems"? Will the traditional and hierarchical firm as we know it be nothing more than a transitional form of organising the economy, a form beginning in the 18th century and now doomed to extinction?

This is of course taking things too far. There are many examples of platforms which have not replaced firms but which have been developed by firms in a context of hybridisation and complementarity between business sectors. The example of Amazon shows that an online sales platform supports traditional logistics and transport operations. Moreover, it is physically present in some fifteen countries and employs more than half a million "traditional" employees (Cakebread 2017, Fagot 2019).

Moreover, as Tomassetti rightly points out, all too often the heading "platform" is used to refer to any entity using the internet, thereby causing a lot of confusion. "Why do we more readily accept that Uber intermediates between buyers and sellers, but that a restaurant does not intermediate a market between buyers of hospitality services (diners) and sellers (waiters)?" The fact that this restaurant has its own website does not automatically make it a digital platform. According to Tomassetti, we are still far away from the extinction of the traditional firm.

Over and above these specific controversies, we need to be aware of the fact that the novelty of this business model has the potential to become a major social challenge, as the transformation (or hybridisation) of a traditional company into a digital platform means nothing less than the abandonment of the whole field of employment relations by the entrepreneur. A platform is nothing more than a marketplace for services, in which there is no place for labour laws and social security. The social model found in a traditional firm, with its staff representatives, its works councils, its collective bargaining, its collective agreements, is not being attacked. It is simply being circumvented, in favour of a form of organising work that pre-dates industrialisation, that of the "cottage industry" (Mokyr 2001). For example, the Belgian post's Parcify platform is turning parcel delivery into a cottage industry devoid of any employment relationship. Baldwin gives us a frightening illustration of this "Brave New World", having himself experimented with freelancers on the Upwork platform: "If something did go wrong, the work dried up, or I decided to switch to another free-lance, firing a freelancer is simplicity itself. You click on a button labelled 'End Contract.'" (Baldwin 2019).

25. Cited in Coase (1937).

In this sense, certain platforms are reinventing labour relations, turning the clock back to pre-ILO times, without ILO Conventions, without the ILO Declaration of Philadelphia which reaffirms that labour is not a commodity. This is highlighted by the comparative legal analyses in the second part of this study, where we talk about the organised irresponsibility of the entrepreneurs, the disappearance of the "employer", the negation of collective relations, the inapplicability of collective agreements, the ban on price negotiations in the name of the antitrust principles, etc.

This second section also reveals – and this is the added value of the comparative analysis – the brutality of platforms like Uber and Deliveroo and their armies of lawyers in each of the ten countries studied, all bent on preventing social law penetrating their platform business model. The amount of energy and financial resources invested in this combat reflects the will of these platforms to be "liberated" from the shackles of social legislation, an integral feature of their business model. In its IPO prospectus published in April 2019, Uber warns potential investors that "Our business would be adversely affected if drivers were classified as employees instead of independent contractors. (…) If, as a result of legislation or judicial decisions, we are required to classify Drivers as employees (or as workers or quasi-employees where those statuses exist), we would incur significant additional expenses for compensating Drivers, potentially including expenses associated with the application of wage and hour laws (including minimum wage, overtime, and meal and rest period requirements), employee benefits, social security contributions, taxes, and penalties. Further, any such reclassification would require us to fundamentally change our business model and consequently have an adverse effect on our business and financial condition." (Uber 2019: 28). This warning to investors is indicative of a business model in which technology is used by the company to abandon social relations.

Obviously, the technology is never completely predetermined, and examples do exist of platforms prepared to invest in collective discussions, the organising of their workers, access to training, etc. Around 2016, several platforms were able to live with salaried workers ("employees") with open-ended employment contracts (Foodora, Deliveroo…). But in late 2016 and early 2017, they changed their model, now only operating with service contracts and self-employed workers. In doing so, they abandoned the field of social relations. As is quite often the case, the most profitable use of a technology will gain the upper hand. It is to be feared that alternative, cooperative platforms will remain niche platforms, while the large capitalistic platforms and their algorithms take over everywhere else.

While one might have thought in the 19th century and early 20th century that mechanisation was going to do away with the necessity for employers to hire workers, in the 21st century it is not the robots who are helping achieve this, but the platforms: while they are not making human labour as such disappear, they are making the employment relationship disappear. They need skilled workers available 24/7, though not hired as employees but working on service contracts.

The "old" economy with its need for a stable, salaried and loyal workforce to operate its machines is heading for extinction. The "new" economy runs its "invisible engines" on service contracts, circumventing all labour laws: the regulation of working time, paid leave, health and safety at work, etc. Similarly, the acquis of social dialogue, collective agreements and wage bargaining is vanishing into thin air, replaced by a commercial or service relationship between a buyer and a service provider, brought together in a platform marketplace by an algorithm: Is this the future of work?

3. By way of conclusion: the end of the employment relationship?

While legal regimes differ from one country to the next, what is at stake in terms of labour and social security legislation is similar in all countries examined. Wherever the major marketplace platforms are present, the question arises as to the "real" status of the workers involved: are they self-employed service providers or employees? This status is examined using various criteria (economic dependence, legal subordination, autonomy in how the work is organised, etc.). Obviously, this debate existed before the arrival of Uber and Deliveroo. For instance, Antonmattei and Sciberras (2008) presented the economically dependent self-employed worker, the service provider, the franchisee, the sales agent, the door-to-door salesman, to which can be added a long list of bogus self-employed: "So many workers twice deprived of protection: not being employees, they have no claim to the legal protection offered by the Labour Code; not being real self-employed workers, they are not benefiting from the economic protection provided by multiple customers where the effect of any one customer cancelling an order has only a limited effect."

But one might think that, should this transformation from a traditional company to a digital platform spread further, this non-status of a dependent and subordinate freelancer could possibly even become the rule in tomorrow's economy. In a rather enlightening way, the question has arisen at European level in recent debates surrounding the European Commission's proposal for a directive on "transparent and predictable working conditions"[26]. In these discussions, the European employers represented by BusinessEurope have stated that they are "strongly against introducing a broad EU definition of a 'worker' (…) It must remain a political decision in Member States to define in national legislation who is an employee and who is self-employed" (BusinessEurope 2018). Similarly, with regard to the definition of an 'employer', they stated that "The Commission also proposes to define the term 'employer' as one or more natural or legal person(s) who is or are directly or indirectly party to an employment relationship with a worker. BusinessEurope

26. Proposal for a Directive of The European Parliament and of the Council on transparent and predictable working conditions in the European Union, COM(2017) 797 final - 2017/0355 (COD).

is against developing such a definition." Refusing to clarify what a worker is and what an employer is can be seen as a way of watering down the notion of an 'employment relationship', a notion at the very foundation of two centuries of social legislation.

"The end of work is not for tomorrow," write Gérard Valenduc and Patricia Vendramin (2019). What is to be feared is the erosion or even the disappearance of the employment relationship. In the platform economy, labour is seen as a virtually inexhaustible global resource, available on demand. Certain authors refer to it as the *Human Cloud*. And it is not just Uber drivers or Deliveroo riders who are involved: According to Sarah O'Connor (2015), "employers are starting to see the human cloud as a new way to get work done. White-collar jobs are chopped into hundreds of discrete projects or tasks, then scattered into a virtual 'cloud' of willing workers who could be anywhere in the world, so long as they have an internet connection". While the operations of the high-profile platforms are visible to all, the Filipino or Malian crowdworker who uses these invisible engines for encoding, accounting, personal assistance or even translation is much less visible and does not seem to cause any controversy in the work environments concerned (secretaries, accountants, translators …). Yet this phenomenon reflects the same transformation of employment into a service contract, a transformation contributing to this abandonment of employment relationships and thus of social models.

In the following contributions, we will see a focus on the real "war of statuses" in each country examined: self-employed, worker, employee, parasubordinate worker, economically dependent self-employed, 'Trades', etc. This war of statuses is closely linked to social models, as a person's status is the key to opening the door to social benefits (Drahokoupil and Fabo 2019: 54), to freedom of association, to collective bargaining, to healthcare, paid leave, unemployment benefits, pensions.

Even if the organised irresponsibility of the employers, to use a term coined by one of the legal experts in Section 2, is not *per se* predetermined by the technology itself, the conclusion of this first section could be that, over and above the status of *gig workers*, the very nature of platform firms needs to be questioned. Instead of conjuring up the threat of a *jobless future* (Ford 2015), should we not start looking at the threat of a *bossless future*?

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Section 2
A comparative legal approach

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1. State of play

Although Austria has not developed any specific platform economy at national level (mainly due to its small size and language limitations[1]), we are increasingly seeing the economic, societal and social effects of this new work model. In 2016, the University of Hertfordshire and Ipsos MORI carried out a survey[2] commissioned by the Foundation for European Progressive Studies (FEPS), UNI Europa and the Vienna Chamber of Labour. This provided a first overview of the specific features of the Austrian gig economy. One of its findings was that 37% of interviewees had in the past year tried to find a job via such sharing economy platforms as **Upwork**, **Clickworker** or **MyHammer**, though only half of them (18%) had actually found work. For the majority of them – mostly men – the work would have been on top of their regular work. Just 2% stated that it would be their sole source of income. For 5%, such paid work was performed at least once a week; for 9%, once a month.

This occasional work was not very lucrative for those engaged in it:

— 48% of interviewees earned less than €18,000 a year;
— 43% between €18,000 and €36,000;
— 3% between €36,000 and €60,000;
— and 3% more than €60,000 a year.

The activities performed were generally ones that could be performed at home or from anywhere, working in a global online market, possibly in competition with workers from all over the world (India, East Europe, North and South America). Of those interviewed, 20% were more oriented towards work needing to be done on the premises of other people: cleaning, woodwork, gardening work. And 16% were looking for work as a driver, working for companies such as **Uber**, **Checkrobin** or **Blablacar**.

The range of skills needed for these activities was wide, ranging from *clickwork* or simple office work, via creative work, to IT and other highly specialised work. As regarded on-demand services, it was found that the workers often earned

1. A limitation it shares with its neighbours Germany and Switzerland, as well as with part of the populations of CEE countries.
2. Online survey covering 2,003 adult Austrians aged between 18 and 65.

their living with several different activities: driving, personal services, minor office work on the work premises of their customers, work in private households.

The age distribution of the crowdworkers clearly showed that, contrary to what is normally presumed, *crowdwork* was by no means mainly done by students. Indeed, while 22% of the crowdworkers were between 18 and 24, 23% were between 25 and 34, 23% between 35 and 44, 20% between 45 and 54, and 13% between 55 and 65. Numbers of *silver surfers* older than 50 were far from negligible. By contrast, only 11% were students.

One final finding was that 36% of those surveyed stated having used the services offered by the platforms themselves[3]. This leads to the conclusion that the distribution of income between platform users and platform workers is quite similar.

2. Legal environment

Certain new forms of work – though not all – put a question-mark over how work is regulated and workers protected, and in turn over labour law itself. The traditional distinction solely between employees and the self-employed is no longer valid. And it is not clear whether the creation of new categories of workers would solve the problem of an adequate, appropriate and enforceable level of protection. Similarly, the application of a mobile system of labour law (basically labour law defined in accordance with the need to protect workers) would engender the risk of legal uncertainty.

2.1 Dependence and subordination

At present, there are basically two legal categories in Austrian labour law, defined by the level of subordination and personal and financial dependence on an employer. In the absence of personal dependence, financial dependence may be sufficient for certain labour law provisions to apply. In such cases, we speak of persons with a status similar to that of employees (*arbeitnehmerähnliche Personen*), as they work solely for one employer and are dependent on the remuneration gained from this legal relationship, even though, from a formal perspective, they work in a self-employed capacity. For such workers, the provisions regarding for example liability in the case of any damage caused to an employer's customer apply, as well as the procedure before a labour court.

Can one apply this legal concept of "*arbeitnehmerähnliche Personen*" to platform workers? Obviously, it is doubtful whether there is any financial dependence. But above all, we first need to ask whether a platform can be

3. Other than accommodation platforms like Airbnb.

considered as a contracting party – or whether it is just acting as an agency. Whatever the case, there is nothing to stop the legislator imposing all or part of employer obligations on a platform.

2.2 The law on work at home?

There is another path that could be explored, not only in Austria but also in several other European countries: that of extending the laws on work at home. As work done at home is generally quite simple, a homeworker can decide him-/herself when, how and where it will be performed. The work is thus performed in an independent manner. Nevertheless, financial dependence is involved. Similarly, the workers have little or no freedom concerning the production of the goods and services, meaning that protection similar to that enshrined in labour law is relevant. In our view, the similarity between working at home and *crowdworking* is such that extending the law on working at home could be an interesting path to take.

2.3 The organised irresponsibility of the employers

More generally, we are seeing a new trend towards the fragmentation of an employer's responsibilities, with these being shared by several people or corporations. This fragmentation is going hand in hand with a progressive dilution and disappearance of contractual obligations, even to the extent that the term 'employer' in its current meaning no longer applies. Workers find themselves standing in front of a "*no-employer black hole*". Far from being a coincidence, in the majority of cases this is a deliberate tactic used to circumvent labour law. Such business models operate in a world of "organised irresponsibility". In the platform economy, this trend is even more evident due to the anonymisation of the employment relationship; we end up in a *cloud* of undefined persons, far distant from a traditional employment relationship.

The Austrian Supreme Court is resolving the problem by applying a "mobile" system allowing the identification of who in the final instance assumes the typical functions of an employer. Such a system helps to reduce a complex contractual construction to a simple bilateral employment contract.

2.4 Temporary agency work

Can platform work be equated with temporary agency work? Both the European Directive on temporary agency work[4] and the corresponding Austrian law assign only a very limited scope to this form of work, with the directive applying to "workers with a contract of employment or employment relationship with a temporary work agency who are assigned to user

4. 2008/104/EC.

undertakings to work temporarily under their supervision and direction". Its Article 2 states that "The purpose of this Directive is to ensure the protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment, as set out in Article 5, is applied to temporary agency workers, and by recognising temporary work agencies as employers, while taking into account the need to establish a suitable framework for the use of temporary agency work with a view to contributing effectively to the creation of jobs and to the development of flexible forms of working".

Austrian law provides for several protection mechanisms for temporary agency workers: an appropriate statutory wage (at least the minimum wage paid in the user undertaking); the joint responsibility of the temporary agency and the user undertaking concerning the worker's protection; limits to the liability of the worker in his relationship with the user undertaking.

In theory, such a model could also apply to platform work. However, this would require a special law, possibly resulting from a European directive.

3. National and European jurisprudence on these new employment forms

Strange as it may seem, there is relatively little jurisprudence on these new employment forms in Austria. With regard to the question of who is the employer in platform work, there are no clear court rulings. In light of the specific features of the platforms, any comparisons with other cases must be done with great care.

With regard to **Airbnb**, the Supreme Court for instance considered the renter to be the contracting party in accordance with the Residential Property Act ("*Wohnungseigentumsgesetz*"). But it is not easy to draw parallels with employment relationships. With regard to **eBay**, the Austrian Supreme Court maintained that a direct contractual relationship existed between seller and bidder, with the sellers themselves deciding what they wanted to sell and at what price. The platform itself only acted as a broker.

What is the nature of the relationship in the context of platform work? For it to be considered as a direct contractual relationship, the broker (i.e. the platform) would need to be seen as the representative of the principal (the user undertaking or instructing party), acting on the latter's behalf. This basically means that the platform would have to act like a subcontractor. Conversely, in the case of the platform only making the infrastructure available, no contractual relationship exists between the worker and the platform. However, one does exist between the worker and the principal. All therefore depends on how the platform communicates its intentions in its terms and conditions.

A further problematic aspect concerns the framework contracts providing for a form of commitment to perform regular platform work for the benefit of a single principal. The frequency with which short-term services are provided can be indicative of an employment relationship, as seen in an Austrian Supreme Court ruling concerning Peek&Cloppenburg, an international chain of retail clothing stores with headquarters in Germany. A large number of people worked there on a day-by-day basis (on-call), only coming in when the company needed labour. Separate employment contracts were concluded for each day of work. After not having received any work (i.e. contracts) for several weeks, a worker filed a complaint, wanting to establish the existence of a continuous contract of employment. The Supreme Court ruled in his favour. However, any application of such jurisprudence to platform workers would require the presumed existence of an employment contract.

4. New forms of employment and collective disputes

In line with the emergence of platform work, the issue of worker isolation has moved up the agenda, with workers having no means to collectively express their interests. Personal contacts with colleagues are the exception and online forums or the social media are not easily usable when one doesn't even have their contact data. From the very start, opportunities for showing solidarity have been hampered.

In Austria, works councils are an important pillar of collective relations, helping to ensure respect of labour law. The election of works council representatives presupposes a certain degree of solidarity and trust within the community in question. From a legal point of view, the problem is that the application of the Austrian legal provisions governing works councils presupposes the existence of employment contracts.

However, a certain legal uncertainty over the question of how to classify workers can have positive effects, as seen by the example of **Foodora** in Austria (a bicycle food delivery platform). Starting operations in autumn 2015, the majority of its riders were given open-ended employment contracts, giving them a true feeling of belonging to the company. They also enjoyed certain benefits like access to a bike repair garage. However, a few months later, their employment contracts were terminated, with Foodora making its employees self-employed. This made it increasingly difficult for the riders to communicate with each other. Nevertheless, a number of them started to organise themselves collectively, setting up a works council. Foodora adopted a cooperative attitude, having understood the benefits deriving from social dialogue with its workers.

Nearly all collective agreements are negotiated by the Austrian Chamber of Commerce, a body established by law. As it is mandatory for companies to be members, the Chamber of Commerce collective agreement is applicable to all workers of the respective sector. Willingness currently exists to initiate sectoral collective bargaining on wages, especially for bike couriers. The Chamber of Commerce has signalled its willingness to open a dialogue on this issue.

In addition, the unions feel it is necessary to integrate platform users into the process of defining work standards. As already seen in the field of fair trade, the unions would like to provide users with information on the respect of working conditions via codes of conduct or good practice labels (even if these are not legally binding). In the event of any non-respect of these good practices, mediation or conciliation would be required.

5. New forms of employment, trade unions and collective bargaining

In November 2018, the Austrian Trade Union Confederation ÖGB put forward a model possibly applicable in Austria: that of the collective agreement signed by the Danish Hilfr, a platform operating in the cleaning sector, to settle the question of "bogus self-employment". This collective agreement allows home helps originally engaged in a self-employed capacity to become employees after having worked 100 hours. In the view of the ÖGB, this model could also be applicable in Austria. It will in any case be one of the union demands in the upcoming collective bargaining round.

Completely understandable from a socio-political point of view, such a demand is not easily realisable from a labour law point of view. Here again. the reason is that labour law requires the existence of an employment contract. As things stand, even if the various parties to the collective agreement would like to include "non-employees" (self-employed workers), they would not be able to do so. A collective agreement is similarly not able to transform self-employed work into salaried employment. To be able to include self-employed platform workers in a collective agreement, the legal basis would have to change. It would obviously be better not to extend the scope of collective agreements in Austria, but instead to create a new legal source, comparable to the collective agreement for "small-scale" self-employed workers. Such specific legal sources already exist for home workers, but also for journalists, radio and TV workers, etc.

Conclusion

In Austria, new forms of work are questioning the traditional view of employment, with workers being either employed or self-employed. This binary view is inapplicable when attempting to understand platform work. Yet it is uncertain whether the creation of a third employment status matching this type of work would lead to a satisfactory solution. Two other, more interesting paths would be to extend existing legislation on home-based work, or to adapt current legislation on temporary agency work.

Whatever the case, there is a dire need to come up with a response to the organised irresponsibility of employers in these new business models. This irresponsibility is reflected in the confusion over the status of platform workers,

which is preventing the traditional Austrian system of collective labour relations from being applied to the platform economy (though with the interesting exception of the works council set up at Foodora). There can be no doubt that Austria will soon have to look into creating a new legal source, comparable to collective agreements for "small-scale" self-employed workers.

Belgium

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1. State of play

In Belgium, the platform economy is mainly a subject of debates in the media (on the "uberisation of the economy and work"), in politics (measures taken by the government to support this new economy) and in academia (especially analyses and studies by labour law experts[1]). By contrast, up to now labour court rulings reveal little debate on the subject. In fact, just one administrative body has ruled on the issue of the salaried or self-employed nature of employment relationships in individual cases[2].

1.1 Notion

The phenomenon interesting us here is that of digital platforms allowing supply and demand for paid services to be matched.

As regards the definition of work brokered by digital platforms[3], four characteristics can be identified:

1. The execution of a task – not the rental or sale of goods;
2. The existence of remuneration;
3. A form of non-standard employment;
4. The brokering role of a platform in a technical and legal sense and its administration of the employment relationship in a variable way and to a variable extent.

1.2 What is at stake?

A legal approach to platform work using the currently existing employment categories defined in social legislation raises a number of questions:

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1. In particular as the result of a conference held in Brussels in June 2016 by the ETUI and the ETUC "*Shaping the new world of work. The impacts of digitalisation and robotisation*".

2. We should also take note of the decision of the Brussels Commercial Court (*Tribunal de l'entreprise francophone de Bruxelles*) which, though not a labour court, ruled on the existence of a subordinate work relationship among UberX drivers.

3. For a typology, see De Stefano V. (2016) The rise of the "just-in-time workforce": on-demand work, crowdwork and labor protection in the "gig-economy", Comparative Labor Law & Policy Journal, 37 (3), 471-504.

— the social status of the workers: are they subject to the social security regime for employed workers or that for the self-employed?
— the brokering role of digital platforms: should they not in certain cases be considered as temp agencies or employment agencies?[4]
— the minimum protections accorded to workers: are the international texts (in particular those of the ILO) proclaiming the fundamental rights of workers being upheld?

The answers to these questions reveal the confusion and problems surrounding the situations in which the workers find themselves. This is why we need to direct our thoughts towards their protection and to reflect on the relevance of the existing categories. Via the looking glass of platform work, we find ourselves confronted with the problems raised by all forms of precarious employment[5].

2. The national legal environment covering new forms of employment and work

2.1 The general context of Belgian social legislation

As regards the legal environment, we need to first look at the fundamental distinction in Belgian social legislation between employees and the self-employed, and to then use this as a basis for discussing platform work[6].

Platform workers are considered by these platforms as being self-employed. In fact, their business models are based on this supposition, as reflected in their terms and conditions and specific clauses therein. However, in Belgium – as in most other jurisdictions – a self-employed business relationship – even if desired by the parties through the conclusion of a collaboration agreement – may be reclassified as an employment contract when the existence of a subordinate employment relationship is determined on the basis of how the work is performed. The presence of a subordinate relationship is thus the determining legal factor.

In Belgian law, the general criteria used in assessing the existence or absence of subordination (*lien d'autorité*)[7], independent of the will of the parties, are

4. Editor's note: on this issue, see in De Stefano V. and Wouters M. (2019) Should digital labour platforms be treated as private employment agencies?, Foresight Brief #07, Brussels, ETUI.

5. A book is in preparation on the findings of the conference organised by the UCLouvain Social Law Workshop on 18 April 2018: *Quel droit social pour les travailleurs de plate-formes? Premiers diagnostics et actualités législatives*.

6. More generally, the legal environment covering new forms of employment in Belgium also covers other aspects such as temporary agency work, employment agencies, flexi-jobs and other very flexible employment contracts. However, we are concentrating here on the social status of platform workers.

7. In accordance with Article 333 of the Programme Act (I) of 27 December 2006 on the nature of employment relations.

the freedom to organise working time and the work itself and the possibility to exercise hierarchical control. For certain economic sectors (construction, security, cleaning, transport, agriculture and horticulture), a mechanism based on the presumption of an employment contract has been introduced, based on criteria revealing the fundamental existence of a dependent economic relationship. A "*Commission administrative de règlement de la relation de travail*" is responsible for taking decisions on how a certain labour relationship is to be classified, at the request of one of the parties hereto, possibly before the work has started. The Commission's decisions are in principle valid for 3 years and are subject to appeals to a labour court.

The specific clauses inserted by many platforms into their terms and conditions are thus no obstacle in the way of getting a service provision agreement reclassified as an employment contract by the Commission or a judge, once subordination has been established.

2.2 Specific measures adopted by the legislator for platform workers

Two legislative initiatives have recently been adopted in Belgium concerning the platform economy. The first is the Programme Act of 1 July 2016, the so-called "De Croo Act"[8], the aim of which is to support the platform economy through introducing a specific fiscal and social regime. In concrete terms, this Act tax-exempts income deriving from services brokered by an approved electronic platform and rendered by an individual taxpayer to a third party outside the exercise of a regular job, insofar as this income does not exceed €6,000 a year. From a social security point of view, the persons performing such activities are exempted from the social status of self-employed workers. The Royal Decree of 12 January 2017 sets forth the conditions for approving electronic platforms operating in the sharing economy. These are very basic, merely defining criteria allowing the identification of platforms, for example the fact that "the platform is hosted within a company or a non-profit organisation established in accordance with the legislation of a Member State of the European Economic Area (…), which has its registered office, principal place of business or corporate/administrative headquarters within the European Economic Area". The list of approved platforms is available on the SPF Finances website[9].

More recently, an act on economic recovery and increased social cohesion was adopted on 18 July 2018. Though not directly targeting the platform economy,

8. Named after Alexander De Croo, the Liberal deputy prime minister (Open-VLD) also in charge of digital affairs in the Michel government, a coalition between Walloon and Flemish Liberals, Christian Democrats and Flemish Nationalists (Editor's note).

9. https://finances.belgium.be/sites/default/files/downloads/127-economie-collaborative-liste-plateformes-agreees.pdf

the act has three pillars: voluntary work (1st pillar), occasional services among citizens (2nd pillar) and the sharing economy on approved platforms (3rd pillar). Without going into details, the objective of this act is to allow any person already in possession of a status covered by the 1st and 2nd pillars to earn on-top income of up to €6,000 a year without being liable for tax.

This act is worrying, as it states that, when the requirements are met, labour and social security law do not apply to the three pillars. From an ideological perspective, it seems to consider social legislation as a constraint needing to be avoided. It defines activities not considered as occupational (under the pretext that a worker is already protected via other regular work), in an attempt to exempt them from social protection.

A further aspect, insisted upon by the Belgian Council of State, regards respect for the principle of equality. This is not assured, as the treatment of compensation for the same activity may differ in terms of tax and social security law, without this necessarily being justified. For example, a difference in the treatment of a voluntary worker and a salaried worker performing the same activity in a part-time capacity might exist, but seems difficult to justify. The Council of State also points to the necessity to check whether exclusion from the scope of social legislation is compatible with EU or international legislation setting minimum requirements for protection at work.

Last but not least, we should note that these measures have been unanimously rejected by the National Labour Council (CNT), on both the employer and union sides, due to the risks of unfair competition and the slippage of jobs in the regular labour market towards these new regimes.

3. National and European jurisprudence on these new employment forms

At present, no rulings in this field have been handed down by labour courts in Belgium. However, the above-mentioned Commission[10] has handed down two rulings (on 23 February 2018 and 9 March 2018) concerning **Deliveroo**. Workers for this platform supplied a wealth of information, via screenshots of communications with Deliveroo, on general work practices at the company (information not available in the platform's terms and conditions, yet of use for the application of existing rights). In view of this information, the Commission arrived at the conclusion that an employment contract existed. To start with, the presumption of an employment contract relating to transportation activities did indeed apply in this case, with no aspects available to refute it: the absence of a financial or business risk within Deliveroo, the absence of liability and decision-making powers over Deliveroo's financial

10. Though not a jurisdiction in the true sense of the term, its decisions are not without effect. Cf: https://www.commissionrelationstravail.belgium.be/docs/dossier-116-fr.pdf

means, the absence of decision-making powers over Deliveroo's purchasing policy, etc.

With regard to the organisation of working time, the Commission noted that the arrangements for booking work sessions, as well as the consequences of not being available during the accepted periods, were very restrictive. Moreover, it considered that the agreements offered by **Deliveroo** to the candidate riders concerned implied a lack of freedom to organise work and a certain hierarchical control (very precise instructions on dress code, the restaurants served, how to interact with them, supervision by geolocation, the ability to terminate the relationship at short notice/exclusion from the platform, etc.). This all casts a bad light on the rhetoric of the platforms: freedom to work, to organise one's working time oneself, to be online/offline when one wants, etc. The only liberty is to log in. But once one is online, any liberty becomes very restricted.

4. New forms of employment and collective disputes, trade unions and collective bargaining

Looked at from a sociological perspective, debates in Belgium relate to the dangers associated with dehumanisation and the invisible nature of this form of platform work, to its extreme flexibility, to the claimed autonomy of workers, to the total absence of a stable income, but also to online assessment systems facilitating unprecedented competition between workers, possibly leading to ever-increasing working hours.

From a legal perspective, a "self-employed" worker is deprived of the protection provided under labour law and has no social security coverage for this work. This means that he is not subject to the rules on minimum wages, working time, collective representation and bargaining, prevention and protection in the field of health and safety. He is not insured against unemployment and work-related accidents and has no right to paid holidays. He does not have the same rights when he is unable to work due to illness or an accident, he accrues no pension rights and has no right to maternity, paternity or parental leave. Questions also arise with regard to third-party liability and insurance, the fight against discrimination, data privacy, etc.

It is interesting to note that, in Belgium, with the exception of the collective actions taken by Deliveroo riders, no other reaction seems to oppose this disastrous scenario. Possible explanations include the diversity of the personal situations of such workers: some of them have alternative sources of income, others not; some are in such a precarious situation that they do not dare to voice any demands, or do not know how to do so. Last but not least and undoubtedly of decisive importance, these workers have no opportunity to organise collectively as they are geographically dispersed, work different hours and often only for very short periods (average employment duration for a Deliveroo rider is just two months). All this makes organising very difficult.

We should however point out that an initial experiment in getting self-employed platform workers to join a union was launched in January 2019 by the Belgian CNE, a member of the Belgian Trade Union Confederation, CSC[11].

Conclusion

Debates on the platform economy, often featured in the Belgian media, do not feature much in the decisions handed down by labour courts. However, many social questions are raised by this new business model, questioning the "neutral" role of an intermediary upheld by the platforms: the social status of platform workers, application of protection schemes specific to certain workers (for example, on temporary agency work, domestic work, etc.), and the application of international and European texts on minimum or fundamental social rights for "workers". Platform workers are currently considered to be self-employed. The question of whether legal subordination exists in the employment relationship plays a decisive role in the (re)classification of workers, though just one administrative body has ruled on the issue of the salaried or self-employed nature of employment relationships in individual cases. Apart from this, the Belgian centre-right government (2014-2018) adopted a stance in favour of the development of digital platforms through adopting measures, via the De Croo Act and the law on economic recovery, aimed at exempting from tax and social security contributions income up to €6,000 a year gained from services rendered via an approved platform or between private individuals (subject to compliance with certain conditions). This was tantamount to legalising undeclared work. Collective actions have been taken by Deliveroo riders. Although Belgium is a highly unionised country, the main unions do not seem to have yet come up with clear strategies for organising such workers, with the exception of a few isolated initiatives. This is undoubtedly also due to the presence of the Belgian SMart cooperative, which over the past few years has positioned itself in the digital field, not without tension with more traditional unions.

11. The Belgian trade union movement is composed of three key organisations: CSC, FGTB and CGSLB (Editor's note).

SMart: A specific Belgian set-up

Belgium is often quoted in debates on platform workers on account of one of its particular features: the existence of SMart (*Société Mutuelle des Artistes*), a cooperative offering social protection to the self-employed and which is increasingly covering platform workers. Set up in the late 1990s in response to growing demand from artists faced with difficulties in managing their employment status and their activities, its primary aim is to provide solutions making it easier for occasional workers to benefit from a legal framework ensuring a better level of social security. Now operating in 8 European countries, the organisation has managed to align its services to the new situation created by the digital platforms, and in particular home delivery platforms (Take-Eat-Easy, Deliveroo, Uber Eats...).

It offers freelancers the opportunity to rid themselves of all those time-consuming and often complex administrative tasks, develops services tailored to their needs and is building up reserves to cover risks, without compromising on the social protection of these workers. Today, "these workers operate within a framework of collective entrepreneurship, developing their own business activity within a shared enterprise. They are journalists, trainers, craftsmen, webmasters, couriers, consultants, urban farmers ... and start up their activity as SMart employees without the risks associated with being self-employed". The organisation's ambition is to become the largest workers' cooperative in Europe.

SMart's relations with the Belgian trade unions are not that good. In the view of SMart, the traditional trade unions have not managed to adapt their organisation and services to the new forms of employment and work generated by the digital economy. In a nutshell: they are outdated. According to the unions, the risk is that SMart, through its work, is legitimising grey areas of work and supporting the substitution of traditional, regular and correctly paid jobs by precarious and badly paid freelancing jobs without a strictly defined status and without a steady career. In sum, the tense relations between these two players arises from two very different visions of labour markets. In the view of the unions, there are just two statuses: either an employee status or a self-employed status. In the view of SMart, a third hybrid status is possible, located between the traditional employee and the "true" freelancer.

France

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Introduction

Surprised by the growth of the platform economy, the French public authorities took action in the form of the El Khomri Act of 8 August 2016. In doing so, it became the only country in Europe to specifically regulate this form of employment, despite the fact that the phenomenon had not yet given rise to stable research findings. That said, the legal provisions applicable to platform workers give labour and social security legislation a very new twist. With regard to social security, the legislator has based the new regime on the social responsibility of the organisation (i.e. the platform) and not on its statutory responsibility as an employer, in particular toppling the idea of having accidents at work and occupational diseases covered by private insurance. As regards labour law, which in such cases would traditionally have led to an extension of its scope, the El Khomri Act puts platform workers on the same footing as the self-employed, to whom it expressly accords – a first in France – collective rights very similar to those of employees. This could be considered as a first step towards a common labour law, as advocated by part of the French doctrine[1]. Almost unnoticed in the public debate, so many different aspects led to the new Act, the scope of which is to be assessed in the light of the legal environment on "Uberisation" (the legal regulation of which seems not yet to be completely stable) (I), and how the collective rights of "uberised" workers are being handled (II).

1. The uncertainties generated by the legal environment on Uberisation

In its approach to platform work, the French legislator has adopted a position breaking with the tradition of continually extending the scope of labour law. Despite this, Court of Cassation judges seem opposed to a vision based on a legal qualification of the facts, i.e. in opposition to all the jurisprudence of first-instance courts up to now tending to be against any reclassification of employment relationships.

1. See Barthélémy J. and Cette G. (2017) Travailler au XXIe siècle : l'ubérisation de l'économie ?, Paris, Odile Jacob.

1.1 The deathblow to the continual extension of the scope of labour law

1.1.1 Extending the scope of labour law

Looked at from a historical perspective, French labour law has always been binary: a worker is either an employee or not an employee. In contrast to other countries (Germany, Italy, Spain), the legislator has never established an intermediate category between employees and the self-employed[2]. The El Khomri Act can be seen as an attempt to create a third status without actually naming it.

Article L.1221-1 ff of the French Labour Code has little to say about employment contracts, stating solely that they are subject to common law rules and can be established in the form decided by the contracting parties. There is no legal definition of an employment contract, though the doctrine describes it in the following terms: an employment contract presupposes a commitment to work for the account and under the subordination of another person for remuneration. Via its landmark ruling of 13 November 1996, the Court of Cassation established that the subordination factor was to become the main criterion distinguishing an employment contract, with participation in the organised provision of a service becoming an indication of a subordinate relationship invokable when working conditions are unilaterally defined by the contractor[3]. A further primary aspect is that the mere will of the parties is not enough to exempt an employee from the social status derived from the conditions under which the work is performed, as labour law is considered to be public order legislation, thus allowing a judge, in a given case, to reclassify the relationship regardless of the will of the contracting parties.

When the conditions under which the work is performed do not fully correspond to a subordinate relationship, the French legislator previously used to extend the scope of labour law, using as a technique the legal presumption of an employment contract or of a salaried position. This practice prevailed until the 1970s and constitutes the base of Part VII of the Labour Code which covers an extraordinary variety of occupations[4]. A number of them are much closer to self-employed work than would be assumed via the traditional indications of a subordinate relationship, to the point where the legislator has had to tighten the – simple – presumption of an employment contract[5]. The 2010s have been marked by new shifts in the scope of labour law to cover new – and very autonomous in their working conditions – categories of workers

2. Despite the report of Antonmattei P.H. and Sciberras J.C. (2008) Le travailleur économiquement dépendant : quelle protection ?, Report to the Minister of Labour, Social Affairs, Families and Solidarity.
3. Soc. 13/11/1996, Droit social (1996), p.1067, note J.J. Dupeyroux.
4. Professional journalists, performing artists, advertising and fashion professionals; concierges and facility managers, homecare staff; door-to-door salesmen, store managers.
5. This is for example the case among performing artists (targeted by article L. 7121-4 of the French Labour Code).

who, rather than taking on the status of a freelancer, have instead sought the support of the public authorities to benefit from the protection provided to employees. The Act of 31 July 2014 thus established the concept of salaried entrepreneurs working as partners in a business and labour cooperative, while the Act of 8 August 2016 established that of an umbrella company.

1.1.2 Back and forth between the scope of labour law and the first signs of a third status

The 1994 Madelin Act and the 2014 Pinel Act are behind the statutory presumptions of self-employed work figuring in Labour Code articles L.8221-6-I and L.8221-6. The El Khomri Act is not in the same vein as these acts as, while explicitly addressing self-employed platform workers, it does not establish such a legal presumption.

Since adoption of the Act of 18 June 2014, platform workers in France have the status of "micro-entrepreneurs"[6]. This Act establishes a simplified tax and social security regime specifically adapted to workers setting up in business and wanting to test their ability to run a business or to perform self-employed work in addition to normal salaried work, while at the same time obliging micro-entrepreneurs to be registered in the company register or trades register, in the presumption that they are not tied to a contractor by an employment contract unless proved otherwise[7]. A micro-entrepreneur is a physical person performing a business activity on his own behalf and fully autonomously within the context of a company or service contract.

Since the 2016 Act, self-employed platform workers come under Part VII of the Labour Code covering a wide range of worker situations, all of which have in common that the work done is performed quite differently to normal salaried work. In 2016, the legislator could have, by analogy, introduced the legal presumption of an employment contract or of salaried employment for platform workers, reflecting reality in a much better way. This would have discharged micro-entrepreneur workers from being required to prove the existence of a subordinate work relationship imposed by the Medelin and Pinel Acts. For example, the legal presumption of a non-salaried work relationship benefiting micro-entrepreneurs can be destroyed when it is established that they are providing, either directly or via a third party, services to contractors under conditions placing them in a relationship of permanent legal subordination[8]. This is at the core of the disputes on the classification of platform workers who have recourse to micro-entrepreneur status to perform their work, not by personal choice but because this is imposed by the platforms whose business model is based on outsourcing the work risk. This may also give rise to questions on the freedom to conduct business.

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6. In lieu of the status of "auto-entrepreneuer" introduced by the 2008 Act on Modernising the Economy.

7. Soc. 6 May 2015, Dalloz, p.807, obs. P.Lokiec and J. Porta; Soc. 20 October 2015, Dalloz, 2016, p.807, obs. P.Lokiec and J.Porta.

8. Soc. 7 July 2016, no. 15-16 110 P, *Dalloz Actualité*, 7/9/2016, obs. Cotrot.

1.2 Litigation on the use of self-employed work by the platforms

1.2.1 The whistle blown by the Court of Cassation

The decision of the Social Chamber of the Court of Cassation on 28 November 2018, the first one handed down by an upper French court on platform workers, was taken in consideration of the above-mentioned Article L.8221-6 II of the French Labour Code. In this very traditional decision from the point of view of Court of Cassation jurisprudence on the classification of employment relationships, the judges highlighted two principal factors: First, the existence of a work relationship is not dependent either on the expressed will of the parties or on the name given to their agreement, given the public order character of labour law. Second, the actual conditions under which the work is performed override everything else. These are examined by the first-instance judges, whose rulings can only be overruled by a Court of Cassation judge when the legal consequences of their findings have not been drawn. If the actual conditions reveal that the work is performed under the authority of an employer who has the power to give orders and instructions as well as to monitor its execution, and if necessary to sanction any wrongdoings, a subordinate employment relationship is deemed to exist, justifying the reclassification of the agreement as an employment contract[9]. In the case at hand, the app had a geolocation system allowing the company to track the courier's movements online and to record the distances travelled; moreover, the company **Take Eat Easy** had the power to apply sanctions to the courier. The outcome of several pending cases filed by platform workers are expected to be greatly influenced by this 2018 decision of the Court of Cassation[10].

Notwithstanding this jurisprudence backing the reclassification of a work relationship, the legal situation of platform workers remains dependent on the platforms' rule of only working with freelancers with micro-entrepreneur status. This means that, while the legislator will not be taking any action against the business model upheld by the platforms through imposing a legal presumption of a contract of employment, the question will be to know whether collective rights could be recognised for these workers despite them being self-employed, bearing in mind that they are at least economically dependent freelancers. And whether, in the face of the economic-social "hardship" to which platform workers are subjected through having to assume micro-entrepreneur status, the legislator had implicitly acknowledged that such workers find themselves at the mercy of the platforms, with only collective rights able to compensate for this situation.

9. These are the distinctive elements of legal subordination as set forth in the above-mentioned 1996 landmark judgement of the Court of Cassation.

10. Fabre A. (2018) Les travailleurs des plateformes sont-ils des salariés ? Premières réponses frileuses des juges français, Droit social, 6, 547-558.

1.2.2 Legislative attempts to strengthen the status of the self-employed

In 2016, the French legislator discovered corporate social responsibility (CSR) as a philosophy allowing it to guarantee platforms the continuing use of their business model based on the use of self-employed workers in return for the recognition of the latter's individual and collective rights. The aim was to avoid abuse and to reduce legal disputes over the (re-)classification of employment relationships. As part of the Taché amendment introduced into the draft law on the future of occupations in 2018, the legislator wanted to tighten the scope of the legal provisions adopted in 2016. The idea was to enable the digital platforms to establish a charter setting forth the terms and conditions linked to exercising their CSR with regard to the self-employed workers they were working with. The draft stipulated that the "establishment of the charter and respect of the commitments made by the platforms cannot characterise the existence of a legal subordinate relationship between the platform and the workers". The draft was rejected by the Constitutional Court in its ruling of 4 September 2018 on the grounds that it contradicted Article 45 of the French Constitution which does not allow the insertion into a draft law of provisions ("riders") with little bearing on the subject thereof. Declared null and void due to its form not complying with the Constitution, it is to be feared that the Taché amendment will soon re-emerge in a different form. Pending the legal recognition of platform workers' collective rights, can international sources of law uphold the legality of such rights?

2. Legal recognition of collective rights for platform workers in France

While EU legislation is used to fuel the controversy over the compatibility of platform workers' collective rights, international law conversely offers serious support for such recognition.

2.1 The audacity of the French legislator

2.1.1 The collective rights of platform workers as seen by the French legislator

The three collective rights – the right to collective action, freedom of association and the right to collective bargaining – normally associated with salaried work have been extended to platform workers by the 2016 El Khomri Act: "Movements aimed at collectively refusing to provide their services organised by workers in defence of their occupational claims may neither – except in cases of their abusive use – incur their contractual liability nor constitute grounds for terminating their business relations with the platforms nor justify measures penalising them in the exercise of their work."[11] This provision

11. Art. L.7342-5 of the Labour Code.

applies when a worker works for a platform which determines "the characteristics of the service provided or of goods sold and sets its/their price"[12]. This text clearly acknowledges that the worker – in this case a micro-entrepreneur – is deprived of the distinctive prerogatives of an entrepreneur, i.e. that of setting prices and terms and conditions of service provision. Here we see an unspoken truth in contradiction to the law addressing the bogus self-employed, for whom all working conditions including the means and amount of remuneration are unilaterally set by the platform.

Even if the legal provision seems wider-ranging, such collective action strongly resembles a strike[13], defined as the "collective and concreted stoppage of work in support of occupational claims"[14]. Under French law, the right to strike is an individual freedom guaranteed by the Constitution to all workers, regardless of their status. The right was recognised many years ago for civil servants (with their special non-salaried status), and has since been exercised by such self-employed workers as truck drivers, lawyers, private health providers, etc. But it is the first time that the French legislator has recognised the right to collective action for a particular category of self-employed workers[15], protecting them from liability lawsuits possibly resulting in the termination of the contractual relationship and/or in the payment of damages. Seemingly simple, the legal provision throws up several questions on the classification of such workers as well as on what constitutes a stoppage (how to judge whether disconnection constitutes the non-execution of a contract resulting from a collective stoppage) and on how platforms react (how to distinguish between the platform disconnecting a worker and a unilateral termination in response to a collective stoppage; how to differentiate modifications in the conditions for granting courier rides from measures penalising the exercise of the work in response to a collective stoppage?).

The risk of collective action consisting of refusing to perform contracted work for another company in a concerted manner is that this might be considered as a horizontal agreement coming under competition law by virtue of article L.420-1 of the Commercial Code. Whether an action is conducted in this form by the workers themselves or by their customers (as was the case during the above-mentioned disputes), any refusal to perform the contracted work should be aimed at excluding a company from a market[16]. This does not however seem to be the case when the main thrust of the action is to put pressure on the company to change its remuneration practices. Collective actions have been conducted in France by platform workers against platform decisions to change the form of remuneration or even to reduce the prices of services. These

12. Art. L.7342-1 of the Labour Code.

13. See Masson F. (2017) Un droit de grève en droit des contrats ? À propos des "mouvements de refus concerté" de fournir des services à une plateforme numérique, Droit social, 10, 861-865.

14. Soc. 4 November 1992, no. 90-41 899, Bull.civ. V. n°529.

15. See Supiot A. (2001) Revisiter les droits d'action collective, Droit social, 7-8, 687-705.

16. Com. 22 October 2002, Bull.civ. IV, n°148; *Dalloz*, 2003, p ;63, obs E.Chevrier.

workers for instance refused to migrate from an hourly wage to piecework (i.e. payment by trip). Moreover, on a European level Article 56 TFEU banning restrictions on the freedom to provide services could not be used – despite the direct and horizontal effect recognised by the CJEU – as justification for claims for damages against micro-entrepreneur workers as this horizontal effect does not relate to individuals. Under French law, the right to a collective stoppage of work is an individual right. Collective actions conducted locally in major European cities have led to new developments in a further field: the creation of workers' cooperatives, sometimes under a union umbrella.

This is the second aspect of the collective rights accorded to platform workers by the El Khomri Act. Pursuant to Article L.7342-6 of the French Labour Code, "The workers referred to in Article L.7341-1 benefit from the right to establish a trade union, to become a member thereof and to thus uphold their collective interests". Was it really necessary to accord freedom of association to self-employed workers? Freedom of association (both positive and negative) is a right accorded to everyone, without restriction, under French law in the preamble to the Constitution. It is also a right protected by the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights, the ILO Conventions and by the International Covenant on Civil and Political Rights. In other words, freedom of association is a human right, i.e. with a status higher than that of a worker's right. Irrespective of whether the worker is self-employed or not, he has this right. Including such a precision in the Labour Code is in fact only of interest because of what it allows to be done. Moreover, it is the subject of much controversy as we will see later. Platform workers have already set up unions such as that in Bordeaux for bike couriers, a local union affiliated to the CGT transport federation. Organised since 2018, these same platform workers meet regularly at European level; the first initiative in Vienna in April 2018 was taken by the German ver.di union with its **Foodora** members. The legal provision also offers a perspective not without interest for possible *rapprochements* between these platform workers and unions predominantly targeting regular employees.

While freedom of association for platform workers does not *per se* pose any problem from a legal point of view, the usages of this freedom can be questioned. For instance, under which conditions can "platform workers exercise their collective interests"? While the legislator has little to say in this respect, the wording suggests recourse to various means and probably to the negotiation of collective agreements. This would not be the first time that freelancers have had recourse in France to collective bargaining. For instance, agreements concluded on 16 April 1996 set the status of insurance agents[17], defining their working conditions, remuneration, the employment of staff and their social guarantees.

17. See Barthélémy J. (1997) Une convention collective de travailleurs indépendants ? Réflexions à propos des accords du 16 avril 1996 fixant le statut des agents généraux d'assurance, Droit social, 1, 40-47.

The bargaining of collective agreements allows a balance of power to be ensured. Such a balance does not exist under either individual employment contracts or service provision contracts concluded between individual workers and a platform. Several documents and specifically statements on the conditions for performing the work in the context of disputes initiated by platform workers reveal a major inequality or dependence on the instructions given, such that the only way to re-establish a balance of power, especially when it is a commercial relationship, would be to collectively negotiate working conditions. In France, unionised platform workers attempted to open collective negotiations with **Uber**. But the latter refused to continue the talks, arguing in particular that the delegation was not representative of the drivers.

Union action in the face of the development of a new category of "atypical" workers and self-employed workers remains limited to the specific sectors traditionally offering work to freelancers, for instance in France journalism and the performing arts. More recently, initiatives have emerged to set up unions for precarious workers or freelancers. We need to highlight the concrete difficulties associated with organising workers with very different statuses, relatively isolated, geographically dispersed and very mobile (or even volatile). Several paths are open to the unions, such as extending the right to collective bargaining, the inclusion of the situation of these workers in existing collective agreements (e.g. in the transport sector), legal action or new forms of organisation.

2.1.2 EU legislation

Under Community law, economic freedom is at the core of competition law and is subject to quite remarkable protection, up to the point where CJEU judges consider collective agreements to be a restriction to competition, only excluding them from the ban on business agreements to the extent that they pursue a social policy objective[18]. Free competition is protected by TFEU Article 101. For example, solidarity is at first sight an obstacle to the rules of competition law which only allows for exceptions when they pursue a legitimate social objective[19]. Unions acting within the framework of their mission to defend employees are not excluded from this ban[20]. This is undoubtedly the position which the French legislator wanted to defend in 2016. The potential conflict with Community law could nevertheless be resolved in a favourable way, provided that the reality of the conditions under which platform workers perform their work is formally endowed with the status of self-employment, as suggested by CJEU jurisprudence.

18. ECJ Albany International, case C-67/96 of 21 September 1999, point 60.

19. See Dupeyroux J.J. (1990) Les exigences de la solidarité : observations sur la désignation d'une institution déterminée pour la gestion d'un régime complémentaire de prévoyance, Droit social, 11, 741-750 ; Lyon-Caen G. (1992) L'infiltration du droit du travail par le droit de la concurrence, Droit ouvrier, 525, 313-321.

20. Lyon-Caen G. (2000) Vieilles lunes et nouvelle lune : action syndicale et accords collectifs sous l'éclairage du droit de la concurrence, Droit ouvrier, 620, 143-149 (obs. p.145 sous CA Paris 29 February 2000).

This jurisprudence has greatly developed in its appreciation of the scope of anti-competition agreements vis-à-vis collective agreements. In its 1999 Albany judgement, the ECJ[21] ruled that certain collective agreements should, "by virtue of their nature and purpose", be regarded as falling outside the scope of the ban on agreements preventing, restricting or distorting competition (governed by TFEU article 85(1)). In the view of the Court, the "social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment."[22] But in its FNV judgement of 4 December 2014, the CJEU decided that "a provision of a collective labour agreement, such as that at issue in the main proceedings, in so far as it was concluded by an employees' organisation in the name, and on behalf, of the self-employed services providers who are its members, does not constitute the result of a collective negotiation between employers and employees, and cannot be excluded, by reason of its nature, from the scope of Article 101(1) TFEU"[23] . This FNV case is interesting because it relates to a professional practice of negotiating benefits for employees and self-employed service providers performing the same work in their capacity as members of an orchestra: the collective labour agreement in question set minimum fees not only for substitutes hired as employees but also for substitutes performing their work under a contract for professional services (self-employed workers). In the case at hand, the union had negotiated on behalf of the self-employed workers. Does this judgement point to the end of a legal perspective of a collective bargaining right for supposedly self-employed platform workers?

In its judgement, the CJEU states for the first time that the classification of a worker as self-employed under national law does not exclude a reclassification under EU law. In its view, there are a series of factors allowing a distinction to be made between service providers and employees. For instance, a service provider is considered to be self-employed when such person individually determines his behaviour on the market, is not entirely dependent on his contractor, assumes the financial and commercial risks associated with his work and does not work as an auxiliary worker within the company in question[24]. It also states that "the term 'employee' for the purpose of EU law must itself be defined according to objective criteria that characterise the employment relationship, taking into consideration the rights and responsibilities of the persons concerned", (…) and "that the essential feature of that relationship is that for a certain period of time one person performs services for and under the direction of another person in return for which he receives remuneration"[25]. In other words, self-employed workers are only true undertakings in the sense of EU law when, over and above the legal nature of

21. ECJ Albany International, case C-67/96 of 21 September 1999, Droit social (2000) note X. Pretot, p. 106. Revue de droit sanitaire et social (2000) F. Muller, p. 212. J.B. Blaise, chronique, RTDE (2000), p. 335.
22. ECJ Albany International, case C-67/96 of 21 September 1999.
23. CJEU FNV vs Netherlands, case C-413/13 of 4 December 2014, §30.
24. CJEU FNV, §33.
25. CJEU FNV, §34.

their contract, they are not in a relationship of legal subordination with their co-contractor[26]. However, it was this finding – in this case the tight control of taxi drivers by the platforms – which led the same CJEU in its Elite Taxi judgement of 20 December 2017 to consider that the platform was indeed a transport company. In the view of the CJEU, **Uber** was not an IT service company: "given the tight control exercised over the individual drivers, the company offered more than an intermediation service (…)"[27] It was also the use of similar elements describing a relationship of legal subordination that led the Social Chamber of the Court of Cassation to conclude, in its judgement of 28 November 2018, that a **Take Eat Easy** rider was an employee and thus a bogus self-employed worker.

These judgements, including that of the FNV, lead us to look beyond the apparent facts to determine whether the person involved is self-employed or not. Platform workers are not necessarily self-employed workers under national law – notwithstanding the apparent facts and notwithstanding the option of the French legislator – no more than they are under EU law. For example, the agreements concluded by their organisations might not be made subject to EU competition law. The **Uber** vs. **Elite** judgement pronounced by the CJEU in the field of commercial law indicates that, in the view of the CJEU, the riders were dependent on the platform and that the latter was therefore a transport company. We need to go just one step further to deduce that this dependency gives the collective bargaining of collective labour agreements by union or other collective representation organisations a nature and a purpose which excludes it from the scope of Article 101 TFEU.

2.2 International labour law to the rescue of platform workers' collective rights

2.2.1 Council of Europe rights

Article 11 of the 1950 European Convention on Human Rights states that "Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests". The article goes on to state that "No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime,

26. CJEU FNV, §37. In the same sense, CJEU 26 March 2015, case 316/13 Dalloz, 2015, p.808 ; Robin-Olivier S. (2015) Politique sociale de l'Union européenne, Revue trimestrielle de droit européen, 51 (2), 443 ("Une convention collective fixant le prix des prestations de travailleurs indépendants n'est pas nécessairement soumise au droit de la concurrence").

27. CJEU, Grand Chamber, 20 December 2017, case C-434/15, Asosiacion Profesional Elite Taxi vs Uber Systems Spain. Douville T. (2018) Arrêt Uber ou l'art délicat de la qualification, CJUE, 20 déc. 2017, La Semaine juridique - Entreprise et affaires, 10 (8 mars), 1111 ; Balat N. (2018) Les apports des arrêts "Uber Pop" au droit des transports, Recueil Dalloz, 17, 934-938.

for the protection of health or morals or for the protection of the rights and freedoms of others". In its Demir and Baykara judgement, the ECHR took the view that, in light of the developments of international law and the practice of the Contracting States, "the right to bargain collectively with the employer has, in principle, become one of the essential elements of the right to form and to join trade unions for the protection of [one's] interests"[28]

On 12 December 2018[29], the European Committee of Social Rights (ECSR) ruled on the possibility for self-employed workers to conclude a collective agreement. The case was brought by the *Irish Congress of Trade Unions*, alleging that a prior decision by the Irish competition agency excluding certain categories of self-employed workers – including freelance journalists, voice actors, and some musicians – from engaging in collective bargaining amounted to a violation of Ireland's obligations to protect the rights of workers under Article 6 of the Charter. This was the first time that the ECSR had been confronted with the question of self-employed workers. In its view, the Charter – with one exception – did not specify whether its provisions applied to the self-employed. It considered that "an outright ban on collective bargaining of all self-employed workers would be excessive as it would run counter to the object and purpose" of Article 6§2. It went on to state: "The Committee considers that self-employed workers having no substantial influence on the content of their contractual conditions, if they were to bargain individually, must therefore be given the right to bargain collectively." It held that "the ban was excessive and therefore not necessary in a democratic society in that the categories of persons included in the notion of 'undertaking' were over-inclusive". The Committee made an important precision in stating that "the decisive criterion is rather whether there is an imbalance of power between the providers and engagers of labour. Where providers of labour have no substantial influence on the content of contractual conditions, they must be given the possibility of improving the power imbalance through collective bargaining". Platform workers find themselves confronted by such a power imbalance.

2.2.2 ILO Conventions

Freedom of association, the right to collective bargaining and the right to strike are enshrined in ILO Conventions 87 and 98, the interpretation of which is regularly consolidated, the last time in 2018[30]. Freedom of association is recognised in Article 2 of Convention 87 for all workers "without distinction whatsoever". The Committee of Experts has repeatedly stated that the criterion for enjoying freedom of association is not an employment relationship with an employer, as such a relationship often does not exist – as is the case for agricultural workers, the self-employed or members of the liberal professions.

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28. ECHR Demir and Baykara – request no. 34503/97 of 12 November 2008.

29. Decision no. 123/2016 of 12 December 2018. See Liaisons sociales Europe no. 463, 27 December 2018.

30. ILO (2018) Freedom of association - Compilation of decisions of the Committee on Freedom of Association, 6th ed., Genève, International Labour Office.

They must all be allowed to enjoy freedom of association. The only permissible exception is for members of the armed forces and the police. In one of its reports, the Committee clearly states that "It is contrary to Convention No. 87 to prevent trade unions of self-employed workers who are not subordinate to, or dependent on, a person"[31]. As regards the right to strike, the Committee has always deemed that "it is one of the fundamental rights of workers and their organisations insofar as it constitutes a means for defending their economic and social interests. It is an intrinsic corollary to the right to organize protected by Convention No. 87" [32].

As with freedom of association, "Only armed forces, the police and public servants engaged in the administration of the State may be excluded from collective bargaining"[33]. Similarly, "As a logical consequence of the right to organize of workers associated in cooperatives, the trade union organizations that workers of cooperatives join should be guaranteed the right to engage in collective bargaining on their behalf with a view to defending and promoting their interests."[34] The Committee further requested "a Government to take the necessary measures to ensure that workers who are self-employed could fully enjoy trade union rights for the purpose of furthering and defending their interest, including by the means of collective bargaining; and to identify, in consultation with the social partners concerned, the particularities of self-employed workers that have a bearing on collective bargaining so as to develop specific collective bargaining mechanisms relevant to self-employed workers, if appropriate"[35].

In its report on non-standard work around the world, the ILO listed recommendations including ones to ensure that all forms of social dialogue and mobilisation are adapted to the situation of the workers concerned. Collective bargaining allows the particular circumstances of a certain sector or company to be taken into consideration and is thus a good way of reducing the insecurities affecting non-standard work, including platform work.

By way of conclusion, the self-employed status assigned to platform workers does not correspond to the reality of the conditions under which the work is performed, as evidenced by the facts reported in the above-mentioned legal disputes. In the face of these new non-standard forms of employment, the foundations of labour law are once again shaken. There are several ways of facing up to this fact. Starting out from the consideration that there is no incompatibility between self-employment and salaried work, we could either consider them – in line with reality – as salaried workers, or we could arrive at a common labour law, consisting of a pillar of fundamental rights for all workers working under the control of others, including freedom of association and the rights to collective action and collective bargaining.

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31. See 363th report, case no. 2868, §1005, listed in the 2018 compilation, p.71.
32. Digest 2006, §520.
33. See 371th report, case no. 2988, §843.
34. See 354th report, case no. 1668, §679.
35. See 576th report, case no. 2729, §888.

Italy

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1. State of play

In its XVII Annual Report, the Italian Social Security Institute (INPS) underlines that it is very difficult to determine the number of platforms active in Italy because they do not have a specific ID code (i.e. platforms are classified according to the sector in which they operate, alongside traditional undertakings)[1]. In its report, the INPS identified 50 platforms operating in the country in 2017[2]: 22 of them had no workers; 17 had employees, and 11 worked mainly with service providers and a few employees. Notwithstanding the high turnover, platforms that survive are growing very rapidly. According to the *Banca d'Italia,* the annual growth rate of food delivery platforms is almost 250%, while other labour-based platforms have a growth rate of almost 95%[3].

According to the INPS, in 2017 there were 753,248 platform workers in Italy. This number is based on a study commissioned by the De Benedetti Foundation. However, many platform workers may not have been identified as such: indeed, if they work as "VAT workers"[4] (see Section 2), they pay their social security contributions themselves, without the Social Security Institute knowing who they work for.

As regards the composition of the platform workforce in Italy, a recent survey of riders in Milan[5] revealed that the majority of them are male (97%), non-Italian (61%), not students (85%) and have a service provision contract (50%) that usually lasts for few months. Many riders do not know which rules are applicable to their contract[6]; they are paid according to distance or to the number of deliveries.

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1. INPS (2017) XVII Rapporto annuale, Roma, Istituto Nazionale Previdenza Sociale, p. 98, https://www.inps.it/nuovoportaleinps/default.aspx?itemdir=51978. Voir aussi Forde C. *et al.* (2017) The social protection of workers in the platform economy, p. 19. http://www.europarl.europa.eu/RegData/etudes/STUD/2017/614184/IPOL_STU(2017)614184_EN.pdf
2. According to the Report TraiLab and Collaboriamo, *Mappatura delle Piattaforme Collaborative* (2017), 11% of the 118 platforms operating in Italy in 2015 were inactive the following year. This Report has monitored 125 active platforms in 2016.
3. Giorgiantonio C. and Rizzica L. (2018) Il lavoro nella gig economy: evidenze dal mercato del food delivery in Italia, Questioni di economia e finanza 472, Roma, Banca d'Italia, p. 12.
4. VAT workers are self-employed workers that have to pay full social contributions.
5. Fasano L.M. and Natale P. (eds.) (2019) I riders: una ricerca di carattere ricognitivo, Milano, Università degli studi di Milano, Dipartimento di studi sociali e politici. Voir aussi Natali P. (2019) I riders milanesi, ovvero gli sfruttati del post-capitalismo, Lavoro Diritti Europa, 1, 1-4.
6. This has been confirmed also by INPS report (2017), p. 97.

Another interesting piece of information provided by the INPS Report is that 38% of the platform workers stated having little or no autonomy in the performance of their activities, while 50% of them declared that their activities were organised and controlled through an algorithm[7].

1.2 Political context

The two successive centre-left governments (Renzi, 2014-2016, and Gentiloni, 2016-2018) were set on boosting the collaborative economy, guaranteeing fair competition and protecting customers. To this end, three legislative proposals were presented. Moreover, in 2017, the Gentiloni Government launched a National Plan called "*Firm 4.0*".

In 2018, the new Lega / 5 Stars coalition showed little support for this plan and dropped all legislative proposals presented during the previous legislative period. In July 2018, 5 Stars leader and Minister for Labour and Industry, Luigi Di Maio, initiated a roundtable with trade unions and platforms. In the run-up to this, he circulated a new legislative proposal aiming to extend the notion of subordination and to guarantee certain rights to platform workers, such as a minimum wage, the right to disconnect and the right to annual leave. Moreover, the proposal introduced the right for trade unions to be informed about a platform's rating system and to negotiate the use of algorithms. However, the platforms made their participation in this roundtable conditional on the proposal being withdrawn. As a result, the proposal has never been discussed.

All platforms participating to the roundtable but one (**Domino's Pizza**) have constantly refused to discuss the subordinate *status* of their workers. Currently the roundtable is "at a standstill" (no meetings have been held since November 2018)[8].

A new legislative proposal was submitted by the Government after the decision of the Court of Appeal of Turin on the Foodora case (see Section 3). This proposal was criticised by trade unions because it aimed to classify only food delivery workers as "workers organised by a principal" (applying Article 2 of the Legislative Decree n. 81/2015; see Section 2). Here again, this proposal has since been dropped.

In April 2019, the Minister for Labour and Industry announced a new legislative proposal to guarantee platform workers the right to be insured in the case of work-related accidents, to make platforms pay higher social security contributions and to prohibit piecework pay.

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7. INPS (2017), p.106.

8. Scacchetti T. and Fassina L. (2019) La tutela del lavoro nell'economia delle piattaforme: note di politica del diritto e di politica sindacale a margine della sentenza Foodora, Lavoro Diritti Europa,1, 1-9.

1.3 Undeclared work and unemployment

The level of undeclared work in Italy is very high: 15.7% according to the European Commission[9]. The unemployment rate is also high (10.5%), as is the rate of inactive people (34.3%). The youth unemployment and youth inactivity rates are even higher (33% and 73.9% among 15 – 24-year-olds)[10]. There is thus wide support for the platform economy as it can transform undeclared work into declared work. Similarly, platforms are seen as helping vulnerable people to find work and as creating jobs.

Such arguments ignore the fact that many platform workers are bogus self-employed, and that the platform economy can transform regular employment into bogus self-employment[11]. Similarly, while many of its supporters emphasise that the platform economy creates jobs, especially for young people, little attention is paid to their quality. The recent debate on poor workers has highlighted the poor working conditions of platform workers[12].

It should also be noted that numbers of labour inspectors have steadily decreased since 2006, the year of the last national selection for hiring them. Since then, retired inspectors have not been replaced. Due to the "invisibility" of the platforms and the geographic dispersion of platform workers, it is extremely difficult for labour inspectors to monitor their work. Moreover, labour inspectors are assessed and paid on the basis of a scoring system under which they obtain the highest score when they uncover undeclared work. Scores are low for reclassifying a self-employed worker as an employee, explaining why, in Italy, no inspections have targeted platform activities[13].

1.4 Literature on the platform economy

Several labour law and social security journals have featured monographies on platform workers[14]. While some of the studies published are of very high

9. European Commission (2017) Factsheet on undeclared work: Italy.

10. Istat (2019) Occupati e disoccupati, January 2019, Roma, Istituto Nazionale di Statistica.

11. See the Swisscom case: http://www.areaonline.ch/L-esercito-di-riserva-di-Swisscom-49aeba00?vis=3

12. Bano F. (2019) Il lavoro povero nell'economia digitale, Lavoro e diritto, 1, 129-148.

13. During the public protest against Foodora in Turin, in 2016, the labour inspectorate was called on to intervene.

14. Rivista giuridica del lavoro (2017) 1; Quaderni della Rivista Giuridica del Lavoro e della Previdenza Sociale (2017) 2; Lavoro Diritti Europa (2019) 1; Labour & Law Issues (2018) 4. Voir aussi : Faioli M. (ed.) (2018) Il lavoro nella gig economy, I Quaderni del Cnel 3; Perulli A. (ed.) (2018) Lavoro autonomo e capitalismo delle piattaforme, Padova, Cedam; Tullini P. (ed.) (2017) Web e lavoro : profili evolutivi e di tutela, Torino, G. Giappichelli ; Somma A. (ed.) (2019) Lavoro alla spina, welfare à la carte: lavoro e Stato sociale ai tempi della gig economy, Milano, Meltemi. Other relevant articles: Delfino M. (2018) Work in the age of collaborative platforms between innovation and tradition, European Labour Law Journal, 9 (4), 346-353; Donini A. (2018) Lavoro agile e piattaforma digitale tra autonomia e subordinazione, Variazioni su Temi di Diritto del Lavoro, 3 (3), p. 837; Papa V. (2018) Post-industriale o pre-moderno? Economia digitale e lavoratori on-demand: nuovi paradigmi organizzativi e vecchie esigenze di tutela, Diritto delle Relazioni Industriali, 3, p. 729; Pacella G. (2018) Alienità del risultato alienità dell'organizzazione: ancora una sentenza

quality[15], there is a lack of interdisciplinarity, for example getting labour law scholars to collaborate with scholars from other fields such as civil law or competition law. It should be noted that researchers in different fields of research pursue different objectives: while labour lawyers are keen to provide certain forms of protection to platform workers, civil and competition lawyers seek to facilitate the further development of the platform market, removing legislative obstacles to service provision.

The labour law debate on platform workers has mainly focused on the methodology to be followed in order to guarantee them a certain degree of social protection.

Some labour law experts have suggested adapting the interpretation of the notion of subordination in order to apply it to employer power exerted via platforms[16]. Other authors have proposed broadening the scope of Civil Code Art. 2094 defining employment contracts to include platform workers[17].

Other authors call for a *remedial approach*, stating that it should be irrelevant to qualify a relationship as subordinate or autonomous and that the scope of each regulation should reflect a worker's *weak position*[18]. However, it is not clear how such weakness should be measured: some authors consider a worker's degree of subordination/autonomy, bringing them back to the original problem from which they wanted to escape (the problem of whether to classify a relationship as subordinate or autonomous). Others suggest increasing labour and social protection in line with the height of a worker's wage, but this would consequently decrease protection for precarious workers[19]. Moreover, "a worker's weak position", however defined, needs to be established; thus, at the end of the day, the problem of "classifying the relationship" remains.

Finally, it should be noted that some rules of Italian health and safety legislation apply also to self-employed workers[20], as is the case with certain rules pertaining to antidiscrimination, maternity and paternity legislation,

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spagnola qualifica come subordinati i fattorini di Deliveroo, Labour & Law Issues, 4 (1), 61-90; Gramano E. (2018) Riflessioni sulla qualificazione del rapporto di lavoro nella gig-economy, Argomenti di Diritto del Lavoro, 24 (3), 730-758; Consiglio A. (2018) Il lavoro nella digital economy: prospettive su una subordinazione inedita?, Labour & Law Issues, 4 (1), p. 100; Balandi G.G. (2018) Concetti lavoristici impigliati nella rete, Rivista Trimestrale di Diritto e Procedura Civil, 72 (2), 461-469.

15. De Stefano V. and Aloisi A. (2018) Digital Age. Employment and working conditions of selected types of platform work. National context analysis: Italy, Dublin, Eurofound.

16. E.g. Loffredo A. and Tufo M. (2018) Digital work in the transport sector: in search of the employer, Work Organisation, Labour & Globalisation, 12 (2), 23-37.

17. See the Piemonte legislative proposal (Section 2).

18. E.g. Treu T. (2017) Rimedi, tutele e fattispecie: riflessioni a partire dai lavori della gig economy, Lavoro e Diritto, 3-4, 367-406.

19. Ciucciovino S. (2018) Introduzione, in Faioli M. (ed.) Il lavoro nella gig-economy,I quaderni del Cnel 3.

20. Delogu A. (2018) Salute, sicurezza e "nuovi" lavori: le sfide prevenzionali nella gig economy e nell'industria 4.0, Diritto della Sicurezza sul Lavoro, 2, 37-77.

social insurance for work-related accidents, pensions and unemployment benefits. Therefore, certain forms of worker protection already apply, even if they are still very weak and fragmented. As stated by Aloisi and De Stefano, "very little systematic effort has been made to establish how existing regulations should apply"[21]. Indeed, solutions could be sought both "interpreting the notion of employment in a resilient or elastic way" and exploiting the existing regulatory framework to its maximum.

2. National legal environment

In Italy, the self-employment rate was 21% in 2016, one of the highest percentages in Europe[22]. The self-employed category also covers economically dependent self-employed workers, so-called "para-subordinate" workers who are addressed by a special regulation. Due to their cheaper labour costs, para-subordinate contracts (i.e. contracts of coordinated and continuous collaboration) have in several cases been used to replace traditional employment contracts. As a consequence, the legislator has since 2003 been trying to limit bogus para-subordinate contracts. To this end, in 2015 the legislator introduced the concept of "collaborations organised by the principal"[23]: when a principal organises several performance-related aspects, including when and where the work is to be performed, all statutory employment provisions afforded to employees apply, even if they are formally self-employed. Collective agreements may derogate from this rule and opt out of labour law regulation. In 2017[24], the legislator modified the definition of para–subordination[25], specifying that, in cases of continuous and coordinated collaboration, the contracting parties must agree on the modalities for coordinating a worker's activity within the principal's activity; furthermore, the worker has to perform his activity autonomously. Law 81/2017 introduced further forms of protection for genuinely self-employed workers. Many authors claim that these legislative interventions have not helped clarify who is an employee, who is self-employed, who is a para-subordinate worker and who is a para-subordinate-hetero-organised worker. For this reason, several national and regional bills on platform workers (e.g. the Di Maio proposal; the Piemonte proposal) aim to eliminate the notion of hetero–organisation[26] and extend the notion of subordination.

In Italy, there are many different kinds of employment contracts. Besides the so-called standard employment contract, i.e. an open-ended full-time contract, there are also people working on fixed-term and/or part-time contracts, intermittent workers, temporary agency workers, voucher workers, occasional workers, "continuous and coordinated workers" and "VAT workers". Platforms

21. De Stefano and Aloisi (2018) op. cit., p. 14.
22. Eurostat (2017) Taking a look at the self-employed in the EU.
23. Article 2 Legislative Decree 81/2015.
24. Law 87/2017.
25. Article 409 Civil Procedure Code.
26. Article 2 Legislative Decree n. 81/2015.

can therefore choose the category best suiting them. For instance, **Deliveroo** has decided to hire its workers as occasional workers or "VAT workers"[27], while **Foodora** prefers to hire "continuous and coordinated workers"[28]. Other platforms (like **JustEat**) have signed a service contract with a company that hires workers who are then provided to the platform[29].

However, a court can always "disregard or override the contractual label that the parties choose when the substance of the work relationship contains legal indications of subordination and when the level of dependence is such that in reality the relationship is one of employment"[30]. Indeed, Italian labour law is based on two fundamental principles: "inderogability" according to which private agreements may not derogate from the requirements established by law and collective agreements; and the "primacy of facts" according to which "the determination of the existence of an employment relationship should be guided by the facts relating to the actual performance of work and not by how the parties describe the relationship"[31].

Until 2019, in Italy, there was no legal definition of platform work (or similar concepts) and no specific regulatory framework covering it[32]. On 20 March 2019, a specific law was adopted by Lazio (an Italian region). Despite the lack of regional-level competence to legislate in this field, the Lazio law introduces several rights for "digital workers", i.e. workers who, notwithstanding the type and the duration of their work relationship, provide their labour to a platform that organises them to offer a service via an app, determining the price and the conditions of this service (art. 2). The law obliges platforms operating in Lazio to provide health and safety training and equipment protecting workers against work accidents (art. 3). Moreover, platforms have to provide their workers with insurance against work accidents, maternity/paternity and third-party liability (art. 4). The law forbids piecework pay and stipulates compliance with the minimum wage established by national collective agreements signed by the most representative trade unions and the payment of an availability allowance (art. 5). Digital workers have to be informed on working conditions (art. 6) and on the functioning of the algorithm and rating system (art. 7). The law also introduces a register where platforms can register to gain a "fair business" label.

27. A principal does not have to pay any social contribution and social insurance for occasional workers who earn less than 5000 € a year. VAT workers have to pay full social security contributions themselves and are not covered by a social insurance. However, Deliveroo has a private insurance that intervenes in case its riders have an accident.

28. In the case of continuous and coordinated collaboration, social security contributions have to be paid by the principal (2/3 of the amount) and by the worker (1/3 of the amount).

29. Guarascio D. (ed.) (2018) Report sull'economia delle piattaforme digitali in Europa e in Italia, Inapp Report 7, Roma, Istituto Nazionale per l'Analisi delle Politiche Pubbliche, p. 74.

30. De Stefano and Aloisi (2018) op. cit., p. 7.

31. Berg *et al.*, 2018; see, Italian Court of Cassation n. 25711/2018

32. In 2013, the Labour Ministry adopted a circular on Amazon Mechanical Turk just to clarify that it does not create a temporary agency work relationship.

In June 2018, a legislative proposal was presented in Piemonte (another Italian region). Improving the Di Maio draft (indeed, it was submitted by 5-Stars), it guarantees the right to information on working conditions, fair wages, a ban on piecework pay, the right for trade unions to negotiate algorithms, the right to disconnect, rules on working time, the prohibition of discrimination, and data protection. Last but not least, the proposal broadens the notion of an employment contract as provided for under Article 2094 of the Civil Code, classifying a worker who receives orders via an app or another programme as an employee.

3. Jurisprudence

The first cases related to platforms in Italy concerned competition law. In 2015, the Tribunal of Milan banned the **UberPop** app throughout Italy for unfair competition. The court stated that the app provided a service comparable with the one provided by traditional taxi call centres, while its pricing system was not subject to the rules governing the public taxi service[33]. The same Tribunal then banned the **UberBlack** service for unfair competition against private hire vehicle drivers who have to return to base between rides[34]. It should be noted that, in both cases, two consumer associations participated in the trial in support of **Uber**'s position.

On 11 April 2018, the first case involving platform workers was decided by the Tribunal of Turin. The case concerned six **Foodora** workers fired after a strike organised in Turin in 2016 (see Section 4). The judge rejected their call for employee status because they were deemed to be free to decide when to work and to disregard previously agreed shifts. Moreover, the judge denied them the status of "workers organised by the principal", following the very narrow interpretation of Article 2 of Legislative Decree 81/2015 suggested by **Foodora**'s lawyers, two famous labour law professors (Paolo Tosi and Fiorella Lunardon). In July 2018, the Tribunal of Milan similarly denied **Foodinho** workers employee and para-subordinate status.

For both courts (Turin and Milan), the facts that the riders, after having declared their availability for a certain shift, had to show up at a defined hotspot where they could log onto the app and receive their delivery orders, that the delivery order had to be executed within a certain time (calculated on the basis of the suggested route), that the platforms could always monitor the riders' location and their speed in performing a task, that the prices were fixed by platforms, that a rating system was used to allocate shifts and delivery orders and that riders' delivery orders depended on their availability and their performance, were deemed insufficient to prove the subordinate nature of the relationship.

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33. Trib. Milano, ord., Sez. spec. Impresa, 25 May 2015.

34. Trib. Milano, ord., Sez. spec. Impresa, 9 July 2015, Rivista Italiana di Diritto del Lavoro (2016), no. 1, II, 46 ff. See also Trib. Roma, Sez. IX, 7 April 2017; Trib. Torino, Sez. I, 22 March 2017; Trib. Torino, Sez. spec. Impresa, 1 March 2017.

Unfortunately, there was no coordination between the lawyers defending the riders' rights in the two cases, with their defence strategy not broadly discussed and agreed.

Both decisions have been criticised by labour scholars[35]. The decision of the Tribunal of Turin was partially overturned by the Court of Appeal[36]. While confirming that **Foodora** riders were not employees because they were free to decide when to work and to disregard previously agreed shifts, Article 2 of Legislative Decree 81/2015 was applied: according to the court, **Foodora** organised riders' activities, also with respect to the time and the place of work (**Foodora** set down shifts, delivery times, wages, etc.). As "workers organised by a principal", **Foodora** riders should thus benefit from employment law. However, the Court of Appeal upheld only the right for them to be paid on the basis of the national collective agreement for the logistics sector. No other employee regulations were applied to the riders (e.g. on unfair dismissal)[37]. It should be noted that none of the above-mentioned decisions assesses if and to what extent antidiscrimination, health and safety or data protection regulations are applicable to riders.

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35. On the decision of the Tribunal of Turin see: Biasi M. (2018) Il tribunale di Torino e la qualificazione dei riders di foodora, Argomenti di Diritto del Lavoro, 4-5, p. 1220; Liebman S. and Aloisi A. (2018) I diritti in bianco e nero dei riders (e degli altri gig workers), 30 juillet 2018, www.viasarfatti25; Cavallini G. (2018) Torino vs. Londra il lavoro nella gig economy tra autonomia e subordinazione, Sintesi, 5, 7-11; Tullini P. (2018) Prime riflessioni dopo la sentenza di Torino sul "caso Foodora". La qualificazione giuridica dei rapporti di lavoro dei gig-workers: nuove pronunce e vecchi approcci metodologici, Lavoro Diritti Europa, 1, 1-9; Dagnino E. (2018) Foodora, esclusa la subordinazione per i rider, Guida al Lavoro, 21, p. 12; Saccaggi M. (2018) La sentenza Foodora: i rider, come i pony express, sono liberi di non lavorare, Bollettino ADAPT, 14 mai 2018; Gragnoli E. (2018) Una complessa, ma significativa decisione sulla qualificazione dei contratti stipulati con i gestori delle cosiddette piattaforme digitali (nota di commento a Tribunale Torino 7 maggio 2018), http://www.dirittolavorovariazioni.com/index.php?option=com_content&view=article&id=1825&catid=10&Itemid=310; Ichino P. (2018) Subordinazione, autonomia e protezione del lavoro nella gig-economy, Rivista Italiana di Diritto del Lavoro, 37 (2), 294-303; Del Conte M. and Razzolini O. (2018) La gig economy alla prova del giudice: la difficile reinterpretazione della fattispecie e degli indici denotativi, Giornale di Diritto del Lavoro e di Relazioni Industriali, 159, 673-682; Recchia G. (2018) Gig economy e dilemmi qualificatori: la prima sentenza italiana, Il lavoro nella Giurisprudenza, 26 (7), 721-734; Gramano E. (2018) Dalla eterodirezione alla eterorganizzazione e ritorno : un commento alla sentenza Foodora, Labor, 5, 609-619; Lai M. (2018) Crowd working e tutela del lavoro, Diritto e Pratica del Lavoro, 35 (19), 1182-1192; Spinelli C. (2018) La qualificazione giuridica del rapporto di lavoro dei fattorini di Foodora tra autonomia e subordinazione, Rivista Giuridica del Lavoro e della Previdenza Sociale, 3, p. 371. On the decision of the Tribunal of Milan see see Forlivesi M. (2019) Nuovi lavori, vecchie interpretazioni? Note a margine di una recente sentenza del Tribunale di Milano sulla qualificazione giuridica dei c.d. riders, Labor, 1, p. 112.

36. On this decision see Paoletti M. (2019) Ciclofattorini: una sentenza interessante, un problema ancora molto aperto, Lavoro Diritti Europa, 1/2019; De Luca Tamajo R. (2019) La Sentenza della Corte d'Appello Torino sul caso Foodora : ai confini tra autonomia e subordinazione, Lavoro Diritti Europa, 1/2019; Tullini P. (2019) Le collaborazioni etero-organizzate dei riders: quali tutele applicabili?, Lavoro Diritti Europa, 1/2019.

37. According to a circular issued by the Ministry of Labour (n. 3/2016), all rules that regulate the contract of employment shall be applied to "workers organised by a principal".

4. Collective action

Different forms of public protest have been organised by riders (strikes, collective disconnections, flash mobs, petitions). Social networks have been used by the riders to communicate with each other and coordinate collective disputes. In October 2016, a boycott was organised in Turin against **Foodora**'s decision to introduce payment per delivery (piecework pay) and to get riders classified as subordinate workers. In July 2017, a similar strike was held in Milan against **Deliveroo**'s decision to introduce payment per delivery. These were followed by further actions: in January 2018, the "snow strike" in Bologna against bad working conditions; in November 2018, a flash mob in Florence against the dismissal of all **Foodora** workers after the company was taken over by **Glovo.** The platforms have reacted in different ways to these collective actions. In 2016, **Foodora** dismissed the riders involved in the protest (i.e. it refused to renew their service contracts). Six of the dismissed riders subsequently sued **Foodora** before the Tribunal of Turin (case decided in April 2018; see Section 3). **Deliveroo** instead decided to hire more riders in order to minimise the impact of strikes.

While there have been many collective actions, Italian labour law scholars have not yet tackled the issue of how the right to strike applies to these new forms of collective disputes. However, in Italy the right to collective bargaining and the right to strike are accorded also to own-account self-employed workers (i.e. workers without any employees working for them).

Local authorities play a noteworthy role. In 2017, the municipal administration of Milan opened the first office (the Riders Bureau of Milan) in Italy dedicated to 'listening to, informing and advising' riders working for food delivery platforms. In Bologna, during the so-called "snow strike" (see above), the municipality ordered the platforms to stop their activities, and then opened and chaired the roundtable in which the Bologna Charter of Fundamental Digital Workers' Rights was adopted (see below). Other regional initiatives have been launched in the Lazio and Piemonte regions (see Section 2).

Furthermore, in recent years we have seen some "grassroots" trade union initiatives[38]. Riders working for a range of food delivery platforms in Bologna have set up their own "Riders Union", and established unions are now beginning to mobilise alongside these "grassroots" unions[39]. In July 2018, the national collective agreement for the logistics sector signed by the three main Italian trade unions (Filt Cgil, Fit Cisl and Uiltrasporti) introduced the category of "rider" into the list of job classifications, qualifying them as subordinate workers. However, this collective agreement is not binding for all platforms: indeed, in Italy, only employers that have signed a collective agreement are bound by it (i.e. collective agreements do not produce *erga omnes* effects).

38. See Occhino A. (2019) Nuove soggettività e nuove rappresentanze del lavoro nell'economia digitale, Labor 1/2019, p. 40.

39. Tassinari A. and Maccarone V. (2017) The mobilisation of gig economy couriers in Italy: some lessons for the trade union movement, Transfer, 23 (3), 353–357.

In May 2019, **Laconsegna** (a food delivery company) and Filt Cgil, Fit Cisl and Uiltrasporti signed the first Italian company collective agreement in which riders are qualified as subordinate workers (i.e. employees). According to this agreement, riders' employment contracts come under the national collective agreement for the logistics sector. As a result, riders are paid on the basis of their working time and benefit from all social protections accorded to employees. Moreover, **Laconsegna** employees have set up a work council, the first one in Italy in the platform economy.

For their part, **Deliveroo**, **Glovo**, **JustEat, Uber Eats** and **Social Food** created a platform federation (AssoDelivery) in July 2018 before taking part in the roundtable launched by the Minister of Labour in 2018. The "Food Delivery Values Charter" signed in June 2018 by **Foodora**, **Foodracers**, **Moovenda** and **Prestofood** aims to guarantee fundamental safeguards for riders. In reality, these platforms have restated the self-employed status of riders, while promising to guarantee fair and adequate pay (but without saying how) and to avoid ranking systems. The Charter is not binding and has not led to any changes in riders' conditions.

4.1 The Bologna Charter

The Charter of Fundamental Digital Workers' Rights was signed in Bologna in May 2018. Though with little legal value – only two platforms, **Sgnam** and **MyMenu**, have signed it –, it has great political value. For instance, the city of Bologna is considering reducing local taxes for platforms that respect it. Applicable to all platform workers operating in Bologna[40], the Charter provides for a right to information on working conditions (including minimum paid working hours) and on rating systems, a fixed and fair hourly wage greater or equal to the wage set in national collective agreements for the provision of similar services, overtime pay, a ban on discriminatory behaviour, official notification including justification in cases where workers are excluded from a platform, insurance (covered by the platform) against work-related accidents and illness, compensation for bicycle maintenance costs, rules on personal data protection, a right to disconnect, freedom of association and the right to strike.

It should be noted that the Bologna Charter does not affect the qualification of platform workers as employees or self-employed. As already mentioned (see Section 2), judges can only qualify a work relationship as subordinate or autonomous in consideration of the facts relating to the actual execution of the work.

40. The Charter is applicable to all platform workers operating in Bologna, but it is binding only for the employers that have signed it (currently only Sgnam and MyMenu).

Conclusion

Italian debate on platform workers is strongly conditioned by two elements: short-term political needs (e.g. to win local, national or European elections) and the bad situation of the Italian labour market (see Section 1.3). As a consequence, several legislative proposals have been presented. However, due to the current political instability, a national legal framework for platform workers is still lacking.

Faced with this situation, local authorities and trade unions have intervened to guarantee certain social rights to platform workers. The engagement of local authorities and trade union confederations was mainly triggered by strikes and other forms of public protest organised by riders. Consequently, in Italy the main regulations governing platform workers (e.g. the Bologna Charter, the application of the national collective agreement for the logistics sector) can be seen as the outcomes of collective actions organised by platform workers.

The Netherlands

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1. State of play

There is a lively debate in the Netherlands on the status of people working for and providing services via digital platforms ("platform workers"). The debate can be seen as part of the wider debate on precarious work and its rise.

In 2016, the Social and Economic Council (*Sociaal-Economische Raad*, SER[1]) published a report on the digitalisation of work.[2] The following year, the government held a conference on the future of labour law, with professors of law, employers and unions taking part.[3] The challenges posed by the platform economy were discussed, though without coming to any clear conclusions. The majority of the professors, as well as the employer federations, shared the opinion that under current legislation platform workers were not employees but self-employed service providers.[4] However, the professors noted that this legislation had not been adapted to take account of the new forms of work.[5] As for the unions, they were of the opinion that platform workers had to be considered as employees entitled to the minimum wage, regular working hours, etc.[6]

1.1 Situation on the labour market

The Dutch labour market is very flexible. Especially after the adoption of a new law in 1999, the country has seen a large increase in the incidence of fixed-term employment contracts, freelance contracts, zero-hour contracts and temporary

1. The SER is a consultative NGO (established by law) made up of employer representatives, worker representatives and experts. It advises the government and parliament on socio-economic policy matters, and facilitates agreements.
2. SER (2016) Mens en technologies: samen aan het werk. https://www.ser.nl/-/media/ser/downloads/adviezen/2016/mens-technologie.pdf
3. Roundtable on « Work in the platform economy", 16 November 2017, Second Chamber. https://www.tweedekamer.nl/debat_en_vergadering/commissievergaderingen/details?id=2017A03004
4. See for example: Houwerzijl M.S. (2017) Arbeid en arbeidsrecht in de digitale platformsamenleving: een verkenning, Tijdschrift Recht en Arbeid, 2, 3-8. Kruit P. and Ouwehand M. (2018) Platformarbeid: de ene platformwerk(nem)er is de andere niet, Tijdschrift Recht en Arbeid, 7-8.
5. van Slooten J.M. (2017) Ter visie – Platformarbeid: nog een reden tot rethinking van het arbeidsrecht, Tijdschrift voor Arbeid en Onderneming, 2, 51-52.
6. A cross-sectoral research group set up in late 2018 is currently compiling a report on the future of work. It is due to be finished at the end of May 2019 (Commissie Regulering werk, set up on 7 November 2018).

agency work. This flexibility has since been complemented by security aspects: collective agreements, minimum protections and pension rights. The tendency among employers is to think that they no longer need employees but can make do with a self-employed workforce. At present, about one million workers are classified as being self-employed[7], with no access to social insurance, even though the majority of them hardly earn enough to pay for private insurance.

The fear is that the development of the platform economy is just a stepping stone towards even more flexible and precarious work. Platform work poses *prima facie* a threat to traditional temp agencies, though also has consequences for the whole labour market (in particular in the form of subcontracting) and for labour law in its current form, i.e. not (yet) adapted to these new forms of work. Dutch labour law was created in 1907 to offer protection to often low-skilled workers without savings. It provided for a guaranteed minimum wage, limits to working hours, working conditions and safety at work, as well as protection against certain social risks. In its use of service contracts instead of employment contracts, the platform economy is circumventing this law, not offering its workers any security. After 100 years of social peace, is a new "social question" developing?

The platforms are able to offer cheap services to consumers (Uber, Deliveroo and their likes) by resorting to gig workers instead of taking on employees. The former are much cheaper, as the platforms do not have to pay social security/insurance contributions for them, do not have to pay minimum wages, do not have to offer training and do not need to put aside money for severance pay. This competition over employment conditions/costs is putting the whole system in danger, because these workers are paid at a very low level, are not entitled to social benefits and can look forward to just a minimum pension, without any complementary (occupational) pension and with the accompanying risk of poverty. The danger is that the platform economy will increase poverty, forcing workers to live off social benefits. A recent government report (26 November 2018) stated that half of all freelancers pay no tax at all as their income is too low (around €15,000 a year). Moreover, a substantial slice of this income (25 - 35%) may be due as a fee to a platform operator for the use of its app. This has the effect of making these workers work longer and longer to earn a living wage.[8]

However, these "workers" also bear the risk of any lack of work: no demand, no work, no pay. The image of the self-employed as enjoying the freedom to manage their lives as they see fit and able to put money aside for their retirement

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7. Plus 1.5 million "self-employed" with an employment contract. Editor's note: For more on the extent of flexibility on the Dutch labour market, see: https://www.etui.org/News/Netherlands-marked-increase-in-flexible-workers. Professors Paul de Beer and Evert Verhulp (University of Amsterdam) show that the surge in self-employment in recent years is due in part to a tax system greatly benefiting self-employed workers without employees (http://uva-aias.net/en/news/publ-dertig-vragen-en-antwoorden-over-flexibel-werk).

8. Bijlage bij Kamerbrief Minister SZW aan Tweede Kamer (Annex to the letter sent by the Minister of Social Affairs and Employment to the Lower Chamber), 26 November 2018.

just does not correspond to reality (even though there are true freelancers who have chosen to work this way and who manage to earn enough to live on). The government is thus of the opinion that it needs to protect these "bogus" self-employed workers suffering from their situation, and to prevent competition over working conditions. This is why it has set forth four measures targeting the self-employed: the service contract declaration (for tax purposes); clarification of the "subordinate relationship" criterion; an employment contract in the case of low wages (*Arbeidsovereenkomst laag tarief*, ALT); and an opt-out.[9]

In the context of this contribution, we will be focusing on the third measure. The government would like to introduce obligatory employment contracts and a ban on service contracts in the following two situations: when the self-employed worker works for a low wage under a longer-term contract binding him to a single co-contractor; or when the self-employed worker works for a low wage but performs regular work in the company of the co-contractor. Details of this project are not yet known, but it is already clear that there is a substantial risk of it being incompatible with EU rules on competition and the freedom to provide services.

Whatever the case, one can wonder why, in the face of so many risks of precarious work, career stagnation and poverty, the debate in the Netherlands remains so "calm". Two possible explanations are that (i) everyone is obliged to take out medical insurance (*Zorgverzekeringswet*, ZVW); and (ii) all citizens have access to a guaranteed basic pension. Moreover, freelancers have set up their own medical insurance funds, the so-called *broodfonds* or "bread funds",[10] setting aside a monthly sum and paying it into a pooled bank account. If one of them falls ill, he is able to receive a share of this "pooled" money for a period not exceeding two years. While off sick, the freelancer receives support from a social "buddy" responsible for relations with other freelancers. One bank has been offering a specific account for this type of savings since October 2018[11].

2. The national legal environment

2.1 Labour law

Labour law in the Netherlands provides for two forms of work: one either works on the basis of an employment contract or in a self-employed capacity. There is no employment relationship offering partial protection. For a worker to qualify as an "employee", he must perform the assigned work personally and be paid by a (legal) person, with a subordinate relationship existing between the two.[12]

9. https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/kamerstukken/2018/11/26/kamerbrief-voortgang-uitwerking-maatregelen-werken-als-zelfstandige/kamerbrief-voortgang-uitwerking-maatregelen-werken-als-zelfstandige.pdf.
10. https://www.broodfonds.nl
11. Triodos Bank (Ed.).
12. Art. 7: 610 Dutch Civil Code.

In the platform economy, the two big problems with regard to classifying a worker are the subordinate relationship and the personal execution of the assigned work. With regard to the latter, the platform often has no means to verify this: an individual accesses the platform using his password, but there is nothing to stop it being entered by a third person. And obviously, neither the platform nor the customer is really interested in who actually delivers the pizza. This is thus the first problem associated with classifying a worker as an "employee".

As regards the subordinate relationship, if supervision exists, it is often done by means of algorithms in the smartphone or computer application and not by the employer. Can an algorithm replace an employer? With platforms like **Uber**, the question is relevant, because an algorithm can disconnect a driver who refuses a ride offer three times in a row. Does such a sanction constitute a subordinate relationship? And if subordination exists, would the driver be subordinate to the algorithm which is determining his hours of work, his pay and any sanctions? With the question not settled, just like the question of whether the work is performed "personally", Dutch judges are unable to rule that a contract of employment exists.

The government is well aware that the key problem is the subordination. In its letter of November 2018, it also attempted to list rules helping judges to decide whether such a subordinate relationship exists[13].

It sets forth five criteria, summarised as follows:

— a manager-employee relationship: the right to give instructions on how to perform the work, a clear definition of the expected results, the setting of a fixed period (start and end of the work period), etc.;
— workforce comparability: has the person concerned performed the same tasks as an employee? Is the work also performed by regular employees? Are the rules the same, is there an assessment system, a training obligation, etc.?
— working hours and methods: if the worker is not free to define his place of work, his work schedule and the tools to be used, he is considered to be working in a subordinate relationship;
— external communications: the fact that the freelancer is forced to use the name of his contractor points to a subordinate relationship. If this is not the case (using one's own name, logo, etc.), a subordinate relationship is not supposed;
— a judge must also pay attention to other aspects such as the existence of a non-competition clause, third-party liability, etc.

Would it be worthwhile exploring other paths, such as temporary agency work? In the Netherlands, the definition of temporary agency work covers a wide

13. We should point out that these rules are not specifically for platform workers, but apply more broadly to the fight against bogus self-employment.

range of situations, with the Appeal Court refusing to differentiate between different types of such work.[14] A temporary worker is basically any person used by an agency (whose job it is to broker) for work. In relation to a platform described as acting as such an agency, the question is to know whether those offering their services to it have to be considered as temporary employees in the sense of the Dutch Civil Code.[15] Conversely, since October 2018, one temp agency is using an app (**MatchAB**) to bring together people offering their labour and people offering work. Does this mean that the agency has been replaced by an app? If yes, what does this mean for the temp workers?

2.2 Social security law

Social security law has two distinct pillars – the mandatory health insurance for the whole population (*Zorgverzekeringswet*), paid by every individual; and a basic pension (AOW) paid for out of tax – which are applicable to all persons domiciled in the Netherlands. As already mentioned, this feature is a probable explanation for the lack of any large mobilisations, strikes or other collective action on the part of the Dutch self-employed 'army'.

On the other hand, for all other social benefits, only those in a regular employment relationship are covered[16], with the law stating that such workers are mandatorily insured against unemployment, disability, etc. There is also a group of workers defined as being in a "fictive" employment relationship: home workers, artists, football players and people working for others in a paid capacity. All workers covered by this "second branch" of social security are also entitled to a top-up pension funded by the employer via a sectoral pension fund (in exceptional cases, freelancers may find themselves having to participate in such a pension fund when offering their services to companies in a sector with such a pension fund).

Generally speaking, persons working as freelancers are explicitly excluded from the statutory social security regime as they are considered to be able to pay for private insurance themselves. But such insurance is very expensive, meaning that only a minority of freelancers are insured against disability and contribute to a (private) pension fund. To avoid a possible generation of precarious workers and impoverished pensioners, discussions are currently being held on mandatory insurance for everybody. But these discussions are proving to be difficult, in particular with regard to the question of mandatory pension contributions for the self-employed and to the retirement age.

14. HR 4 November 2016, ECLI :NL :HR :2016 :2356 (Care4Care).
15. See Verhulp E. (2018) Platformwerkers verdienen meer, ArbeidsRecht, 2018/1.
16. The term "employment relationship" is selected, as it includes employment contracts and statutory employment.

3. National jurisprudence

In the Netherlands, three rulings relating to the platform economy have been handed down: one on 23 July 2018 from the first-instance court of Amsterdam on employment relationships at **Deliveroo**[17] and two on 15 January 2019, again from the first-instance court of Amsterdam.[18] The July 2018 case concerned a young man, Mr X, who worked as a rider for **Deliveroo**. At the start, Mr X had a fixed-term employment contract extending to 3 February 2018. He was paid an hourly wage of €6.02 and was entitled to paid leave. He had to be prepared to work hours specified by the employer. If he refused an order three times in a row during his specified hours, the employer was entitled to dismiss him without notice. Moreover, Mr X had to wear a **Deliveroo** anorak, use the **Deliveroo** thermobox and was not allowed to work for competing firms.

In November 2017, **Deliveroo** sent out an email to all its riders, explaining the success of its "*fee per delivery*" scheme and its desire to extend this scheme to all riders. As with Mr X, no rider had his employment contract extended; riders either had to stop working for **Deliveroo** or to continue working on the basis of a service provision contract. This contract listed different conditions: the possibility to use a third party for performing the services, no obligation to provide services during "reserved" hours, payment by delivery and no longer by hour, an obligation to register with the Chamber of Commerce and to take care of one's own insurance contributions and taxes. As the work had not changed, Mr X requested the judge to reclassify the contract as an employment contract, arguing that he was performing work, that it was paid, that there was a subordinate relationship and invoking the presumption of the existence of an employment contract.

3.1 The ruling

The judge started by focusing on the legal presumption raised by Mr X. Pursuant to Article 610a, an employment contract is presumed when a person works for three months or at least 20 hours a month for another person and is paid by this person. However, Mr X had only worked an average of 7.5 hours between November and January 2018. He could not therefore invoke legal presumption. Though he had worked more than 20 hours in April, May and June, the judge refused to take this period into consideration. Moreover, the judge pointed out that the article existed to rule on employment relationships without a contract or with a contract which did not state an exact number of working hours. This was not the case here.

17. ECLI:NL:RBAMS:2018:5183.
18. ECLI:NL:RBAMS:2019:198 and 210.

The judge then had to determine whether an employment contract existed. According to the Dutch Appeal Court, a judge needs to examine not only the terms of the contract, but also its execution and the intention of the parties. The intentions of **Deliveroo** were clear: to do away with employment contracts and to subsequently only offer service contracts. Mr X alleged that he wanted to continue his work but had had no choice other than to sign the service contract, even if he would have preferred to have had an employment contract.

The execution of the contract was a further aspect able to change the legal classification of the contract. The judge examined six aspects: the obligation to work, the clothing, insurance and safety, the substitution possibility, and the fees. With regard to the working hours, one of the problems was access to the deliveries, which was determined by an algorithm. This gave priority to the most "efficient" riders. Such efficiency was decided by the algorithm, though riders were unaware of the factors taken into consideration (over and above the number of deliveries performed, availability during "rush-hours" and the number of refusals). Did such a system constitute a subordinate relationship? Mr X did not contest that he had a right to refuse a delivery. However, he affirmed that that had consequences for access to subsequent deliveries. Taking the fact that **Deliveroo** had surplus riders into consideration, it became crucial to work the hours with the most orders. As a result, the risk of losing out through refusing a delivery meant that, in reality, any freedom to determine one's working hours did not really exist. However, in the view of the judge, the negative consequences were not *per se* sufficient to suppose the existence of a subordinate relationship, and thus of an employment contract.

As regarded the clothing, there was no formal instruction to wear specific clothing. There was thus no subordinate relationship here. The safety instructions were normal for the transport sector and their general nature more than specific. As regarded the possibility to use a substitute rider, the judge considered that the fact that Deliveroo merely demanded that any substitute be capable of performing the work did not mean that substitution was impossible. At the end of the day, Deliveroo possessed a record of meals delivered, using this data for invoicing. But here again, the mere fact that Deliveroo dealt with the administrative aspects and set the fees did not mean that an employment contract existed.

Winding up, the judge ruled that it was absolutely clear that the contract had been an employment contract before February 2018 and that afterwards the parties had changed their contractual relationship and that the execution of the new contact took place in his name. Neither the name and the intentions nor the execution of the contract obliged the judge to reclassify it. Nevertheless, he did add an *obiter dictum* addressed to the legislator, stating that labour law in its current state was probably not appropriate for judging the new forms of work.

An about-turn occurred on January 15, 2019, with the first-instance court of Amsterdam handing down two further rulings[19], in which the judge decided that the relationships between **Deliveroo** and the riders needed to be classified as employment contracts. The judge explained that he was not bound by the preceding ruling of his colleague, as legislation on platforms was developing extremely quickly; there was thus no precedent.

The judge then went on to examine the contract. First, there was an obligation to work. **Deliveroo** was in need of riders, it managed their availability via an algorithm which gave priority to the "best" riders. Similarly, the algorithm selected the nearest rider; this obliged riders to be ready to work. Any freedom to turn down a ride was not as absolute as stated. As regarded the personal aspect, while riders could use a substitute, the administrative obligations needing to be fulfilled made this possibility hypothetical. Furthermore, it was **Deliveroo** that set the fees, without riders having any opportunity to negotiate them. While it was true that the riders had to register with the Chamber of Commerce, this was in the view of the judge not a decisive factor, as such registration was solely at the request of **Deliveroo**. Last but not least, even if the use of a **Deliveroo** thermobox was not obligatory, riders could purchase one at a reduced rate. Riders' obligations seemed evident, while the scope for **Deliveroo** to give instructions was very wide-ranging. In consideration of all these facts, the judge arrived at the conclusion that the riders were entitled to employment contracts. It comes as no surprise that **Deliveroo** has announced that it will be appealing against the ruling.[20]

4. Collective disputes

There is no tradition of collective disputes in the Netherlands due to the very restrictive jurisprudence of the Supreme Court. Although this changed in 2014 and 2015[21], collective action remains rare. At the beginning of 2018, a "day of collective action" was organised against Deliveroo, but this was still when its riders were employed on the basis of employment contracts. Since February 2018 and their conversion to self-employed workers, no further collective mobilisation has taken place (it should be pointed at this juncture that Deliveroo itself has created a "Riders Forum", acting as a council for informing and consulting riders. But it is naturally not a works council).

On the part of the unions, the FNV filed two lawsuits in 2018. The purpose of the first one was to determine whether Deliveroo riders were really self-employed and to decide on the applicability of the road transport collective agreement (*Beroepsgoederenvervoer*). On 15 January 2019, the first-instance court of Amsterdam decided that the collective agreement was indeed

19. ECLI: NL:RBAMS:2019:198 and 210.
20. https://www.loyensloeff.com/en-us/news-events/news/benefitsbit-platformarbeid-de-belangrijkste-ontwikkelingen-op-een-rijtje
21. ECLI:NL:HR:2015:1687 (Amsta) & ECLI:NL:HR:2014:3077 (Enerco).

applicable as it had been declared generally binding by the Minister and the work involved corresponded to the work described in the clause defining the scope of the collective agreement. The second case related to Helpling, a platform where people could register themselves as a home help (or find a home help). The FNV demanded that these people be engaged as employees and paid in accordance with the provisions set forth in the collective agreement. However, Helpling applied the "regulation on domestic personal services" (*regeling dienstverlening aan huis*), a regulation aimed at making it easier for an individual to engage a home help and at preventing undeclared work. This was considered as an employment contract between two individuals, with less strict rules and with any tax being paid by the worker.

In both cases, one might ask what the unions' goal was. In the case of Helpling, application of the collective agreement could result in an individual in need of personal help at home having recourse to undeclared work due to the little-known and unsuited rules for a contract between individuals. In the case of Deliveroo, the goal was clearer: higher pay for the riders. But looking at the first-instance rulings, we should avoid placing too much hope in the courts.

5. Trade unions and collective bargaining

In the Netherlands, "flexible employees" can organise, and indeed they even have their own union: FNV Flex. However, this union is mainly oriented towards employees with a fixed-term employment contract or a temporary agency contract. Just recently, an association of **Deliveroo** riders was created by the riders themselves, the "**Riders Union**". It receives support from the FNV. But we still do not know whether this association can be recognised as a union, because, under Dutch law, a union is an association of employees. If the riders are not classified as employees, they have no right to set up a union in the sense of the law.

Nevertheless, Dutch law does offer the possibility of extending collective agreements to commissioning contracts and company contracts.[22] It is not very clear who should represent the self-employed (the law dates back to 1927); but whatever the case, a union representing employees may include in its statutes further goals such as representation of the self-employed. However, account needs to be taken of the ruling of the Court of Justice of the EU (CJEU) in the FNV/KIEM case[23], in which it ruled that an agreement between persons who were not employees was not a collective agreement and therefore had to comply with competition rules. Summing up, even if Dutch law offers the possibility of concluding collective agreements, there are problems with competition law. If the self-employed set up an association tasked with negotiating, what would be the relationship between freedom of association and competition law?

22. Art. 1 (2) Wet cao (the law on collective agreements).
23. http://curia.europa.eu/juris/liste.jsf?num=C-413/13

Another collective bargaining aspect also needs to be highlighted. In the horeca sector, FNV Horeca started negotiations with **Temper**, a platform for freelancers, with a view to improving working conditions in the sector. One of the first results was that the fees which the workers had to pay to the platform were repealed. This in itself increased their incomes. For the future, the negotiations are focused on certain collective benefits such as the right to training, disability insurance and third-party liability insurance. It is interesting to note that the FNV Flex section is not very pleased with these developments, as it considers **Temper** to be a temp agency and that, as a result, it should apply the sectoral collective agreement rather than presenting itself as a platform.

Conclusion

Nothing is currently clear in the Netherlands. There is agreement on the fact that labour law in its current state is not suited to the challenges posed by platform work. But other than that, agreements are hard to find. According to the judges, the exact circumstances of each case have to be taken into consideration today, a fact that does not help a minimum of clarity to be found. Judges are therefore calling on the legislator to modify the situation, but the latter doesn't really seem to know what to do. Should it extend the current protective law, even if it doesn't really fit the bill? Should it accept a new category of "workers", people who are neither employees nor freelancers? Would this not risk other discussions arising? What about social security legislation? At present, all we know are questions but no answers. And even less, ideal answers.

Romania

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(Summary: Christophe Degryse)

1. State of play

For several years now, Romania has been experiencing a remarkable upsurge in the IT field. Given the major support provided to this sector by the government, we need to distinguish between platform work, a recent phenomenon, and work in the IT sector with its longer history.

Looking specifically at platform work, we are witnessing the development of new practices:

— bike couriers: **Foodpanda**, a subsidiary of **Foodora**, and, more recently, **Glovo**;
— workers on micro-task platforms (crowdworkers): small jobs and micro-tasks[1];
— ride-hailing services: **Uber** and **Taxify** (now **Bolt**), as well as a Romanian app, **Clevertaxi** strictly reserved for authorised taxis (in possession of a taxi licence);
— platforms based on the voluntary exchange of services or which allow costs to be shared between users (such platforms usually do not pose any problems linked to workers' protection and are thus not dealt with in this article).

There are no official data on these workers, their numbers, their income, any disputes related to payment for the work done, possible discrimination or attacks on a worker's dignity. In particular, many of these crowdworkers are "invisible" because they work from home.

1. Crowdworking platforms:
- Computer-assisted text editing: https://www.peopleperhour.com/, https://www.guru.com/, http://congrazie.ro/, https://www.upwork.com/
- Evaluation and tests of websites: https://www.trymyui.com/, https://www.testingtime.com/,http://www.enrollapp.com/, https://www.userlytics.com/
- Text transcription: http://transcribeme.com/, https://waywithwordsjobs.com/, www.appen.com, https://gotranscript.com/
- Marketing: https://profitshare.ro/ (plateforme roumaine), https://hi.2performant.com/ (plateforme roumaine), https://affiliate-program.amazon.com/, http://www.clickbank.com/
- Video tutorials: https://www.udemy.com/, https://teachable.com/, https://www.vedamo.com/
- Online work: https://ro.jooble.org/

Source: http://postmodern.ro/articol/6-joburi-online-care-iti-aduc-bani-fara-sa-iesi-din-casa/

As regards work in the IT field, this has been around longer and has been greatly encouraged by successive Romanian governments. According to the Romanian National Bank[2], the country ranks first in Europe and sixth in the world in its number of certified IT specialists. With more than 64,000 IT specialists, Romania has a higher density than either the US or Russia. However, many of them were originally bogus freelancers working from home. In the meantime, several measures taken by the government have allowed the amount of undeclared work to be reduced considerably in this sector.

The IT market is now one of the most dynamic sectors of the Romanian economy, with growth rates of 40-60% a year since 1994. The country is the second-largest producer of software in Eastern Europe, and the third worldwide in terms of IT outsourcing services.[3] The Romanian government is providing wide-ranging support to the sector, constructing technology parks, special zones full of IT facilities and benefiting from an advantageous tax and customs regime.

One of the points platform workers and IT specialists have in common is often their precarious situation, even if to varying degrees. In most cases, the IT specialists are employees (in particular due to the government measures listed above; but also due to the major sanctions applicable in the case of undeclared work[4]).Even if they are well-paid, they often work longer than 8 hours a day, including Sundays, especially in small companies, without benefiting from collective representation and without any possibility of achieving a good work-life balance. As for the platform workers, they do not enjoy any specific protection measures, representing a phenomenon too recent to be covered by government regulations/legislation. Generally speaking, these workers are considered as being self-employed – but this is an illusion sold by the majority of platforms, despite indications of subordinate work (see below). Crowdworkers also see themselves as being self-employed.

2. The national legal environment covering new forms of employment and work

Platform workers and home workers in Romania are currently invisible to the legislator, labour inspectorates and the unions, enjoying no specific protection. However, certain overriding statutory provisions are applicable to them: a) health insurance, b) the reclassification of their contracts into employment contracts, c) the legal protection applicable to telework.

2. Grigoraș V., Tănase A. and Leonte A. (2017) Studiu al evoluțiilor sectorului IT&C în România. https://www.bnr.ro/Studii,-analize,-puncte-de-vedere-4009.aspx

3. www.zdnet.com

4. Undeclared work is subject to a fine of ca. €8,500 (40,000 lei) for each employee without a written contract recorded in a payroll list.

2.1 The social security system in Romania

The Romanian social security system is open to all citizens, regardless of whether they are employees or self-employed. Health insurance is mandatory (all citizens are insured or have to insure themselves), with contributions not based solely on work income.

The social security system underwent a major reform in 2017. As of 1 January 2018, social security contributions are 100% paid for by employees (with a few exceptions)[5]. They have to pay 10% of their income for health insurance, 25% into a pension fund and 10% income tax. Before the reform, employers also had to pay a share of these contributions, whereas now they are obliged to pay a flat-rate contribution amounting to 2.25% of their total payroll. This contribution is used first to finance a wage guarantee fund (to cover wages in the event of bankruptcy), and second to finance the unemployment insurance system, sick leave, maternity leave and occupational health and accident insurance[6].

Though the reasons for this reform have never been clearly explained by the government, the main goal was to fight undeclared work. Employers no longer have any interest in concealing the existence or nature of an employment contract. In addition, as of 1 January 2018, any physical person resident in Romania benefits from the health insurance and pension fund, subject to having paid the corresponding contributions: 10% and 25% on all monthly income derived from salaried or self-employed work[7]. Certain categories of people are exempted from the obligation to contribute to the health insurance system[8].

Before the reform, only health insurance was mandatory for people with income from salaried or self-employed work (whatever the level), though the contribution was proportional to income. Freelancers could conclude contracts allowing them to enjoy pensions, unemployment benefits and benefits for sick/maternity leave or leave to take care of a sick child.

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5. See: https://www.etui.org/fr/Reforms-Watch/Romania/Romania-protest-against-judicial-and-fiscal-reforms. we should note that the Romanian unions (BNS, Cartel-Alfa, CNSLR-Fratia, CSDR) and civil society organisations are protesting against this reform (Ed.).

6. We should also point out that employers in high-risk sectors (hazardous work, exposure to noise, heat, toxic substances, etc.) must pay an additional monthly contribution of 4 - 8%, dependent on the working conditions. The idea here is that the employer must be subject to a financial burden for the hazardous work performed on its behalf.

7. Subject to this income exceeding the guaranteed minimum wage (currently 2,080 lei, i.e. ca. €440). Other income (rental, property, …) is also taken into account for health insurance contributions. For those whose total income from all activities does not exceed this threshold (2,080 lei x 12 months), a contribution of 10% is due on half of this threshold (about €265).

8. Students and apprentices below the age of 26, insofar as they have no income from work; persons persecuted under the Communist regime for political reasons; disabled persons; pregnant women; recipients of the guaranteed minimum wage, etc.

Under this new social security system, platform workers now have to contribute to health insurance and the pension fund. As self-employed workers, they can also take out voluntary unemployment insurance. Maternity protection, maternity leave and parental leave are not limited to employees but are recognised rights for everyone with income from work (maternity protection, maternity leave) or income subject to income tax (parental leave).

Last but not least, occupational health and accident insurance for freelancers was voluntary before the reform. Now it is paid by employers via the payroll contribution.

2.2 Criteria for reclassifying work as salaried employment

The status of platform workers varies. In certain cases, they are employed by the platform, while in others the platform concludes contracts with service providers which it considers as freelancers. In the latter case, the platform presents itself as an agency matching supply and demand, without assuming any obligations deriving from an employment relationship.

In the past, self-employed status had become very distorted, with more than 43% of the workforce, at least on paper, working in a self-employed capacity in Romania[9]. As a result, the legislator adopted a series of criteria for use in determining the legal nature of an employment relationship[10]. According to the Tax Code now in force, an activity is considered to be freelance when at least four of the following seven criteria are met:

1. The person performing the work (the service provider) has the freedom to choose where, when and how he performs his work;
2. He is free to work for several customers;
3. He bears the risks, including the financial and business risks, inherent to the work performed;
4. He uses his own equipment for the work;
5. He invests his physical or intellectual capability to perform the work, in accordance with its specific features;
6. He belongs to an occupational organisation or association representing, regulating and overseeing the occupation (e.g. A lawyers' bar);
7. He is free to perform the work himself or with the help of employees or colleagues.

In the case of the employment relationship not meeting at least four of these criteria, the work is considered to be dependent (subordinate), with the service

9. Freelancer status represented the main source of flexibility - European Parliament (2008) The impact of new forms of labour on industrial relations and the evolution of labour law in the European Union, VIII, 10.

10. By 2017, the percentage of self-employed workers had dropped to 19%, a rate still amongst the highest in the EU, after Greece and Italy. 37% of them declared that they had no choice – Eurofound (2017) Exploring self-employment in the European Union, Luxembourg, Publications Office of the European Union, p. 7.

provider being reclassified as an employee. Certain platforms sell an illusion of self-employment to their workers, though the example of the bike couriers shows all the signs of a subordinate activity, in line with the principle of the "reality of the facts": the conditions under which the work is performed determine the nature of the employment relationship.

2.3 Rules governing teleworking

In the past, teleworking was considered as a form of home working, governed by the Labour Code[11]. But these rules proved to be inadequate in light of the specific features of telework, and the inadequate protection of teleworkers. As a result, Law 81/2018 was adopted. Nowadays, platform workers with the legal status of an employee can benefit from the legal protection offered by this law.

Law 81/2018 on teleworking[12] includes a definition of telework and tele-employees (it only applies to employees). Telework is defined as the form of work organisation by which an employee regularly and voluntarily performs tasks specific to his job or his occupation in a place other than the workplace provided by the employer, at least one day a month, using information and communication technologies. One day a month thus suffices in order to enjoy the statutory protection.

This form of work organisation must be voluntary for both parties and foreseen in the employment contract. The law's provisions refer to providing the teleworker with information, the recording of working time, a teleworker's right to organise his working time as he sees fit (while allowing inspections of the work), as well as to overtime. In addition, the law provides for the establishment of measures allowing an employer to check the teleworker's activity and hours worked, to define the responsibilities of the parties (including in the field of health and safety at work), for the protection of personal data used and processed by the teleworker, for maintaining relations with colleagues, and for the costs of teleworking (supply, installation and maintenance of the equipment needed).

In order to monitor the correct application of the provisions regarding health and safety at work and reporting, the law assigns employers and the competent authorities the right of access to the tele-workplace. Union representatives and elected workers' representatives also have a right of access to check working conditions, within the bounds of the applicable collective agreements, the employment contract or internal company rules (as appropriate). If the teleworker works at home, this right of access is subject to prior notification and consent.

11. Articles 108-110.
12. Official gazette, n° 296 of 2 April 2018.

The law thus allows salaried teleworkers to benefit from all statutory rights, internal company rules and the collective agreements covering comparable employees working on the employer's premises. The collective agreements, internal company rules or the employment contract may also contain rights specific to telework. Platform workers could thus benefit from this statutory protection, though it is subject to them having the legal status of employees.

3. National and European jurisprudence on these new employment forms

To date, there are no court rulings in Romania on the reclassification of platform workers. The only one worthy of mention is a non-final ruling of Cluj Court in a case against **Uber** for a breach of competition rules (see below). Apart from that, a circular has been adopted at administrative level by the Bucharest City Council prohibiting the provision of commercial transportation services for remuneration by means of digital intermediation. This circular is being contested in the administrative courts and, pending a pronouncement, the Bucharest Court of Appeal has decided to suspend its application.

Decision 1192/2018 handed down by Cluj Court involves the plaintiff, the Association for monitoring taxi operations in Transylvania (*Asociatia de Monitorizare Taxi Transilvania*), and the Confederation of authorised transportation operators in Romania (*Confederatia Operatorilor de Transport Autorizati din Romania*, an employer confederation) and its lawsuit against **Uber** (SC Uber Systems Romania SRL) and the Dutch company Rasier Operations BV. SC Uber Systems Romania SRL is a company registered in Romania, with Uber International Holding BV (99%) and Uber International BV as its partners. Uber BV holds the licence to use the application developed by Uber Technologies, Inc, San Francisco, California. The reason why the Court dismissed the application to put a stop to the functioning of the application was that the latter was not owned by the defendants.

The Court referred here to the 2017 CJEU judgement in case C-434/15 (*Asociación Profesional Elite Taxi* vs. *Uber Systems Spain SL*) (see the Spanish case study, Ed), according to which "an intermediation service …, the purpose of which is to connect, by means of a smartphone application and for remuneration, non-professional drivers using their own vehicle with persons who wish to make urban journeys, must be regarded as being inherently linked to a transport service". **Uber** thus indirectly comes under the scope of the Romanian law on transport by taxi[13] which prohibits public transport for remuneration in vehicles without a taxi licence. According to the Court, the way the platform functioned was different to *ride-sharing* services. The Court therefore concluded that the **Uber** practices constituted unfair competition.

13. Law n° 38/2000, article 7.2.

4. New forms of employment and collective disputes

After 45 years of Communism, the Romanian population has lost the habit of protesting for improved working conditions, as witnessed by the fact that there have been no large mobilisations or wide-scale strikes. This cultural background is one possible explanation for why no notable collective disputes have been initiated by platform workers. Another possible explanation is to be found in Romanian legislation on collective disputes[14], under which a collective dispute can only be triggered in the context of collective bargaining. However, bargaining is only obligatory in companies with more than 20 employees (91% of all ICT companies have less than 10 employees[15]). Though companies are legally required to negotiate, there is no requirement for an agreement to be reached. If the collective bargaining is unsuccessful, the parties can trigger a collective dispute. In turn, following unsuccessful mediation, the employees or the representative union can call a strike.

Not enjoying employee status, platform workers thus have no chance of getting their working conditions improved through legal strike action. However, IT specialists have already entered into collective disputes in the context of collective bargaining, though only in large companies (for instance at Elster Rometrics in May 2018).

5. New forms of employment, trade unions and collective bargaining

The same legal obstacles associated with employee status and company size apply to collective bargaining. Freedom of association is not recognised for freelancers, with only employees, farmers and members of cooperatives able to set up or join a union. Taking further account of the small sizes of the companies in the sector, we find that the majority of them have neither unions nor collective bargaining.

Furthermore, there is no tradition in Romania of "charters" or "codes of conduct" in the private sector, such as often found in multinational companies. One strategy open to unions is to inform consumers about the working conditions found on such platforms and to compile manuals of good practices, respect of which could influence consumers. The unions could also base their

14. Law n° 62 of 10 May 2011 on social dialogue. We should point out that this law was adopted in the context of the European economic and financial crisis, and that it has been greatly criticised for considerably weakening the role of the social partners and for cutting back union rights. All this has led to a major decrease in Romania's collective bargaining coverage rate (https://www.etui.org/ReformsWatch/Romania/Industrial-relations-in-Romania-background-summary) (Ed.).

15. Grigoraș V., Tănase A. and Leonte A. (2017) Studiu al evoluțiilor sectorului IT&C în România. https://www.bnr.ro/Studii,-analize,-puncte-de-vedere-4009.aspx

activities in this field on ILO Convention 87 on Freedom of Association and Protection of the Right to Organise Convention[16], a convention applying to Romania by virtue of Article 20 of the Romanian Constitution.

Unfortunately, the Romanian union movement has little power (especially in the IT field). Unions are having difficulties attracting workers from this sector by methods familiar to the latter (the Internet, social media, etc.). The one notable exception is the Syndicat IT of Timisoara (SITT), set up in 2009 within the company Alcatel-Lucent. It has more than 5000 members employed in the IT sector and in shared service and outsourcing centres. But these are mainly employees working for large companies and not platform workers.

Conclusion

Just recently, we have been seeing a surge in platform work (above all micro-work) in Romania. But its workers are "invisible": there is no official data on this phenomenon and they are ignored by the legislator, labour inspectorates and even unions. They do not enjoy any specific protection. In principle, they could enjoy the legal protection afforded to teleworkers through a law adopted in 2018, but this is conditional on them being accorded employee status. Criteria have been established to define whether an activity is truly insubordinate or not, possibly leading to the workers concerned being reclassified as employees. Platforms consider their workers to be self-employed, though this is often based on an illusion. The example of bike couriers reveals signs of a subordinate activity. However, to date no court has ruled on the reclassification of platform workers.

An important – and controversial – reform of the Romanian social security system was adopted in 2017, officially to combat undeclared work. Since then, and without any exceptions, social security contributions are paid entirely by employees. For platform workers, this means that they have to take out health insurance and pay into a pension fund, and may also (voluntarily) become insured against unemployment. Despite all these difficulties, there have been no wide-scale mobilisations or strikes of Romanian platform workers. One possible explanation is that the population has no tradition of protesting for improved working conditions. But the most likely explanation concerns the legislation on collective disputes adopted during the crisis, which weakens the role of the social partners and cuts back union rights. Whatever the case, freedom of association is not granted to platform workers not enjoying employee status. without any prospect of them improving their working conditions via strikes called legally. One strategy open to unions is to inform consumers about the working conditions found on such platforms and to compile manuals of good practices, respect of which could influence consumers.

16. 1948, in accordance with the recommendation of the Freedom of Association Committee of 03/2012, case no. 2888, Poland.

Spain

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1. State of play

To a large extent, the situation in Spain's digital platform sector reflects the specific features of the country's economy, in a context of the (weak) recovery of employment. Available studies indicate that Spaniards are making relatively extensive use of these electronic markets; that the number of operating platforms in Spain is high; and that the sector giants are present in the country. However, the volume of platform work *stricto sensu* remains small.

According to available data, 55% of Spaniards used an online platform at least once in 2016. Accounting for 1.4% of Spanish GNP in 2017, the sector is expected to represent between 2% and 2.9% by 2025. About 500 firms are currently operating in the country. The platform economy has a greater incidence, firstly, in the purchase and sale of goods (used by 30-35% of the population), followed by accommodation-tourism, transportation and finance. Spain ranks above the European average (15%) and is in the upper tier within the EU-28. The country tops the rankings in terms of people offering goods or services through these electronic markets, both as a percentage of the population and compared with the rest of the European Union (6%). Over two million Spaniards draw a significant percentage (>25%) of their total income from these platforms.

Some 700,000 Spanish workers have their main employment in this kind of activity, making Spain the country in Europe with the second largest number of platform workers. Studies also show that people performing this type of work do so largely because they have no other opportunities of employment, in many cases despite having an academic degree. The consequence is that such work is not a secondary activity or a supplemental income, but the one and only occupation. Differing greatly from other countries, this state of affairs is due to the critical situation of the labour market and explains why Spaniards' perception of platform work differs dramatically, with major concerns about quality of employment, stability of work and level of income.

In common with other countries, a paradox exists: while platform work has a strong impact on public opinion and academic debates, it represents just a

1. Research Group PAIDI SEJ-322; this paper is a scientific outcome of the Research Project funded by the Spanish Ministry of Research Der 2015-63701-C3-3-R, "Instrumentos normativos sociales ante el nuevo contexto tecnológico 3.0".

small share of the global platform economy. There is, to begin with, a social debate, with platform work seen to be iconic of precarious work, and with widespread concern about an "uberisation" of the economy and employment.

There is a second debate at a political level, with some (left-wing[2]) political parties promoting initiatives supporting labour inspectorate measures or even legislative changes. Some administrative bodies are also participating in this debate, such as the *Comisión Nacional de los Mercados y la Competencia* (CNMC)[3], created by Law 3/2013 of 4 June 2013. This body has taken a strong stand in favour of these new services and against any restriction or regulation in this sector. According to the CNMC, the sharing economy "represents an opportunity from the perspective of competition, and therefore an increase in the well-being of consumers". Nevertheless, it launched a public consultation on the collaborative economy which ended with a series of draft conclusions/recommendations, including ones on the regulatory framework needed to properly regulate the sector. As expected, these recommendations stirred up a major debate, being clearly biased towards e-business models in various sectors, particularly in transportation and holiday accommodation.

At an academic level, this matter has similarly attracted a lot of attention. Much has been said and written, and the volume of publications is already high. It is a highly topical issue at the moment, again totally out of proportion to its actual impact. The number of research projects, scientific meetings and publications on this issue has surged, all within a relatively short period[4]. Labour lawyers are interested in platform work mostly as an early manifestation of deep-going labour market tendencies rather than an isolated innovation. Its effect on working conditions, not particularly positive so far, and the notion that in some cases it is encouraging fraudulent practices, also serve to explain this interest in a country where precarious employment is a major concern.

Academic interest is also changing its focus. Originally it was directed towards the practical problem of how to classify platform employment, whether as self-employment or contractual employment. The practice of some of the most visible platforms, such as **Glovo** or **Uber**, explains this attention, as they all hired their workers on a self-employed basis. This led to a series of administrative and judicial proceedings, resulting in a number of rulings from both the labour inspectorate and the labour courts on this question, unfortunately as yet without a common denominator. Other issues have since moved up the research agenda, particularly those related to collective rights and actions organized by such workers. Health and safety issues or in-work poverty are also the subject of several studies, as emerging research topics.

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2. Unidos Podemos and other associated regional parties such as Compromís.

3. The National Commission on Markets and Competition.

4. See for example: Rocha F. and de la Fuente L. (2018) The Social Dialogue in the face of digitalisation in Spain: an emerging and fragmented landscape. Final report, Fundación 1º de Mayo, Diresoc, WP1: Literature review and expert interviews (Ed.).

An analysis of the development of platform economy in Spain shows that it has developed in a way consistent with the features of the country's economic situation. The importance of tourism has increased the presence of platforms for temporary accommodation such as **Airbnb**. The existence of strong public transport regulations explains why the footprint of **Uber** and other similar platforms remains small (and set to get even smaller following some regulatory changes in Barcelona and other cities). Recent economic hardship explains why platforms for the sale and exchange of goods are booming. The most visible platforms are only present in a few big cities, again reflecting a trait common to the platform economy everywhere.

As the emergence of platform work in Spain is occurring at a time when the labour market is very weak – still as a result of the global financial crisis – , it has been easy for the platforms to justify their presence and oppose any attempt at regulation on the basis of their contribution to job creation; indeed, they have attracted many unemployed citizens looking for a main source of income. This rebuts the main argument used by the platforms in support of a deregulated environment, justifying their business model as a mere opportunity for students and non-professionals to earn a bit of pocket money. In the case of Spain, we are dealing with real jobs and real workers.

The presence of *Ayuntamientos del cambio* ("City Councils of Change") in Spain's two main cities, Madrid and Barcelona, (heirs to the social movement known as the "15-M" (the "Indignados" or "Outraged")), has been an important factor with many practical consequences for the operations of some of these platforms, whose operations can be subject to local regulations. Another fact conditioning the country's reaction to this phenomenon is the general political context, in particular the weakness of the Sánchez government in office since June 2018 and the lack of a legislative reaction to the problems generated by certain platforms, despite their impact on public opinion.

2. National legal environment

In Spain, there is no regulation specifically covering platform work. Spanish labour law continues to reflect the two traditional modes of work, subordinate and insubordinate work. Each has its own set of rules, with little or no bridges between the two. Recently, health and safety regulations and certain employment policies have established a modicum of common ground for the two.

Subordinate workers are the core subject of Spanish labour law which governs all aspects of their employment relationship. The 2015 Workers' Statute is applicable to all workers voluntarily rendering their services for compensation on behalf of another party, within the scope of the organization and management of another physical or legal person, called the employer or entrepreneur.

Regulations covering self-employment are less developed. Self-employed workers are defined as those performing an economic activity on their own

account under no labour contract, irrespective of whether or not they hire employees and regardless of the type of business. This kind of work has traditionally been very relevant to the public social security system, with the self-employed having their own protection scheme. However; other aspects regulating self-employment have received much less attention. The special social protection scheme covers most of the self-employed, regardless of whether they have employees or not, or in which sector or occupation they work. There are two major exceptions: the non-regular self-employed and those whose income from self-employment does not reach the minimum wage for subordinate workers are exempted from the requirement to contribute to this special scheme. Moreover, a small number of these are covered by other special schemes targeting specific sectors such as agriculture or seafarers. The adoption of Law no. 20/2007, the Self-Employed Workers' Statute, represented a major advance in the legal regulation of these workers, although it did not establish a complete framework for their activity. In terms of collective rights, it is still a very under-developed form of employment.

A new employment status was introduced by the 2007 legislation: the so-called "economically dependent self-employed" (*trabajador autónomo económicamente dependiente* or TRADE for short). The status applies when a single client accounts for at least 75 per cent of a worker's income. It was introduced as an instrument to provide protection to the large number of economically weak workers operating on the Spanish labour market. There is a widespread conception that this status has served mainly to 'legalise' bogus self-employment, rather than effectively improving their working conditions. It was also a way to introduce the model of "parawork", a *tertium genus* between subordinate and insubordinate work. In practical terms though, TRADEs are not really "semi-dependent" but rather 100% self-employed. Law no.20/2007 introduced a new form of collective agreement – the "professional interest agreement" – specially designed for these workers and intended as a way of regulating their working conditions. Collective organizations can bargain such agreements on behalf of TRADEs.

Interest in this form of self-employment is twofold. On the one hand, many platforms are using it as their standard form of contracting service providers. Certain employer associations in the sector are promoting this model as it is a clever way to avoid the risk of an employer being qualified as the employer of couriers, drivers and other persons providing their services through electronic channels. On the other hand, it was common for academic debates on this form of employment to propose, as a possible solution to the misclassification problems and inspired by other legal systems, the creation of a new, intermediate category between the two mainstays of labour markets. Spanish labour law is thus acting as a testbed for this type of contractual arrangement. However, experience up to now has not been good.

As indicated above, the traditional role of Spanish legislators has changed in dealing with platform work. Rather than passing legislation, Spanish parliaments have become fora for discussing the problems that platforms are generating on labour markets. Many of the ideas circulating in academic and

political debates have been taken up in the parliamentary arena, as witnessed by motions, legal proposals and other typical instruments.

A pioneering expression of this interest in the platform economy occurred in 2015, when the leaders of two political parties, the Socialist Party PSOE and the newly-created centre party CIUDADANOS agreed on a government programme. The coalition was unsuccessful and eventually new elections had to be called. But what was interesting is the fact that the government programme included measures aimed at improving the situation of the self-employed, in particular those directly involved in platform work. Both parties agreed to "find formulas of social security contributions for part-time self-employment, as well as for employment intended to be casual or economically complementary, a growing phenomenon within the new reality of the collaborative economy".

On 4 July 2017, the parliamentary group formed by the left-wing coalition (Unidos Podemos- En comú Podem- En Marea) presented the Senate with a motion calling on the government to adopt measures to control and supervise firms operating in the "digital or collaborative economy". In it, the parties were very critical of the "inappropriately named collaborative economy", with attention focused on the platform under scrutiny at that time (**Deliveroo**). The main concern was the negative consequences of such practices on workers' rights. Similar initiatives were presented in regional parliaments: for example, the left-wing nationalist party Compromís presented the Parliament of Valencia (*Cortes Valencianas*) with a non-legislative motion calling on the national government to investigate, with the help of the Labour and Social Security Inspectorate, labour practices in firms operating in the on-demand or gig economy, explicitly mentioning **Deliveroo** and **Glovo.**

On 20 February 2018, the Congress of Deputies adopted a motion in which it asked the national Rajoy II government about which measures it was considering in order to ensure adequate working conditions in the digital economy. Eventually the Organic Law on the Protection of Personal Data and the Protection of Digital Rights was adopted, a text fulfilling two functions. On the one hand, it applies the EU regulation on the protection of natural persons with regard to the processing of personal data and on the free movement of such data[5] to Spain. On the other hand, the Parliament used it to introduce a new chapter on digital rights, including the right to digital disconnection and protection in cases of geolocalization or video surveillance. This Act, passed on 5 December 2018 as Law 3/2018, constitutes a real advance in the construction of digital law in Spain, even if it does not include any specific provisions regarding platform work.

5. Regulation (EU) 2016/679 of the European Parliament and of the Council, of 27 April 2016.

3. Labour administration

The labour administration has been particularly active in Spain, explained by the traditional activism of Spanish labour and social security inspectorates. These have the power to issue official notifications of infringements, and to propose sanctions when these notifications or reports (*actas de la Inspección de Trabajo y Seguridad Social*) indicate breaches of social legislation. These *actas* are subject to judicial review in administrative courts.

Bogus self-employment (*falsos autónomos*) is a major and growing problem in the country. With platforms almost unanimously considered a major source of this, inspectors, already sensitive to this widespread fraud, have reacted quickly and strongly. The first intervention by the Spanish labour administration took place in 2015, when the Barcelona Labour and Social Security Inspectorate concluded that **Uber** had breached Spanish legislation by not registering its drivers as employees with the social security administration. At that time, the firm had been operating in the country for just a few months. The inspection was triggered by a complaint against the firm's practices submitted by a professional association of taxi drivers. At the time, **Uber** claimed that its drivers were neither employees nor self-employed, just plain citizens offering their cars to other people for a ride. This complaint also covered the drivers themselves, as they found themselves unable to get registered as self-employed in fulfilment of their social security and tax obligations, as most taxi drivers do. The incumbent inspector concluded that these breaches existed, and that the **Uber** drivers should have been treated as subordinate workers, as the company provided them with smartphones for their work, offered a system of incentives based on driver productivity, and informed them that it would help them in case they had any problems with courts or the police.

The labour administration sentenced the company to pay the unpaid contributions with interest, as well as some punitive overpay, though no fines were set. Opposing the ruling, the company, besides filing a suit with the Spanish courts, also filed a formal complaint with the European Commission, alleging that the restrictions applied to them were in breach of European Union law.

This case is interesting for several reasons. As the first legal reaction to the so-called platform economy, it received a lot of attention among the public, the media and the legal academic community. It also paved the way for many further administrative interventions, all of which followed the Barcelona Inspectorate's assessment, clearly upholding the classification of **Uber** drivers as subordinate workers. Furthermore, the associations filing this complaint in Barcelona were the same ones that eventually succeeded in getting the case heard by the European Court of Justice, producing the notorious **Uber Pop** ruling[6].

6. ECJ C 434/15 Elite Taxi v. Uber Systems Spain S.L.

This case is a good example of the peculiar way these problems have been managed by private and public players. The association representing the taxi drivers also filed complaints against **Uber** drivers, as they were not registered as self-employed persons in the appropriate social security scheme. Unions and the public administration sided with the taxi professionals, supporting their claims. By contrast, **Uber** drivers' interests and needs were completely ignored by all players, including the unions – a common feature of the "**Uber** case" throughout Europe.

This first intervention was followed by many others, inter alia by the labour inspectorates of Valencia, Barcelona and Madrid against **Deliveroo** and by the Labour Inspectorate of Barcelona against **Take Eat Easy**. The latter ended in a sanction that contributed to the company closing down its operations in Spain. This was also the case with a small company that operated as a platform for managing home help services, which closed as a result of proven social security infringements. Generally speaking, the activism of the Spanish labour inspectorates is noteworthy, displaying great diligence in dealing with this phenomenon.

The importance of this phenomenon for the labour administration is highlighted by the Strategic Plan for the Labour and Social Security Inspectorate 2018-2020, which includes among its priorities the control of platform work with a view to avoiding employment frauds[7]. This Strategic Plan was passed by the Conservative Government under the leadership of Prime Minister Mariano Rajoy. In June 2018, Rajoy was ousted as Prime Minister by Pedro Sánchez. One of the first initiatives of the new Socialist Government was to present a Master Plan for Decent Work which included a wide array of measures directly linked to platform work. Agreed with regional governments and organizations of self-employed workers, this document contains a section (6) dedicated to "addressing the new modalities of work provision". As in the rest of the Master Plan, this section includes a diagnosis of the problem and a list of concrete measures to adopt to solve it.

The starting point of this diagnosis is the impact of ICT technologies on labour relations. Platform work features as one of the most relevant manifestations of new forms of employment generated by technological change. The document points out how, under the umbrella of these new forms of employment, irregular practices are emerging, against which the Labour and Social Security Inspectorate needs to take action. One of the consequences of these irregular practices is the precarious employment of those hired by the platforms. This effect occurs with respect to all types of workers, increasing the risk of in-work poverty. Other negative consequences are also possible, such as the elimination of existing business structures and the spread of bogus self-employment. Finally, a particularly serious risk associated with platform work is that of the irregular or underground economy, with the provision of services outside the bounds of the social security system.

7. Line 88 on "Activities through Internet Platforms".

In accordance with this diagnosis, several new measures have been proposed to avoid or at least reduce the incidence of these risks. The Master Plan lists three main measures: (i) to provide the Labour and Social Security Inspectorate with the technical means to identify the elements involved in digital platforms and electronic commerce; (ii) to draw up an action guide to help officials perform their work better, as well as providing training to allow their specialization; (iii) to implement a specific inspection campaign on platforms and electronic commerce.

4. National jurisprudence

Spanish jurisprudence on platform work is, to this day, scarce, though the number of court rulings is growing quickly and their orientation changing continuously. As mentioned above, the first public reactions were purely administrative. This has now changed, with administrative courts beginning to study the complaints filed by the platforms against the fines or other sanctions levied by the Labour and Social Security Inspectorate. At the same time, the labour courts have started ruling on individual suits filed by platform employees, all from the food delivery sector and mostly after having been excluded from a platform's workforce, in some cases because of their activism in support of better conditions. In all cases, the platform in question treats them as self-employed. The plaintiffs equate this exclusion with dismissal, meaning that the first thing a labour court has to do is to assess the real nature of the service provision contract between the platform worker and the company concerned.

So far, the Spanish "*Juzgados de lo Social*" have ruled five times, producing judgements that have received a lot of attention. What is interesting is that the cases were very similar, all involving riders working for multinational food delivery platforms. However, they were not exactly the same, as the defendant companies varied. On two occasions, though, two courts ruled differently with regard to riders working for the same company. The following rulings are available:

— Judgment of Social Court No. 6 of Valencia of 1 June 2018, ruling that **Deliveroo**'s riders were **salaried workers**. This forced the company to reinstate or compensate a worker who had been dismissed;
— Judgment of Social Court No. 39 of Madrid of 3 September 2018, ruling on a suit filed against **Deliveroo**. The ruling concluded that the riders were **self-employed**;
— Judgment of Social Court No. 11 of Barcelona of 29 May 2018, ruling that the services rendered by riders working for **Take Eat Easy** were **subordinate**, not autonomous;
— Judgment of Social Court no. 39 of Madrid of 3 September 2018, ruling that **Glovo** riders were **self-employed**;

— Judgment of Social Court No. 33 of Madrid of 11 February 2019, ruling that **Glovo** riders were **salaried employees**[8].

This divergence in the rulings is not surprising, considering the complex situation of this form of employment. It reveals the ability of the platforms to adapt to Spanish legislation, to change their practices in line with these first rulings, and to evolve their legal strategies. The varied composition of the Spanish judiciary, where judges come from different backgrounds and have different sensibilities, is a further factor needing to be considered. Furthermore, Spanish unions are familiar with strategies using judicial actions as an instrument to put collective pressure on platform operators in order to protect the status of employees.

Overall, the situation is very poor, with a surprisingly low number of judgments so far – just a series of court decisions, all from first-instance courts. There are no judgments from appeal courts, and we are still one or two years away from a Supreme Court ruling, needed to trigger the construction of legally binding case-law on these issues. This lack of finalised jurisprudence on the most controversial aspects of this form of employment is a major element explaining the heated debates among legal players.

There are several reasons explaining why Spanish court rulings on these matters are so scarce. First, platforms are a relatively new phenomenon on the Spanish labour market, with the consequence that there has not been enough time for the courts to intervene more actively[9]. Labour court rulings are pending in Valencia, Barcelona and Madrid.

Then, many riders have withdrawn their suits after having reached out-of-court settlements with the platforms. At all costs, the platforms want to avoid the risks associated with rulings going against them: this can negatively affect public opinion, harming their reputation and image and possibly having a "push effect" prompting other workers in similar situations to file their own suits. Finally, any adverse decision would contribute to the creation of a jurisprudence going against their interests. On the other hand, the out-of-court settlements reached by the (often precarious) workers provide them with much greater compensation than that obtainable through winning in court – especially since, in the case of a trial, platforms are able to hire the most prominent law firms in the country's labour practice.

All these factors explain this tendency towards out-of-court settlements. This phenomenon has become so widespread that some unions have decided to file suits themselves instead of supporting their members' individual suits in order to ensure that court rulings are actually handed down.

8. In this case the Court concluded that the rider had been dismissed in retaliation for his involvement in collective action, meaning that the dismissal was considered discriminatory, and consequently null and void.

9. It is worth mentioning that labour courts are being deluged with work, suffering from a crisis-related lack of resources and a sharp rise in suits due to the employment crisis.

5. Collective disputes

Three major areas of dispute have emerged[10]. The first one concerns accommodation platforms in large cities such as **Airbnb**, with many regulatory problems in a context of opposition to gentrification and of "tourist-phobia". In Barcelona, the city council has adopted several pioneering regulations injecting some order into this activity. The debate has been very high-profile but is of little or no interest from a labour relations perspective.

The second major dispute is between the taxi sector and **Uber** and other platforms such as **Cabify**. These firms, after initially operating with no legal basis, are currently working with a public licence as "car with driver renting" (known as VTC), a constellation foreseen in the transport regulation, but as yet little used. But the big problem was the number of licences available. Without providing any real solution, the national government transferred the regulatory competence to regional authorities. In early 2019 the dispute exploded, with large strikes called in Madrid and Barcelona against a background of extremely high tension (violence against platform drivers and the destruction of their vehicles). In Madrid, the regional government rejected most of the taxi drivers' demands, leading to the latter calling off the strike without any substantive gains. By contrast, the local authorities in Barcelona issued a regulation fulfilling the taxi drivers' demands, making it more complex to hire the services of **Uber** and the like. The platforms have since counter-attacked, though they have quit Barcelona. What is peculiar is that, in most cases, the drivers were not self-employed, but employees of the companies holding the VTC licences and owning the vehicles that were hired by the platforms' users. As a result, these transport companies have had to lay off a large number of drivers. These have in turn organized themselves as an association, demonstrating in the streets of Barcelona and expressing the need for a solution. Self-employed drivers have also joined this initiative[11]. Additionally, licensed VTC firms and the platforms themselves have started a legal campaign against local regulations, potentially with extremely high financial consequences for the local authorities in the case of success.

The third dispute, and the most interesting from a labour relations perspective, concerns riders working for **Deliveroo** in Valencia. A group of riders here decided to organize themselves and took action against the company in an attempt to get better working conditions. All were initially generally hired as self-employed and later as TRADEs. The platform stubbornly refused to

10. Other disputes also exist, such as between intercity bus companies and Blablacar, but are of less importance.

11. It is interesting to see how platforms and transport companies have followed a common strategy of levering public opinion, including publicity campaigns during the strikes, and of treating cities and citizens almost as hostages, threatening them with abandonment and the cessation of their services. The threat of massive dismissals has served also to mobilize employees and put pressure on public authorities. In a way, they have resorted to an atypical lockout, a form of action virtually absent from labour relations in Europe for decades.

consider them as employees, despite pressure from workers, administrative bodies and courts.

The riders set up the platform, **RidersXDerechos**[12] and started trying to collectively bargain with the platform. **Deliveroo** refused and even 'dismissed' the most active leaders by disconnecting them from the application (citing strictly technical reasons). **RidersXDerechos** then launched other actions, such as public campaigns, posts on social networks, strikes, complaints to the Labour and Social Security Inspectorate, and support for dismissed employees in their lawsuits against the company. They gained strategic and legal assistance from a small yet active minority union from Valencia. Major unions were absent to start with, although they joined in later and have since become actively involved. This riders' movement soon extended to other platforms and cities, making the dispute nationwide.

This experience is remarkable in three ways: (i) the contrast between the novelty of this form of employment and the classical model of industrial relations; (ii) the contrast to the traditional phases of industrial action (grievance, complaint, organization, recognition, pressure and bargaining), reflecting a widespread tendency to declare conventional unionism outdated, if not dead; and (iii) the rarely seen "conflict of recognition", with **Deliveroo** denying **RidersXDerechos** the status of being representative of the workers. Labour laws in continental Europe have smothered such disputes, with trade union law setting the legitimacy rules for collective bargaining and an obligation for companies to only bargain with unions considered legally representative.

As regards the platforms' strategy, they have used "union avoidance" practices, combining direct pressure on workers and the offer of unilateral improvements to their working conditions, to avoid any collective action. At the same time, they have offered to change the employment status from self-employed to TRADE, providing workers with a few advantages. This strategy has had little effect, as riders have remained a very active and motivated group.

6. Unions and collective bargaining

6.1 New bottom-up organizations

The most notable bottom-up experience has been that of the "**RidersXDerechos**", established not as a union but as a "platform" for riders. **Uber** and **Cabify** drivers have also created their own association, as well as some workers employed in other sectors of the platform economy. In the "**Deliveroo** dispute", riders did not seek help from traditional unions (CC.OO and UGT), instead acting on their own and creating a collective structure.

12. They avoided the use of the name "union", not wanting to be tied to the legal regime governing unions.

When needed, they sought support from small unions such as CGT, CNT and the Intersindical Valenciana. Furthermore, the riders were able to rely on associations related to the same platforms in other countries. There has been a high level of international cooperation, made possible by the technology.

6.2 Traditional trade unions

The most representative national unions, CC.OO and UGT, are also involved, using their resources and knowledge to improve working conditions in this sector and publicly denounce poor practices. Their involvement is crucial for gaining access to the government and public authorities. But the use of traditional representation channels, such as works councils, is completely absent. Despite union efforts, no collective agreement for platform workers has yet been signed. Neither has any sectoral agreement including specific categories of platform workers or any trilateral agreement (i.e. also encompassing local authorities, following the model of some Italian cities) been concluded. Platform work is completely excluded from collective bargaining. By contrast, the use of technology, including web portals to defend the rights of riders, has been widespread. For instance, in 2017 the UGT launched an online portal to assist virtual workers in their claims against the platforms: "Your Union Response Now" is a channel for information, advice, claim, organization and complaint, as well as a means of participation for platforms workers[13].

6.3 Trade unions and judicial actions

Unions have also used their power to file complaints with labour inspectorates, and have supported individual suits filed by riders against their platforms in labour courts. In one case, unions made use of the "process of collective disputes" (*proceso de conflicto colectivo*), an instrument designed for use in lawsuits affecting many workers and where the resultant court ruling applies to all similar cases that may occur in the future. In August 2018, the UGT decided to move from filing complaints with the labour inspectorate and supporting individual suits to addressing the problem at a collective level, suing the platform **Glovo**. This is the first time that the National High Court[14] will be ruling on a situation of bogus self-employment. Its potential impact on the current state of play is enormous.

13. http://www.turespuestasindical.es

14. Despite its name and its jurisdiction over the whole of Spain, the National High Court is a court of first instance with no power to produce binding precedents; but its authority is nonetheless strong, and its judgments are taken over directly by the Supreme Court, allowing the fast-track production of binding jurisprudence.

6.4 Unionization

These actions have been accompanied by a more traditional strategy aimed at creating union structures within these platforms. But this move faces a legal problem due to the regulatory framework for the election of workers' representative. According to the Workers' Statute, there are two alternative bodies for workplace representation in the private sector: workers' delegates and workers' committees. This model is only appropriate for large workplaces but ill-suited for firms such as platforms. Union bodies are more flexible but may be difficult to organize in firms with a high degree of workforce rotation and a geographically dispersed workforce.

6.5 Lobbying

Unions have resorted extensively to lobby tactics to influence political parties and the public and to get them to support workers' interests in these new markets. Traditional alliances with certain political parties have been useful, and some of the new ones have been especially sensitive to their demands. This explains why so many parliamentary initiatives have been launched, with platform work becoming a major concern in Spanish labour relations. This strategy has targeted all levels, with all administrations more or less involved. The administrative bodies in which unions are represented, for instance social and economic councils (at national, regional and local levels) or regional labour relations councils, have been quite active in preparing statements, declarations and other documents on the topic.

6.6 The 'model' of the Acuerdo Interprofesional de Cataluña?

To date, the most interesting experience is the Cross-Industry Agreement of Catalonia (*Acuerdo Interprofesional de Cataluña*, AIC) for 2018-2020, signed on 24 July 2018. Covering the territory of the Autonomous Community of Catalonia, the objective of this agreement is to regulate collective bargaining in Catalonia. Signed by the most representative trade unions and business organizations at this level, the AIC contains a section on platform work[15], including proposals in two different areas: the legal nature of platform work and the recognition of collective rights for platform workers.

Concerning the legal nature of services rendered through digital platforms, the AIC states, inter alia, that "Early judicial pronouncements (…) have declared,

15. The AIC signatories began their discussions within the context of the Inter-departmental Commission on Collaborative Economy report (2017), in which the social partners expressed the necessity to strengthen their presence in order to increase their capacity to represent working people, professionals and employing platforms, to extend collective bargaining and agreements of professional interest, and endow the new agreements with updated contents reflecting the new economic reality.

mainly, the existence of an employment relationship between the platform and the service provider (…)"; and that "The lack of a specific European regulation on digital platforms generates uncertainty about the applicable law, especially with respect to labour relations in cases in which the company's headquarters and the provision of services are in different countries. We consider that we must apply the labour regulations of the country where the service is provided (that is, wherever the worker is) and not the registered address of the platform."

Concerning the collective rights of workers, several statements are included in this agreement, mainly addressing the geographical dispersion of platform workers and its possible impacts on their collective rights (systems of representation, freedom of association and collective bargaining). The AIC signatories declare that "communication mechanisms promoting contacts between working people must be studied or adapted in order to be able to choose the legal representation of the workers". They undertake to "propose the creation of a technical committee within the Labour Relations Council to analyse specific cases in this area, within the legally established margins and the powers of the social stakeholders".

The Andalusian Council of Labour Relations is also drawing up a series of recommendations for collective agreements, related to the way these should deal with the issues raised by the platform economy. Unsurprisingly, these initiatives lack the support of the platforms themselves. These uphold a completely different model, claiming that any regulation will restrict their activity and impede their positive impact on employment.

6.7 Other initiatives

In July 2018, **Deliveroo** and the Spanish Association of Riders (*Asociación Española de Riders Mensajeros*, ASO) signed the first "professional interest agreement". This agreement is consistent with the model backed by similar digital service platforms: riders are not subordinate workers, but TRADEs; platforms are not their employers, and therefore do not assume the duties and responsibilities inherent to this status. They acknowledge the need for some protection for these workers, and that their organization may be justified. But no more than that. The agreement is mostly defensive. Rather than being an instrument for improving working conditions and achieving a balance of power between the platform and workers, it is designed to avoid the application of collective agreements.

This rejection of collective agreements is reflected in the production of other documents that, in some way, try to fill the void. In addition to the Deliveroo-ASO agreement already mentioned, the most relevant are:

— the "Code of Good Practice for Digital Platforms" presented in Catalonia in 2018; a document also related to the report of the Inter-departmental Commission on Collaborative Economy;

— the "Code of Good Practice" of Sharing España, a group of firms operating in the collaborative economy. It contains 13 principles and good practices that its members (over 30 firms) agree to respect. No digital platforms for the provision of services have signed it;
— the "Manifest for intelligent, innovative and quality work" drawn up by Adigital, an association representing the country's leading work platforms and engaged in major lobbying and public opinion activities to defend their views about the employment they manage. They also express their compromising desire to collaborate with the government in dealing with the problems hitherto generated.

Conclusion

In Spain, platform work is quickly gaining ground among the whole population and not just among students or occasional workers. This is explained mainly by the critical labour market situation, but also by the importance of the tourist sector (for platforms such as Airbnb). The controversial status of these workers initially gave rise to administrative proceedings, with the labour administration (labour and social security inspectorates) recording several offences and imposing sanctions on such platforms as Uber for violations of social legislation. This initial administrative phase has been followed by a judicial phase. The number of court rulings has risen quickly (five important rulings have been handed down) and the legal doctrine is in a state of permanent development, though there is currently a lack of consistency. Spain has still not yet come up with a clear and consistent response to the issue of the status of platform workers. While Spanish labour law is based on the two traditional forms of work – employed or self-employed –, a third status was introduced in 2007, that of an "economically dependent self-employed" worker (TRADE), with a view to providing certain protections to those self-employed workers with no stable foothold in the labour market. Collective agreements may be negotiated for them, even if they remain 100% self-employed.

The main collective disputes relate to the regulation of tourist platforms (Airbnb, etc.), taxi platforms (Uber, Cabify, etc.) and meal delivery services (Deliveroo). Deliveroo riders have set up their RidersXDerechos collective outside the scope of traditional unions. The latter lack the traditional representation channels within these platforms, though they are involved in the legal handling of collective disputes. They are also trying to use technological channels (websites) to defend riders' interests. There is one initiative in Catalonia which could serve as a model: the 2018-2020 Cross-Industry Agreement of Catalonia has a chapter devoted to platform work, presenting proposals in two fields: the legal nature of platform work and recognition of the collective rights of such workers.

Switzerland

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1. State of play

1.1 Doctrine

In Switzerland, the legal doctrine on the platform economy is still not well developed from a social legislation perspective. However, progress is being made, with research contributions mainly related to the contractual relations associated with platform work[2]. There are also a few contributions on the labour law consequences of the use of robots in companies[3].

Finally, we would like to mention a large-scale compendium of works, soon to be published, which contains the proceedings of a multidisciplinary (with a focus on law, sociology and work psychology) conference organised by the undersigned at the University of Neuchâtel in February 2018 (Révolution 4.0 et droits fondamentaux au travail – Un nouveau défi pour le droit social et le droit du travail? / Revolution 4.0 and fundamental labour rights – A new challenge for social and labour legislation?)[4].

1.2 Authorities

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— The consequences of digitalisation for employment and working conditions: opportunities and risks (8 November 2017)

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1. www.unine.ch/cert. @jp_dunand ; @MahonPascal

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2. The national legal environment

2.1 Institutional characteristics: federalism and direct democracy

Looked at from an institutional perspective, Switzerland features two characteristics that also have an influence on labour law and the field discussed here: (i) the country's federal structure; and (ii) the major dose of direct democracy, both at federal and cantonal level.

As regards federalism, this first means that the Swiss Confederation, the central State, only has legislative competences in the fields assigned to it by the Federal Constitution. However, while the Confederation is assigned general competence to legislate on private employment law (Article 122 of the Constitution) and on the state protection of workers (Article 110 of the Constitution), all areas affected by the platform economy are not within its competence. This is for instance the case with regard to taxi services or to home helps, both of which are within the competence of the cantons. There is thus not necessarily any uniform and centralised response to the various manifestations of the platform economy.

As regards direct democracy, this means first that any legislation, whether federal or cantonal, can be hit by a call for a referendum, i.e. be subjected to a popular vote, something that sometimes acts as a brake; and, second, that a certain number of citizens, whether at federal or cantonal level, may, via a popular initiative, put forward to the population a proposal to adopt a constitutional or legislative provision aimed at regulating a certain situation. Even if this has had no direct impact up to now on the platform economy, this feature of direct democracy nevertheless marks the Swiss political system, leading or binding it or to a constant search for consensual solutions.

2.2 Sources and characteristics of Swiss labour law

Legal sources

Switzerland has no Labour Code As a result, the rules governing labour are scattered in many acts of private and public law. The main private law provisions are to be found in the Code of Obligations (CO) devoted to employment contracts (Articles 319 - 362 CO). As for the main public law provisions, these are to be found in the legislation governing employment, in this case the federal law on employment in industry, the skilled crafts and commerce, and its five enforcement decrees.

Characteristics

Swiss labour law is characterised by various elements, including the following three:

1. The law is quite liberal (no statutory restriction on working time; no minimum wage for the whole of Switzerland; freedom to terminate a contract, no cancellation of improper dismissals and no right to reinstatement).
2. Collective employment rights play an important role. Specifically, nearly one third of employees benefit from the provisions of a collective agreement, in many cases improving workers' protection and rights.
3. Swiss jurisprudence is very influential, frequently complementing legislation in a decisive manner. For instance, Swiss jurisprudence has played an important role in defining the contours of employment contracts with a minimum / maximum duration, on-call contracts, psychological harassment (*mobbing*) or bonuses.

3. National jurisprudence

3.1 General status of jurisprudence

Jurisprudence covering the platform economy is still in a fledgling state in Switzerland. The first rulings relate to administrative law, to the extent that, in line with what has been said above about federalism, some cantons which have sought to modify their legislation on taxi services to rein in **Uber** *et al.* have seen their legislation challenged before the Federal Supreme Court. Up to now, however, all published rulings have related more to procedural issues and not to the underlying problems.

On the other hand, a few first-instance rulings relate to social security legislation, where the legal classification of a worker – whether he is employed or self-employed – is of decisive importance in certain insurance forms to determine his membership, type of protection and/or status with regard to the obligation to pay contributions. The social security system thus has an interest in classifying people working for such platforms as **Uber** as employees (see below). The Swiss Federal Court has not however yet had the occasion to rule in this matter.

Furthermore, to our knowledge there is no ruling relating to labour law.

3.2 Situation in social security legislation

One case has hit the headlines, though without it having yet been definitively settled: the treatment of **Uber** drivers in the context of accident insurance.

SUVA, the Swiss National Accident Insurance Fund, issued a decision classifying an **Uber** driver as an employee. **Uber** filed a complaint with the

Zurich courts, managing to get the decision partly reversed on procedural grounds: **Uber** is made up of two Dutch companies, and the Swiss subsidiary is not really the drivers' contractor.

The issue of **Uber**'s liability has been the subject of several legal opinions, including the following two:

— Pärli Kurt, Arbeits- und sozialversicherungsrechtliche Fragen bei **Uber** Taxifahrer/innen (Labour and social security questions relating to Uber drivers), (Berne and Basle, 10.6.2016);
— Kahil-Wolff Bettina, Statut des chauffeurs utilisant les applications **Uber** en Suisse au regard de la législation sur l'assurance-vieillesse et survivants (Status of drivers using Uber applications in Switzerland with regard to pension and survivors' insurance legislation) (13.3.2017).

The two authors agree that distinguishing whether the drivers are employed and self-employed is no easy thing. It depends on the weighting of the usual criteria. It comes as no surprise that the legal opinion requested by the unions concludes that the drivers are employees (the Pärli legal opinion), while that requested by **Uber** concludes that they are self-employed (the Kahil-Wolff legal opinion).

4. Collective disputes

4.1 Union demands

Up to now, the platforms have not been the subject of any real collective disputes. Nevertheless, the unions are closely following developments with apprehension. The 16-member Swiss Trade Union Federation has compiled a dossier on digitalisation which contains several demands[5]. Below are some of the measures called for:

— tighter enforcement of legal provisions in the field of social security and the fight against undeclared work in the digital field;
— full recording and payment of working time;
— the filling of legislative gaps in the field of teleworking;
— guaranteed union rights, and especially the right of unions to contact platform workers;
— the promotion of IVET and CVET;
— better protection against dismissal for older workers, taking account of seniority, etc.[6]

5. USS (2017) La numérisation doit servir aux salarié-e-s analyse et mesures requises [Digitalisation must serve employees: Analysis and measures required]. https://www.uss.ch/themes/economie/article/details/la-numerisation-doit-servir-aux-salariees/

6. See: https://www.uss.ch/themes/economie/article/details/la-numerisation-doit-servir-aux-salariees/

4.2 The case of bike couriers

One particular dispute concerned bike couriers working for **Notime**, a small start-up operating in various cities in German-speaking Switzerland. In September 2017, 4,000 **Notime** riders demanded employment contracts, then a collective agreement, and the payment of social security arrears. To a certain extent, they were successful. After having initially considered them as (bogus) self-employed, i.e. refusing to pay social security contributions for them, the company was forced – under pressure from the unions and the social security authorities and under a certain collective pressure from the riders themselves (with high media visibility) – to accept that they were employees as of October 2017 or 1 January 2018, meaning that the riders were given employment contracts and the company had to pay social security contributions for them.

What remained disputed however was the payment of arrears from previous years (social security contributions, paid leave, compensation for the use of private equipment, etc.). Success was also relative, as the new employment contracts were on-call (zero-hour) contracts with a new probation period and were accompanied by pressure to renounce the demands regarding previous years.

Also interesting was the fact that the riders demanded a collective agreement. They had initially planned to have it concluded by UNIA, a trade union which the platform was absolutely against working with. Thus, by linking arms, the riders managed, at least in part, to have their demands met.

In March 2018, **Notime** was taken over by Poste, the Swiss public postal service, with the latter taking a 51% stake in the start-up's capital (see also 5.1 below).

5. Trade unions and collective bargaining

5.1 Examples of collective bargaining / the conclusion of collective agreements

Again, developments in the field of bike couriers are the most interesting. In February 2019, a first collective agreement "for bike couriers and city courier services" was signed between the *Syndicom*, the Swiss media and communications union, and its counterpart, the employer association *Swissmessengerlogistic* (SML). This agreement, which came into effect on 1 May 2019 and is hailed as a "world first", provides for a minimum wage, supplementary remuneration for night and Sunday deliveries, proper work schedules, sickness and other social benefits (e.g. paternity leave).

However, it only covers some 600 riders. It does not cover all companies in the sector. One of the main operators not covered is **Uber Eats**, Uber's meal delivery service which has started operations in several regions of Switzerland,

especially in the French-speaking part of the country. Paradoxically, neither is **Notime**[7].

5.2 The National Tripartite Commission on ILO matters

An in-depth discussion has taken place within this Commission responsible for liaising between the Swiss Confederation and the ILO. It commissioned a study on the future of social dialogue and tripartism in the context of the digitalisation of the economy[8].

The study's authors came to the conclusion that it was crucial to strengthen the social partnership and the degree of collective agreement coverage by maintaining and promoting collective bargaining at sectoral level. At the same time, it was seen as a good idea to make it easier for "self-employed workers" and atypical employers to be included in the scope of collective agreements.

These discussions ended with a declaration signed by the Minister of Economy, representatives of the unions and employer organisations, as well as the director-general of the BIT: the Tripartite declaration on the future of work and of the social partnership in Switzerland in the era of the digitalisation of the economy (Berne, 18.10.2018).

Conclusion

In Switzerland, the legal debates on the social impacts of the digitalisation of the economy relate mainly to contractual relationships in the platform economy, the consequences of the use of robots for labour law, and on fundamental labour rights in the context of 4th Industrial Revolution. Certain institutional features of Switzerland – in particular the division of competences between the Swiss Confederation and the cantons, as well as the major use made of direct democracy –, add to the complexity of the debate. With regard to the platform economy, the first court rulings relate to administrative law and to social security law. As elsewhere, whether a worker is classified as being employed or self-employed is of decisive importance, determining membership of social insurance, the type of protection or the status with respect to the payment of contributions. The Swiss Federal Court has not however yet had the occasion to rule in this matter.

To date, there have been no real collective disputes in Switzerland, though the USS has put forward a set of demands pertaining to digitalisation, including a

7. This agreement is available at: https://syndicom.ch/fileadmin/user_upload/Web/Website/GAV/28_Velokuriere/GAV_Velokuriere_f_web.pdf.

8. Meier A., Pärli K. and Seiler Z. (2018) Le futur du dialogue social et du tripartisme dans le contexte de la digitalisation de l'économie : étude établie sur mandat de la Commission nationale tripartite pour les affaires de l'OIT. https://www.isdc.ch/media/1600/23-dialogue_social_digitalisation_final_fr.pdf.

call for the monitoring of digital work and greater protection for the workers concerned. Moreover, a first collective agreement has been signed between Syndicom and Swissmessengerlogistic, though it does not cover all companies in the sector. Whatever the case, politicians and social partners are becoming increasingly aware of the need to strengthen the social partnership and the rate of workers covered by collective agreements and to do more to integrate "self-employed" and atypical workers in their scope. As in other countries, discussions also relate to the opportuneness of establishing a new intermediary status between an employee and a self-employed worker. The government seems however to be exercising caution, analysing developments carefully before making any changes to the legislation.

United Kingdom

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1. State of play

The emergence of work under what can broadly be termed 'platform capitalism' has coincided with a series of parallel developments in industrial practice and technologies in the United Kingdom. Over the past three decades or so there has been a dramatic flexibilization of the labour market through a combination of deregulation, the normalisation of atypical working patterns and an explosion in self-employment.[1] The recent genesis of the so-called 'gig economy' can be seen as the apotheosis of these processes, in which workers are, ostensibly, recruited to complete discrete tasks, whether for the same or different end-users, rather than engaged in a single overarching relational contractual nexus.[2] The United Kingdom has seen an explosion in these forms of working practice, in particular within certain industries and among certain demographic groups, notably younger workers.[3]

The emergence of platforms, that is digital applications or systems which take advantage of data and technologies such as geo-location to connect disparate groups, is a separate phenomenon to the emergence of the gig economy. For instance, social media networks such as Facebook as platform-based services which connected users with each other and with advertisers, with no necessary link to changing working models. Equally, such platforms can be used within enterprises to distribute work and liaise with customers with no discernible impact on the relationship with the employee in terms of employment status or protections. However, many new iterations of gig working in the United Kingdom have emerged primarily through the use of platforms to the extent that the two are often thought of as being inherently linked phenomena. In particular, these processes have led to a great number of business models which have been able to externalise work functions, disrupting the Coasean vision of the firm and the place of the worker within it. Caution should be exercised in this regard, however. Not only are the emerging forms of work extremely heterogenous in nature, they also interact in different ways with various aspects of the digital economy and information technology.

1. Davies P. and Freedland M.R. (2007) Towards a flexible labour market: labour legislation and regulation since the 1990s, Oxford, Oxford University Press.
2. De Stefano V. (2015-2016) The rise of the 'just-in-time workforce': on-demand work, crowdwork, and labor protection in the 'gig-economy', Comparative Labor Law Journal, 37 (3) 471-504.
3. Prassl J. (2018) Humans as a service: the promise and perils of work in the gig economy, Oxford, Oxford University Press.

Notwithstanding these complexities, growing attention is being paid to these emerging forms of work, whether from a management, economic, legal or sociological perspective. In the UK, there is a hyperactive amount of popular and scholarly literature dedicated to questions of artificial intelligence, the digital economy, algorithms and the future of work more generally.[4] However, there is no clear agreed taxonomy of ideas or concepts, and these are often borrowed from international literature or developed on an *ad hoc* basis within the literature. Policy responses have been rather slow, with a characteristically 'pragmatic' approach having been taken in general by the British government and legislature.

In reality, policy discussions on issues connected to the platform economy of labour law have emerged tangentially at best. In recent years, there has been a great deal of discussion about such practices as 'zero hours contracts',[5] a nebulous term with no precise legal meaning which captures contractual arrangements in which there is no (or next to no) formal obligation on either side to provide or accept work. A growing number of such arrangements take place through platform-like interfaces, meaning that much work done through platforms is captured within discussions of new forms of 'casual' or 'informal' labour and the 'flexible' labour market. However, there has, surprisingly perhaps, been no specific government or legislative response to the apparently radical changes which the use of platforms and information technology are bringing to the labour market and the employment relationship.

In 2017, the Conservative government published the so-called 'Taylor Review'[6], a report and series of recommendations on the future of work and its regulation. This was not explicitly concerned with platform capitalism as such, and did not deal with the technological questions which emerge from the use of such platforms. However, the Report uses 'platform'-based work as its central case of modern working practices and structures much of its commentary and many of its recommendations around the centrality of platforms. It particular, as will be considered in this entry, it highlights the difficulties regarding the legal classification of those who work under such technological arrangements in the context of the current lack of clarity in this regard. The report makes some strident recommendations in this regard, in particular the removal of the need for work to be provided personally to have access to employment protections, as well as the replacement of the current 'worker' category with a new 'dependent contractor' one based on the central concept of 'control'. However, in general, the report advocates continuity in terms of the existing 'pragmatism' of the British reaction to the emergence of

4. Susskind R. and Susskind D. (2015) The future of the professions: how technology will transform the work of human experts, Oxford, Oxford University Press; de S. Cameron N.M. (2017) Will robots take your job? A plea for consensus, Malden, Polity Press.

5. Adams A. *et al.* (2015) 'Zero-Hours Contracts' in the United Kingdom: regulating casualwork, or legitimating precarity?, Giornale di diritto del lavoro e di relazioni industriali, 148, 529-553.

6. Taylor M. (2017) Good work: the Taylor report on modern working practices. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/627671/good-work-taylor-review-modern-working-practices-rg.pdf

these new industrial practices and forms of work. The Review broadly approves the new practices and the 'flexibility' which they can offer to both businesses and workers, and encourages the use of such models, including those entirely outside of the scope of employment law, where this reflects the genuine 'choices' of the parties. Thus far, there has been little legislative reform which can be understood as either implementing these recommendations or which deals explicitly, or even indirectly, with platform-based models of work. As a consequence, the relationship between labour law, industrial practice and these new technologies is governed by the interpretation and application of the existing legal framework.

2. National legal framework

As in almost all systems of labour law, the 'gateway' question of the scope of employment law is fundamental. Historically, this divide was essentially the classical binary one between those relationships which were covered by labour law and those which lay outside its scope.[7] In recent decades, this binary divide has been disrupted by a series of 'concentric circles' of protection, which extend various parts of employment law to larger categories of workers.[8] The emergence of the platform economy and the crowdsourcing of work through such platforms must therefore be understood through this complex variable geometry of the modern system of labour law.

As the legislator has not intervened to create *ad hoc* categories or coverage for platform-based working, the categories of labour law must be understood in this new context. This is in line with the general approach of English labour law, in which common law has been the traditional 'gatekeeper' of the meaning, and indeed the content, of the contract of employment upon which statutory protections have been built. The following section considers how the courts have responded to the emerging realities of platform capitalism in the labour market in the context of the legal framework presented here.

The central regulatory unity of the UK labour law system stems from the common law contract of service or contract of employment. This is the common law keystone upon which the edifice of labour law is generally built. Indeed, s230(1) of the Employment Rights Act (ERA) 1996, a consolidated catalogue of individual employment protections defines 'employee' for the purposes of that Act as 'an individual who has entered into or works under […] a contract of employment', that is, according to s230(2) 'a contract of service', a common law concept. It is the general expectation that common law should continue to develop the appropriate criteria for establishing the existence of an employment relationship.[9] In line with most other legal systems, there is a

7. Freedland M. (2003) The personal employment contract, Oxford, Oxford University Press.
8. Brodie D. (2005) Employees, workers and the self-Employed, Industrial Law Journal, 34 (3), 253-260.
9. Bales K. *et al.* (2018) 'Voice' and 'choice' in modern working practices: problems with the Taylor Review, Industrial Law Journal, 47 (1), 46-75.

multifactorial approach in which the characteristics of the working relationship are weighed up. However, in English common law, this process is characterised by two significant elements. Firstly, close attention is paid to the contractual obligations between the parties rather than simply the social or economic realities of the relationships. Secondly, there are certain necessary criteria which generally must be present in order for there to be a contract of service, regardless of the presence of all other factors, meaning that these are not simply to be weighed against the overall nature of the circumstances.

The contract of service stems from the principle of vicarious liability within the common law of tort. Employers are liable for the actions of their employees where such actions are carried out 'in the course of employment'. For this reason, the basic starting point for such matters is that of 'control', that is whether the employer exercises sufficient control over the other person's work.[10] However, over the past half-century or so, the Courts have developed a more complex set of factors to determine employment status. In *Ready Mixed Concrete*,[11] McKenna J famously reduced this to a three-part test: remuneration in exchange for work, control and the absence of contractual provisions which are inconsistent with an employment contract. Other case law has identified additional important factors, such as the level of business risk taken on by the worker and the level of integration into the enterprise, with no factor being absolutely crucial in isolation.[12]

Subsequent developments in common law have identified two core additional requirements for there to be a contract of service, the absence of either of which is fatal. The first is that there must be 'mutuality of obligation', i.e. there must be an obligation on the employer to provide work and a correlative obligation on the employee to accept that work.[13] Secondly, there must be a personal obligation to work, meaning that a valid 'substitution clause' which allows the worker to send someone else to do the work in his place is incompatible with employee status.[14] What these aspects in particular demonstrate is that English law is traditionally primarily concerned with the context of the contract and its formal obligations. As will be discussed below, this approach has undergone subtle changes in recent years.

Many of these factors make platform working problematic in terms of establishing employment status: the externalising tendencies and the progressive fragmentation of the Coasean firm in such working arrangements, alongside the 'casual' nature of the gig work, mean that the contractual arrangements which typify platform work generally possess several characteristics which do

10. Performing Right Society Ltd v Mitchell and Booker (Palais de Danse) Ltd [1924] 1 KB 762; Mersey Docks and Harbour Board v Coggins and Griffiths (Liverpool) Ltd [1947] AC 1, [1946] 2 All ER 345, HL.

11. Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1969] 2 QB 173, [1968] 3 All ER 732.

12. Hall (Inspector of Taxes) v Lorimer [1994] ICR 218, [1994] IRLR 171, CA.

13. O'Kelly v Trusthouse Forte plc [1983] ICR 728, [1983] IRLR 369, CA; Wickens v Champion Employment [1984] ICR 365, EAT.

14. Express & Echo Publications Ltd v Tanton [1999] ICR 693, [1999] IRLR 367, CA.

not cohere with the contract of employment. However, in recent years, the English courts have been more willing to look beyond the wording within written contracts, and to seek to consider the genuine contractual expectations of the parties where these might differ from those formally recorded, in recognition of the imbalance of bargaining power in such circumstances. This is not a departure from the 'contractual' approach of English law as such, but is certainly a contextualised 'softening' to reflect the social realities of contractual obligations.[15] As will be discussed below, this is potentially significant in the judicial treatment of platform models of work.

Traditionally, those whose working relationships did not fall within the scope of the contract of employment were automatically deemed to be independent contractors under a 'contract for services', and therefore entirely outside the protection of labour law. This binary dichotomy has since been significantly disrupted by the appearance of numerous intermediate status categories. These categories do not, it would appear, function in the same way as the contract of employment in terms of providing a unitary relational framework for employment regulation, but rather seek to capture those individuals or relationships who are deemed worthy of specific aspects of employment law but who would otherwise be excluded from it.

The most important intermediate category of this type is that of 'worker', which is defined in s230(3) of the ERA 1996 as an individual who works under either a contract of employment or 'any other contract […] whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual'. This category is in fact rather longstanding, having been used within trade union legislation for many decades. However, it came to have its current function as a broader concentric circle of coverage of employment law in the late 1990s, when it was used as the basis of the personal scope of rights such as the national minimum wage and protections connected to working time and holiday rights. Similarly, discrimination law[16] uses a broader definition to determine its coverage, that is either a contract of employment or 'a contract personally to do work'. Although these definitions are ostensibly different, they are broadly understood to have the same meaning.

However, there is a relative paucity of enlightening case law on this matter. The leading authority stems from the case of *Mirror Group v Gunning*,[17] in which it was held that 'personal service' must be the primary or dominant purpose of the contract, although the importance of this as a sole criterion has been questioned in subsequent case law.[18] In the discrimination law case of *Jivraj*,[19] the Supreme Court held that the 'primary purpose' approach was not

15. Autoclenz Ltd v Belcher [2011] UKSC 41.
16. Equality Act 2010, s 83(2).
17. [1986] ICR 145, [1986] IRLR 27, CA.
18. James v Redcats (Brands) Ltd [2007] ICR 1006, [2007] IRLR 296, EAT.
19. Jivraj v Hashwani [2011] ICR 1004, [2011] IRLR 827, SC.

sufficient as the definition should fall in line with European Union law on the matter (which, of course, has its own 'autonomous' definition of worker developed in the jurisprudence of the EU Court of Justice), and therefore personal; service is not sufficient; there must also be an element of subordination in the relationship and not an entirely independent provision of services. This decision sparked great controversy among labour law scholars,[20] as it appears to reinstate a form of 'control' requirement for intermediate categories as well as employees.

The question of the scope of labour law is the subject of intense debate in the UK, as in most jurisdictions at present. In many respects, this discussion is more pressing due to the emergence of the challenges of the platform economy. Certain influential scholars have forcefully made the claim that many forms of platform work can and should be captured by existing categories within employment law, or could be if these were slightly reimagined. One of the most influential approaches is to take a 'functional' approach to the figure of the employer and ask who carries out various aspects of the employer's function, attributing legal duties which correlate to these functions.[21] Such a radical idea, however, does not cohere with the courts' current understanding of their own function in determining the application of the existing criteria to new situations. In addition, such a fragmenting of questions regarding the identity of the employer would put at risk the regulatory and normative unity of labour law, i.e. the employment relationship and similar constructs, which holds together this field of law.[22] The following section considers how the courts in the UK have responded to recent cases concerning gig working and the platform economy.

3. Case law

As there has been no legislative intervention in relation to these working practices, and indeed no legislative changes to the scope of labour law (as discussed in the previous section), in recent years it has been left to the courts to respond to the emergence of the platform economy through the application of existing categories and concepts. This has the advantage of being flexible and contextualised, but there exists the clear danger that current taxonomies and legal understandings are not suitable for emerging working practices. However, most important is the crucial point that while the case law which has emerged is important in various respects, it must be understood as, in each case, limited to the contractual and economic arrangement in the case at hand.

20. Freedland M. and Kountouris N. (2012) Employment equality and personal work relations: a critique of Jivraj v Hashwani, Industrial Law Journal, 41 (1), 56-66; MCCrudden C. (2012) Two views of subordination: the personal scope of Employment Discrimination Law in Jivraj v Hashwani, Industrial Law Journal, 41 (1), 30-55.

21. Prassl J. (2015) The concept of the employer, Oxford, Oxford University Press; Prassl J. and Risak M. (2016) Uber, Taskrabbit, and Co.: platforms as employers? Rethinking the legal analysis of crowdwork, Comparative Labor Law and Policy Journal, 37, 619.

22. Mason L. (2019) Le salarié-actionnaire en droit anglais: l'histoire d'un échec législatif, in Mazuyer E. (ed.) La place des salariés dans l'entreprise, Paris, Mare et Martin.

As this jurisprudence does not produce, or even suggest, new categorisations of working relationships, for the platform economy or more generally, the case law should be apprehended as merely a guide to the potential general application of existing categories. If the contractual or working arrangements of other platforms differ in significant respects to those considered in the cases which emerge, there is no guarantee that they would be decided in the same way. In the platform economy, contractual arrangements are frequently changed, so there is also the possibility that the case law which does emerge will be obsolete by the time it is decided, even for the companies concerned. This is doubly true in the UK due to the attention paid to the contractual obligations of the parties in such matters. Most platform work arrangements in which there is some degree of 'externalisation' of the work from the firm is characterised by a contractual attempt to characterise the work either as done by an 'independent contractor' or as an agency arrangement in which the platform arranges for a contractual relationship between the worker and the end-user. The case law which has emerged asks whether these self-labelling exercises are successful.

The three major cases in recent years which appear to be relevant to work in the platform economy have all concerned 'worker' status, i.e. the intermediate category of people who are granted a limited range of employment protections by virtue of their provision of personal work. The first such case is ***Pimlico Plumbers***,[23] which is only tangentially linked to the platform economy, but which is extremely influential due to the fact that it reached the Supreme Court. This case concerned the question of whether a plumber who was able to choose to accept or reject jobs for a plumbing company benefitted from the protections of the Working Time Regulations among other things. The company insisted that its contractual terms, in particular the ability of the worker to send someone else to carry out the work in limited circumstances, meant that this could not be considered a contract for personal provision of work. The Court disagreed, holding that in such cases the court should ask itself whether, notwithstanding any limited substitution clause, the dominant purpose of the contract is nonetheless personal performance. In this case, the Supreme Court held that there was such a dominant purpose. This case is significant because it opens up the possibility that platform work can be considered to form part of the traditional categories of employment law, if the contractual arrangements can be made to fit into those categories. In this specific case, there was no consideration of whether the worker might also have been an employee, primarily due to the fact that there was no obligation on the parties to provide or accept work. Future cases might consider the 'realities' of contractual clauses which purport to govern such matters in the context of the platform economy, in which there is often an algorithmic sanction for the refusal of work. No such case has emerged thus far however.

23. Pimlico Plumbers Ltd and another v Smith) [2018] UKSC 29.

The second relevant piece of case law falls more squarely within the platform economy paradigm, and concerned the status of drivers who work through the well-known **Uber** platform.[24] In this case, two **Uber** drivers claimed that they should be classified as 'workers' and thereby be guaranteed the national minimum wage and paid holidays. By majority decision, the Court of Appeal found that, under the contractual terms applicable at the relevant time, the drivers were indeed workers. Significantly, the Court found that the precise wording of the contract, in particular regarding the self-categorisation of the drivers as 'self-employed', was not relevant if the realities of the contractual dealings did not reflect this. The Court approved the first-instance decision which found that the contractual sophistry employed by **Uber** did not reflect the realities of the working relationships between the company and the drivers. Crucially, it was found that the claimants had no say in the terms under which they performed work, and that this work should be personally performed. The Court did not specifically consider some of the more specific aspects of the platform's operation, limiting itself to upholding the first-instance finding. That first-instance decision was noteworthy for a particular observation which has been widely cited. **Uber** had sought to rely on a contractual document which suggested that all drivers were in fact independent entrepreneurs to whom **Uber** provided the service of locating passengers. Instead the employment tribunal found that **Uber**'s 'general case and the written terms on which they rely do not correspond with practical reality. The notion that **Uber** in London is a mosaic of 30,000 small businesses linked by a common 'platform' is to our minds faintly ridiculous.'[25] In this piece of *obiter* reasoning, we can see the beginnings of a reckoning with the platform economy and its interaction with labour law. The very fact that a platform is able to coordinate a large number of drivers according to broadly the same terms and conditions, and distribute work between them, while providing end-users with what is ostensibly a transport service appears to be very strong evidence in itself for the existence of a relationship covered by the 'worker' category. Whether such arrangements might also, in future cases, be considered to involve full-blown contracts of employment remains to be seen, however the coordinating function of the platform might be understood as generating the requisite level of control. In many such cases, however, employee status would appear to be ruled out due to lack of mutuality of obligation. Where the decision not to accept discrete work tasks is penalised by the platform in the future distribution of work, however, the realities of such an absence become more questionable. This will be a matter for future cases to decide. Equally noteworthy in the **Uber** decision was the dissenting judgment of Underhill LJ in the Court of Appeal. He considered the case to be about the appropriate level of protection for workers in the gig economy and through platforms which should be a matter for government and the legislator. He therefore refused to look behind the contractual terms in the manner done by the majority in the case.

24. Uber BV v Aslam [2018] EWCA Civ 2748.
25. Para 90.

The third relevant case concerns the food delivery platform **Deliveroo**.[26] In this case the Central Arbitration Committee (CAC) was responding to a request for statutory recognition of the delivery riders' trade union. In order to benefit from this right, the riders had to show that they were workers. The CAC held that union members were not workers but were in fact self-employed on the basis that **Deliveroo** riders did not have to perform their services personally, instead having an unfettered right to use a substitute in the performance of the delivery. The CAC specifically pointed to the fact that several of the riders made use of this contractual right to subcontract their delivery function to other riders and take a share of the fee. As a decision of the CAC rather than a court, this decision does not create a binding precedent. However, it does show how the application of the general principles of employment law in one instance of platform-based work might apply in a completely different manner to a different platform or its methods of organising or distributing work.

While this case law has received a great deal of attention and is surely significant in various respects, this is still a very limited sample of judicial reasoning in this context, in particular given the heterogenous nature of work within the platform economy. To some extent, the perceptions of the judicial treatment of work have been coloured by the serendipity of the cases which have been brought. There are various matters which have not yet been explicitly dealt with, in particular the question of whether platform work can ever be considered to fall under a contract of employment, and, in which case, what the significance of the platform and its operation are from an employment law perspective. Equally, no cases have yet been brought regarding the application of discrimination law to the operation of algorithms in platforms' distribution of and remuneration for work.

4. Industrial action and collective bargaining

Traditionally, the UK labour law system has been said to depend on an ideology of 'collective laissez-faire', that is a form of collective regulation of the terms of employment without the intervention of the law.[27] Taking such a view, the collective regulation of platform work would depend simply on the social pressure which people working in the platform economy were able to place on companies. In reality, however, matters are far more complex, as the law plays a crucial structuring role in enabling and framing collective action and collective bargaining. When it comes to those who work in the platform economy, it is far from clear that all such workers are even permitted, legally, to seek to organise and bargain collectively. Again, such matters revolve around how those who work through platforms are classified from a labour law perspective. There is growing evidence of organisation amongst workers in the

26. Independent Workers' Union of Great Britain (IGWB) and RooFoods Limited TA/Deliveroo, Central Arbitration Committee, 14 November 2017 (TUR1/985(2016)).

27. Kahn-Freund O. (1954) The legal framework, in Flanders A. and Clegg H.A. (ed.) The system of industrial relations in Great Britain: its history, law and institutions, Oxford, B. Blackwell, 42-127.

gig economy, both within existing trade union organisations and within new groupings. Most notably, the Independent Workers' Union of Great Britain (IWGB) has been organising gig economy workers and has organised numerous forms of industrial action and helped bring cases before courts and the CAC.

However, the ability of such groups to engage in effective collective action and/or bargaining is in doubt. The Taylor Review, discussed above, was largely dismissive of the need for collective representation of workers in the platform economy, pointing to the low levels of trade union membership among young workers. It is not clear, however, that the current law would allow platform workers to partake in such processes in any case. The aforementioned case involving **Deliveroo** riders before the CAC concerned the ability of those riders to force the company into recognising the IWGB for the purposes of collective bargaining.[28] The finding that the riders were not in fact workers meant that the union could not rely on that procedure. The place of collective bargaining will therefore depend on the rather capricious question of the legal classification of workers at that point. Given that worker or employee status is, at least to some extent, a negotiated outcome, this approach is problematic as it denies such workers the possibility of collectively bargaining an improved set of working arrangements which would grant them this status in the first place. Furthermore, however, there is the question of the legality of any collective action taken. Where platform workers are independent contractors, i.e. self-employed, it is not clear that they benefit from the right to strike, such as it exists in UK and European law. Famously, there exists no freestanding right to strike in the British labour law tradition. Instead there is a complex system of immunities for trade unions where individual action is in furtherance of a trade dispute, i.e. a dispute between workers and their employer over employment-related matters.[29] Given the status of many platform economy workers as independent contractors, trade unions might be liable for the economic torts for which they would ordinarily be liable if there were no immunities. Equally, given that platform workers might often fall outside the scope of employment law, they would not seem to automatically fall within the 'exclusion zone' created by the *Albany*[30] case before the CJEU regarding the application of competition law to collective action and collective agreements. The recent case of *FNV Kunsten*[31] seemed to suggest that self-employed workers are not covered by the protection afforded by the Albany approach. These matters, concerning the legality of industrial action and collective bargaining for platform workers have yet to come before a court in the UK. Interestingly, the Taylor Review does make one specific recommendation in this respect, that is the expansion of the right to trigger Information and Consultation procedures in companies, which currently only applies in the case of 'employees' and requires a large level of initial support and which only

28. Schedule A1, Trade Union and Labour Relations (Consolidation) Act (TULR(C)A) 1992.
29. s244(1) TULR(C)A 1992.
30. C-67/96 Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie [1999] ECR I-5751.
31. C-413/13FNV Kunsten Informatie en Media ECLI:EU:C:2014:2215.

applies to relatively large companies. This would not address the more general issues discussed in this section regarding industrial action and collective bargaining, but might provide an indirect impetus for greater collective regulation of the platform economy, something which is currently almost entirely absent.

Conclusions

As is the case in most jurisdictions, the emergence of the platform economy provides very specific challenges, both practical and intellectual, for labour law in the UK. However, these challenges have emerged alongside a series of parallel overlapping developments, some of which are connected to the digital economy and technology, while others are related to labour market trends of flexibilization and re-casualisation. The platform economy poses acute problems because it encapsulates many of these separate issues at the same time. The response of labour law in the United Kingdom has, in some ways, been characteristic of the employment policy trends in the country over the past four decades: a general acceptance of the industrial changes and their potential to selectively deregulate sections of the labour market. The anaemic response of the legislator has seen the courts take up their traditional and perhaps underestimated role within employment law: the continued development of the core unifying categories which define the scope and unitary core(s) of labour law. Given the heterogenous nature of the platform economy, this more broad-brush approach might be more appropriate than a naïve attempt to capture these new forms of work within a single definition which would quickly be transcended by evolving industrial practice. Whether the current categories are capable of application to the emerging models of capitalism remains to be seen: if current trends continue, this will depend on the dexterity of judges. The ability of platform workers themselves to impact upon this process will depend to some extent on these questions as well. While social mobilisation and industrial action depend on social power and organisation, the legal ability to negotiate and take collective action would greatly improve the prospects of workers and their unions in this regard. The United Kingdom remains hostile to collective regulation of work in general, and *a fortiori* in the platform economy.

United States

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1. State of play[2]

1.1 The platform phenomenon

Platform workers only represent a very low percentage of the US working population (between 5 - 15% depending on the estimate). Moreover, nearly 80% of them work part-time or even just a few hours a month. Nevertheless, this form of work seems to be gradually changing the structure of the US economy. As a result mainly of the financial crises, we have seen a sharp rise in atypical work and the creation of many small companies (so-called '1099 filings')[3], corresponding to a fall in full-time employment. Generally speaking, when the economy picks up again after a recession, such a curve is reversed. However, since the 2010s, the United States has been seeing its economy pick up again, but this time without full-time employment increasing and with '1099 filings' continuing to rise. This can be explained by a growing trend, now structural and observable, towards platformisation of the economy[4].

How can this platformisation be described? In an article published in 2016, Julia Tomassetti looked at how Uber functions[5]. As with many other digital platforms offering work, Uber upholds the notion that such platforms are more in tune with market structures than firm structures because they use algorithms which, through their neutrality and purity, reflect the functioning of an ideal market much more than an integrated and centralised company.

But this discourse falls short for a number of reasons. First of all, platforms operate like companies in the sense that they seek to monopolise information

1. Kieran Van den Bergh is writing his Ph.D in law under the co-supervision of Isabelle Daugareilh (COMPTRASEC, Bordeaux) and Simon Deakin (CBR, Cambridge) on "Digitization and the evolutions of Labour" using French, English and US law.
2. The production of US legal doctrine on the platform economy cannot be summed up in just a few lines. In the following, we will be looking at a few articles we consider to be of major significance.
3. In the US, the 1099 form is used to report payments to independent contractors, rental property income, income from interest and dividends, sales proceeds and other miscellaneous income.
4. It should be emphasised that a recent study published by the US Office of Labor Statistics shows that, despite their vulnerability, more than 82% of independent contractors in the US preferred their current situation to salaried employment.
5. Tomassetti J. (2016) Does Uber redefine the firm? The post-industrial corporation and advanced information technology, Hostra Labor & Employment Law Journal, 34 (1), 1-78.

instead of releasing it. Secondly, the algorithm itself is not designed in such a way as to allow the market to work freely; it simply takes on the role of a manager (command and control). Finally, the platform maintains control over the execution of the work because it is part of its productive scheme. According to Tomassetti, platforms do not mean the disappearance of the traditional business model but instead embody a further step in the trend towards separating a company from its corporate form.

1.2 Regulation of digital platforms

In the class action *Cotter v. Lyft* (2015)[6], a judge came up with a sentence that has since caught on: "asking a jury whether platform workers are self-employed or employees is like giving them a square peg and asking them to choose between two circular holes". All observers agree that this form of work does not correspond to the traditional paradigm of employment, as the parties have no mutual obligation to provide work. That said, the platform exercises such a high level of control that it is difficult to view the workers concerned as really being self-employed. The current *status quo* is therefore unsatisfactory given the precarious situations of many platform workers.

Do we need to reclassify them as employees? This path is considered by many as a dead end as it would be tantamount to destroying the platform economy by making the majority of its actors disappear. In addition, it would not be in the interest of workers who appreciate flexibility, of platforms whose business model would collapse, or of consumers who would no longer find the rates offered attractive.

Another option: to create a third employment status (*tertium genus*). This is the proposal put forward by two former members of the Obama administration, Seth Harris and Alan Krueger. They propose a status between employed and self-employed, which they refer to as an 'independent worker'[7]. Such workers would enjoy certain employee rights while remaining self-employed. They would be entitled to collective bargaining outside the NLRA (National Labor Relations Act[8]), protection against discrimination, certain social benefits, but not the minimum wage or overtime pay. Is this option politically realistic? Not at the moment, as it would require completely reforming the structure of US labour law. It might nevertheless become an option in the long run, considering how the American economy is evolving.

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6. A *class action* refers to a collective lawsuit allowing a large number of people to sue a company or public institution for damages. Its big advantage is that it bundles individual lawsuits.

7. Harris S. and Krueger A. (2015) A proposal for modernizing labor laws for twenty-first century work: the 'independent worker', Discussion Paper 2015-10, Washington DC, The Hamilton Project. http://www.hamiltonproject.org/papers/modernizing_labor_laws_for_twenty_first_century_work_independent_worker

8. The federal law defining the union rights of private-sector workers.

Pending a comprehensive solution, one temporary solution would be to extend the antitrust law exemption enjoyed by employees to platform workers. This would give them the right to organise, to take collective action and to bargain collectively[9]. At present, any attempt by the self-employed community to organise can fall under the scope of antitrust law. In the case of the legislator remaining passive and without any jurisprudence forthcoming, opening up the field to collective pressure could act as a lever for platform workers, allowing them to build, together with the platform, a business model more respectful of their rights.

2. Legal environment

Uber was officially launched in San Francisco in 2010, before quickly expanding to the rest of the US and then to the rest of the world. Its business model has since been emulated in many sectors of the service economy. But even today, there is still no consistent and systemic legal response to this phenomenon. In the following sections, we will be examining the existing regulatory set-up potentially able to impact these new forms of employment, as well as the US institutional, legal and political structure and how it prevents the emergence of a coherent legislative response.

2.1 The Federal level

In the US, the Federal State's competences are *a priori* limited to sovereign functions such as international and inter-state trade. These are so-called 'explicit' powers. However, the Federal State has been able to justify the production of labour and social protection legislation enabling it to produce regulations necessary for carrying out its sovereign powers ('implicit' powers). One example of this is the prevention of forms of social competition in domestic inter-state trade. At the Federal level, Congress votes on regulations called Statutes or Acts, in many cases involving the establishment of a specific administrative entity for overseeing their implementation[10].

A number of Statutes have the potential to improve the working conditions of platform workers if their scope was extended or if the workers concerned were classified as employees. Examples include the *statutes* on contributions to federal insurance (Federal Insurance Contributions Act), on contributions to unemployment insurance (Federal Unemployment Tax Act), on the pension and wage guarantee system, on labour relations (collective rights of employees), on fair working conditions (Fair Labor Standard Act, FLSA), or on non-discrimination, disability, etc. But all this legislation applies solely to employees and not to independent contractors.

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9. Lao M. (2018) Workers in the 'gig economy': the case for extending the antitrust labor exemption, UC Davis Law Review, 51 (4), 1543-1587.

10. For example, the National Labor Relations Board (NLRB) applies the provisions of the National Labor Relations Act (NLRA).

It should be noted that each of these *statutes* generally contains a more or less exact definition of what an employee[11] is in order to determine its scope. It comes as quite a surprise to European legal experts that a person can be reclassified as an employee under the common law principle of *respondeat superior* ("Let the master answer") with regard to a liability dispute, without being reclassified for the purpose of minimum wage or collective rights legislation. Several New York **Uber** drivers have, for example, been reclassified as employees for the purpose of unemployment rights, but not for anything else[12]. It would nevertheless be possible for the Statutes considered to expand the notion of employee to include dependent contractors – i.e. platform workers – or even to include an intermediate status benefiting from partial coverage. But the current pro-business administration makes this appear quite unlikely.

2.2 State level

While the Federal State has an overall competence, the individual US states have a residual competence giving them a large scope to set labour legislation at state level. While a state-level regulation or standard may not contradict a federal-level one, they sometimes improve it[13].

Right from the start, certain US states such as Nevada tried to banish digital employment platforms such as **Uber** or **Lyft**. But at some stage they were forced to cave in under great political and business pressure. The majority of US states want to profit from the business stimulus created by these platforms. In the US, it is politically complicated to oppose a form of work presented as innovative and disruptive with regard to labour law issues.

There is thus no real political will on the part of the US states – which compete with each other to attract business – to take up the issue of the precarious situation of platform workers. Though California is the most progressive US state with regard to social rights, this is mainly because it is already one of the country's most attractive states (if it were independent, it would rank as the world's 6th largest economy).

2.3 The regulatory environment at city level

With regulatory competence over mobility, housing, local deliveries, etc, cities are responsible for settling local disputes. They are in the front-line when it comes to platforms, as the latter generally set up shop in densely populated

11. Sometimes in a very roundabout way: "an employee is a person working for an employer".

12. State of New York, Unemployment Insurance Appeal Board, Uber Tech. v. N. Salk *et. al.*, A.L.J., case n° 016-23858, 12 July 2018.

13. California has for instance its own Labor Code. The State of Washington has adopted a Minimum Wage Act, with the minimum wage set at $15 and with overtime being paid.

areas. The aim of any dispute settlement is to find a balance between local interests (taxis *vs*. car-sharing *vs*. Uber and Lyft; hotels *vs*. Airbnb, etc.). This is achieved via so-called ordinances. These set operating requirements for platforms, such as occupational insurance, guarantees, background checks for drivers, restrictions on where they can wait for customers or sometimes restrictions on working hours (max. 12 hours a day).

But a city's room for manoeuvre is dependent on the state in which it is located. The most progressive states tend to see cities as testbeds (e.g. California, Washington, etc.), allowing them for example to raise their minimum wages, whereas more conservative states will try to muzzle cities often seen as dangerously progressive areas.

It is also interesting to note that many cities in which Uber and Lyft are not yet present are currently negotiating a legal set-up with these platforms to enable them to set up shop there. Uber quit Houston (Texas) when the city started requiring drivers to be fingerprinted on grounds of cases of rape and sexual violence. After the city withdrew this legal requirement, Uber restarted its operations there.

At city level, concerns are not directed so much at how these forms of work are legally classified but at what minimum regulations are needed to make such services safe for use and compliant with existing rules, while at the same time doing everything to make sure that the platforms do not shut up shop.

Winding up, the current political, legal and institutional situation in the US makes it unlikely that any general legislation aimed at protecting platform workers will be adopted. The platform-based business model as such is not politically questioned. What is being questioned is the unsuitable nature of the existing legal framework for dealing with the new forms of work generated by this model. Thus, in the absence of any answers to these fundamental questions, all problems are being dealt with on a case-by-case basis.

3. US case law on digital platforms

Up to now, the *respondeat superior* principle has not offered any enlightenment, even though it has been tested many times:

— ***Liu v. Uber*, 27 January 2014** regarding a 6-year-old girl killed in a crash with an Uber driver in San Francisco. Attracting a great amount of media attention, the case ended with an out-of-court settlement.
— ***Phillips v. Uber tech.*, 14 June 2017, New York**. Two customers were assaulted by an Uber driver. The Court evaded the issue, basically saying that it would be no use ruling on the classification of Uber drivers in light of the fact that assaulting a customer was not something for which an employer could reasonably be held responsible.

— Hundreds of other lawsuits involve women assaulted by **Uber** drivers[14]. Nearly all were referred to private arbitration under the terms of the service contract the women signed with the platform. A *class action* was filed by 9 women in 2017, but **Uber** called on the judge to require them to also refer their cases to individual arbitration under the terms of the contract. The judge's ruling is pending.

3.1 Reclassification decisions

Several tests exist in the US for determining whether a worker is an 'independent contractor' or an employee. Used by the US states, these tests resemble each other to a certain extent, though with sometimes important nuances. In California for instance, if a worker brings forth elements that make it appear *prima facie* that he is providing a service to a contractor, he benefits from a presumption of employment. This in turn transfers the burden of proof to the contractor, meaning that it is up to the latter to prove the contrary. The Borello[15] decision lists a series of criteria to be used by a judge, in the knowledge that the contractor is the principal, i.e. has the power to control execution of the work. The Borello test analyses the following factors:

1. Whether the person performing services is engaged in an occupation or business distinct from that of the principal;
2. Whether or not the work is a part of the regular business of the principal or alleged employer;
3. Whether the principal or the worker supplies the instrumentalities, tools, and the place for the person doing the work;
4. The alleged employee's investment in the equipment or materials required by his or her task or his or her employment of helpers;
5. Whether the service rendered requires a special skill;
6. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;
7. The alleged employee's opportunity for profit or loss depending on his or her managerial skill;
8. The length of time for which the services are to be performed;
9. The degree of permanence of the working relationship;
10. The method of payment, whether by time or by the job; and
11. Whether or not the parties believe they are creating an employer-employee relationship;
12. Last but not least, whether the person to whom service is rendered (the employer or principal) has control or the right to control the worker both as to the work done and the manner and means in which it is performed.

14. See for instance: "CNN investigation: 103 Uber drivers accused of sexual assault or abuse", https://money.cnn.com/2018/04/30/technology/uber-driver-sexual-assault/index.html?sr=fbCNN043018uber-driver-sexual-assault0544PMStory

15. S.G Borello & Sons, 1989.

Applying these criteria, a judge weighs up the overall situation to determine a worker's status.

Decisions in favour of reclassification

In the case *B. Barbara Berwick v. Uber Tech.* of 16 June 2015 (Labor Commissioner of the State of California, 1st instance), an administrative ruling reclassified a worker's status through application of the Borello test. The judge ruled that **Uber** had full control over the services concerned, as it was **Uber** that recruited the workers, ensured that the services were performed properly, gained the necessary clientele and despatched workers to customers. Moreover, the services performed by the drivers were part of the regular business of a transportation platform. Similarly, the platform controlled the equipment required for the work (type of vehicle and GPS access) and the quality of the service provided (with star ratings). Drivers were not paid directly by customers. Instead, the latter paid the platform which subsequently paid drivers at a rate that it set unilaterally. Finally, the service required no special skill and the driver had no real "opportunity for profit or loss depending on his or her managerial skill". Consequently, B. Berwick was reclassified as an employee under California labor legislation. However, this decision had few consequences, as it was a one-off case (the worker was one of the few not affected by individual arbitration clauses).

On 12 July 2018, the Chamber of Appeal of the New York State Unemployment Insurance Office issued a ruling similar to *Berwick v. Uber,* confirming a first-instance decision applying the "right to control" test. After having examined how the platform functioned, the judge explained that **Uber**'s technological interface basically served as a replacement for managerial functions, i.e. exercising control over how workers performed their work. Combined with the rating system, GPS monitoring and control over key information (access to the clientele, selected destinations) the platform exercised all the control necessary for workers to be considered as employees.

Decisions going against reclassification

In the case *Lawson v. Grubhub Inc.*, 8 February 2018, U.S District Court Northern District of California (**Grubhub** operates a meal delivery service similar to that of **Deliveroo**), the Borello test was also applied. But despite the procedural advantages in favour of employee status, no reclassification took place. In the view of the judge, the **Grubhub** platform exercised little control over how the work was performed, to the point where the party concerned had been able to cheat the system to get paid even without fully performing the required services. The control exercised by the platform related to the result of the services and not to how it was performed. Service provision was thus seen as being done by a self-employed worker and not by an employee. Moreover, Mr Lawson had been struck off for breaching the contractual provisions linking him to the platform. The unilateral termination of the contract for non-performance did not *per se* make it possible to acknowledge the existence of a contract of employment, as the main criterion of control was

not fulfilled. There was no requirement to wear a uniform and, above all, the relationship between Mr Lawson and the platform had not been permanent, as the former only worked sporadically for the latter. Finally, the only criteria in favour of reclassification were the fact that the work performed by Mr Lawson was no different to the platform's main line of business, and the fact that the work did not require any special skills. Weighing up all these aspects, the judge concluded that the worker was not an employee.

The case *Razak v. Uber Techs.*, Inc., 11 April 2018 (U.S District Court for the Eastern District of Pennsylvania) concerned **UberBlack**, the deluxe branch of Uber offering a limousine service. The test applied here was different. Compared to Californian legislation, the first difference is that there is no presumption of employment. The burden of proof thus lies with the platform workers. The test applied in this case – the so-called *Donovan* test – is based on six factors relating to what is termed "economic reality". The six factors for determining whether a worker is an employee are as follows:

1. The degree of the alleged employer's right to control the manner in which the work is to be performed. For the judge, the control exercised by **Uberblack** served to protect the passengers' safety rather than to allow control over how the work was executed;
2. The alleged employee's opportunity for profit or loss depending upon his managerial skill. Limo drivers could work for several platforms, sometimes even concurrently. They did their own advertising and developed their own businesses;
3. The alleged employee's investment in equipment or materials required for his task, or his employment of helpers. The worker owned the limousine, also using it independently of **Uber**;
4. Whether the service rendered requires a special skill. As driving is not a special skill, this would have been a criterion in favour of reclassification;
5. The degree of permanence of the working relationship; The workers concerned worked sporadically with several different platforms in accordance with their interests and sometimes even on their own;
6. Whether the service rendered is an integral part of the alleged employer's business. Here again, the argument is in favour of reclassification, as Uber cannot function without its drivers.

Four factors were thus in favour of classifying the workers as independent contractors and two in favour of reclassification. The judge therefore considered that, given the totality of the circumstances, and the fact that no single factor in the economic realities test was dispositive, the plaintiffs were unable to prove that they were employees.

We can conclude that US case law varies considerably dependent on the facts concerned (in many cases, case-by-case rulings) and on the US state in which the case is heard.

4. New forms of employment and collective disputes: class actions

In the US, workers regularly resort to *class action*, i.e. filing a lawsuit collectively. However, even though designed to enable workers to pool their resources to achieve a balance of power vis-à-vis an employer, this form of dispute is very often – if not systematically – undermined by the arbitration clauses that are fairly common in the US system.

Cotter v. Lyft, 11 March 2015 (Judge Chhabria), Northern District of California: a class action filed by several drivers working for the **Lyft** platform. After many twists and turns, this ended with a $27 million settlement. In his ruling of 11 March 2015, the judge refused to rule on whether the drivers were employees, as he was unable to reach a decision. Lyft preferred a settlement agreement to seeing the *class action* referred to a jury trial. The judge gave his approval to the settlement[16], despite explaining that it was not perfect and did not solve the issue whether Lyft drivers were employees or not. However, it constituted a 'reasonable' result in light of the expectations of the drivers concerned. The judge refused to endorse the provisions in the agreement aimed at barring future claims against **Lyft**. An audacious driver might thus choose to take **Lyft** to court despite the settlement, though in the knowledge that in practice his chances of success would be significantly reduced.

O'Connor v. Uber, No. 14-16078 (9th Cir. 2018): this case was THE *class action* filed by **Uber** drivers, upon which all hopes rested, especially in California and Massachusetts. Filed in 2013, it abruptly ended in 2018 after many legal twists and turns. To start with, the judge had again refused to reach a decision, considering that the situation of platform workers was too difficult for him to decide alone and that a jury was needed. The scope of the *class action* was regularly extended, with more and more drivers jumping on board. **Uber** attempted to limit the damage by inserting arbitration clauses in 2013 and 2014, but these were considered 'unreasonable' by the first-instance judge. The judge had initially resisted the practice of systematically validating these arbitration clauses, but two reversals of jurisprudence put an end to this resistance[17]. As a consequence of these two reversals, the judge reversed his decision in a judgement of 25 September 2018[18], considering the arbitration clauses of 2013 and 2014 signed by the drivers to be valid. This now means that the vast majority of drivers who had signed the arbitration clause will now have to resort to private arbitration if they want to challenge the content of their contracts linking them to the platform. Arbitration invariably leads to non-disclosure clauses, meaning that, barring a procedural hiccup, the fate of this private litigation will remain strictly confidential.

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16. Cotter v. Lyft Inc., 16 March 2017.

17. Mohamed v. Uber Tech. Inc. APPEALS, 9th Cir. 2016, and Epic Systems Corp. v. Lewis U.S (2018).

18. O'Connor v. Uber, 25 Sept. 2018, US Court of Appeal 9th Circuit [Appeal].

Other rulings favouring the arbitration clauses[19] show that class actions filed by platform workers are unable to answer the questions raised by these forms of work, and are often stifled by arbitration clauses or settlement agreements in order to avoid substantive rulings on these fundamental legal issues. Last but not least, we should be aware that arbitration can have serious consequences for these workers, as they find themselves fighting their powerful employer by themselves and faced with sometimes prohibitive legal costs. Furthermore, the non-disclosure clauses prevent the publication of the results of such cases.

5. New forms of employment, trade unions and collective bargaining

The issue of unionisation of platform workers in the US should have been a non-subject in US law, given the fact that the 1947 Taft Hartley Act clearly excludes independent contractors from the scope of the National Labor Relations Act (NLRA). However, a number of initiatives aimed at allowing such workers to organise or even to bargain collectively are breathing new life into the debate.

5.1 Obstacles in the way of organising platform workers

Loyal to its progressive tradition, Seattle issued an Ordinance on 14 December 2015 that resembles, in its structure, the NLRA mechanism. Its stated purpose is to allow independent contractors working via digital platforms to negotiate collective agreements with their platforms. This ordinance sets forth that an "entity" must, in order to become a union, first request the Director of Financial and Administrative Services of the City of Seattle to allow it to become "a Qualified Driver Representative" (QDR). Once this request has been accepted, the QDR must inform the platforms concerned of its intention to represent their drivers. The platforms must in turn provide the QDR with a list of drivers and their contact data. If a majority of the platform's drivers express the wish to be represented by the QDR, the Administrative Authority will certify this representative as an "Exclusive Driver Representative" (EDR), making the EDR the certified spokesman for negotiating such aspects as vehicle safety, safe driving practices, working hours and pay.

If the parties conclude an agreement, they must submit its content for approval by the Administrative Authority. Only after the latter has given its approval can the agreement come into effect (if no approval is given, the draft agreement is sent back to the parties with recommendations attached). The Ordinance provides for recourse to arbitration in the event of no agreement being reached.

19. Lamour v. Uber, US District Court Florida, Miami Division, 1 March 2017.

This Ordinance is not to everybody's taste and has been challenged in Federal courts. The US Chamber of Commerce as well as **Uber** and **Lyft** have decided to challenge the City of Seattle, stating that it is in breach of federal legislation on collective rights (the NLRA) and of the 1890 Sherman Act (the Antitrust Act) which prohibits anti-competition practices. The first-instance judge did not agree with **Lyft** and **Uber**, but the Court of Appeal of the 9th Circuit overturned this decision on 5 February 2018, deeming that the Ordinance did not encroach on the NLRA's field of competence, but was in breach of the Antitrust Act.

It is interesting to note that one exception to the antitrust principle had been explicitly endorsed by Congress in 1914, allowing employees to collectively bargain their wages. This is backed by the notion that work is not a good or an article to be traded, and should therefore not be dealt with in the sense of a market (1914 Clayton Act). However, this exception does not apply to independent contractors: any agreement on their price rates would be seen as price-fixing, i.e. as a cartel. While the US states enjoy some leeway allowing them to benefit from exceptions to the Antitrust Act for reasons of general interest, there are limits. The Court considered that the requirements for an exception were not fulfilled.

The City of Seattle's initiative is thus stalemated. Nevertheless, this does not necessarily mean that it is doomed. But if this jurisprudence is upheld, state legislation will need to be adapted.

5.2 Alternative forms of unionisation

Given the legal vacuum concerning the collective organisation of platform workers, or the self-employed in a broader sense, a number of initiatives have emerged, wanting to give them a voice outside traditional channels. Though not allowing any collective bargaining over improved working conditions, these may, at least to a certain extent, put pressure on the platforms to improve working conditions.

For instance, the Freelancers union organises more than 200,000 freelancers. It does not negotiate collective agreements and is not even recognised as a spokesman for the freelancers by the platforms. But it does offer a range of benefits and services to its members, including access to health insurance. It also conducts lobbying, for example on tax issues.

Another group with a similar role is Working America, a lobbying group active in fighting for a minimum wage. Affiliated to the AFL-CIO, it presents itself as the largest group of non-unionised workers in the US, with 3.2 million members.

The Independent Uber Guild (IUG), a guild for self-employed drivers, was set up in 2016 in New York City by the local branch of the Machinists Union[20], which, for the past twenty years, has been defending the interests of New York City drivers (more than 65,000 members). Its goal is to collectively bargain on behalf of its members and to carry out public actions. It supports Uber drivers but has decided not to unionise them as long as they are not recognised as employees by the federal courts. Its aim is thus to improve relations between drivers, platforms, users and public authorities without recourse to traditional union methods. A group of member drivers considered as representative meets up once a month with Uber to discuss working conditions. They also organise a kind of appeal system for drivers who have been disconnected. They have for instance won a "toilet or coffee break" as well as the possibility to get paid for waiting time exceeding 2 minutes. Furthermore, they offer further benefits such as online information on the cheapest filling stations.

Winding up, we note that US cities, drivers, unions and other organisations are experimenting with various ways of providing platform workers with forms of collective expression, while remaining outside the traditional schemes open to employees. While these experiments obviously have limits, they are already yielding concrete benefits. However, at a time when traditional forms of unionism are losing ground and are sometimes perceived as anachronistic by workers and their employers, alternative forms of collective organisation based on more consensual associative schemes could prove promising avenues for improving the situation of platform workers while maintaining their flexibility.

Conclusion

An analysis of the situation in the United States reveals that legal uncertainty and insecurity continue to prevail. The various legislative levels constitute a hindrance to a consistent solution, while the lack of any political will to remedy the problem does not point to any solution in the short term. This is also the reason why court cases feature all procedural ins and outs, with many disputes ending in arbitration or in unconvincing out-of-court settlements. Finally, disputes which do run their full judicial course are frequently characterised by individual case-related circumstances without any overall consistency emerging. In this respect, the US is a victim of its size, but also of its political and cultural diversity, with laws not the same throughout the country and with not all states viewing the platform phenomenon from the same perspective. The US remains faithful to the country's very individual conception of labour relations and entrepreneurship, where the gospel of the *self-made man* and the *American dream* continues to resonate strongly in the platform economy. Even so, drivers are trying to organise themselves and certain local initiatives are tackling the problem in a bottom-up manner, giving rise to hopes that over time a more understandable legal solution could emerge. Seen this way, the

20. Affiliated to the International Association of Machinists & Aerospace Workers.

issue of platforms remains urgent. The example of Uber, the eponymous frontrunner which continues to lose money and is desperately trying to make a profit through worsening the working conditions of its drivers, cruelly highlights this reality. The political, financial, legal and collective pressure is thus not about to dissipate, with the platform economy remaining a "hot potato"[21].

21. https://www.vox.com/recode/2019/5/7/18528512/uber-driver-strike-gig-economy-labor-dilemma

Conclusions

Christophe Degryse

The platform economy is helping consumers and companies to enter a world transformed into a global shopping centre, the many shop windows of which are made up of platforms and their associated mobile apps. Anyone with a smartphone now has immediate access to supermarkets, banks, book shops, cinemas, taxis, hotels, as well as to offices and even to cheap or skilled labour, whether in the form of a courier, driver, programmer, accountant, translator or assistant. The platform economy puts a global virtual marketplace offering goods and services 24/7 at our fingertips.

But what goes on behind those glossy shop windows? There we find the virtual factories of the 21st century, with their "invisible engines", their algorithms, their smart robots, and their workers. Who are they, where are they, under what conditions are they working?

In this study, we have tried to take a peek behind the scenes. One common social denominator of any major technological/management transformation is the deep-going change brought to the structure of employment. Any such change has its winners, people whose skills are upgraded, and its losers, those whose qualifications, expertise and know-how suddenly become obsolete. Although new occupations requiring new skills emerge, others get downgraded. As we have seen, we are also witnessing a trend towards work intensification and a loss of identification with one's work, and in some cases even an expropriation of human labour. The technologies embedded in the production processes are put at the service of productivity and profitability, in turn putting, through the use made thereof by management, constant pressure on labour and to a certain extent marginalising it.

The platform economy is no exception in this respect. It is transforming the very structure of employment, producing winners and losers. The increasing use of algorithms in production processes is helping intensify work, while the automation of management functions increases the risk of a de-skilling of workers. The platforms and their algorithms coordinate production, match supply and demand, organise, control and appraise workers, where necessary even making them "redundant" by disconnecting them.

Proposed by the University of Bordeaux, the comparative legal approach used to analyse the situation of platform workers in ten industrialised countries allows us to observe this evolution *in situ*. It paints a gloomy picture of this transformation with respect to labour and social security rights: minimal remuneration levels, the "organised irresponsibility" of employers, confusion

regarding legal statuses, barred access to social rights, to social security, to collective bargaining and organisation, as well as algorithm-based management leading to work intensification and uninsured health and safety risks. In this sense, the platformisation of the economy, even if this evolution is still the subject of controversial debates, brings with it the risk of social rights being abandoned by these new forms of companies.

Discussed in this study, several major platforms have deliberately chosen a business model in which human labour is nothing but a low-priced commodity. Their managerial strategy is reinventing the social relations seen in the 18th and 19th centuries, i.e. pre-dating the International Labour Organisation, its conventions and its Declaration of Philadelphia which affirms that labour is not a commodity. These platforms are synonymous with technological disruption and social dereliction.

But even so, as also shown by our comparative legal approach, such technologies do not have to always lead to circumventions of labour and social security legislation. Other platforms exist, platforms giving their workers employee status and thus access to social security, to collective organisation, to works councils and to vocational training. They positively opt for a 21st-century business model, respectful of social models slowly but steadily established in reaction to the scourge of child labour, exploitation, enslavement and misery observed at the dawn of the first industrial revolution.

Within this inclusive and social platformisation, we are also witnessing the emergence of rejuvenated or even completely new collective organisations:

— workers' collectives and informal associations (the Spanish *RidersXDerechos*, the Swiss couriers' collective *NoTime*, the *Coursiers bordelais* in France, the *Asociación Española de Riders Mensajeros* in Spain, etc.);
— solidarity movements such as the *broodfonds* in the Netherlands;
— various types of cooperatives (SMart in Belgium, Coopcycle in France, etc.);
— collective action (the "Snow Strike" among Bologna riders, the UberEats strike in London and other UK cities, the strike of Deliveroo riders in Brussels and Liège in Belgium, Class actions and Uber drivers strikes in the United States, etc.);
— discussion and mutual help groups on the social media (*Riders Union Bologna* in Italy);
— guilds (*Independent Uber Guild* in New York) and independent unions (*Independent Workers Union of Great Britain*);

as well as revamped action on the part of more traditional unions: the "*turespuestasindical.es*" initiative in Spain; the works council at Foodora in Austria; FNV-Flex in the Netherlands; the collective agreement between Laconsegna and Filt CGIL, Fit CISL and UILtrasporti for Italian riders, the collective agreement signed by Syndicom and *Swissmessengerlogistic* for Swiss couriers; union membership of freelancers in Belgium, Italy and other

European countries[1], *Working America* affiliated to the AFL-CIO in the United States … So many initiatives aimed at helping or supporting the collective organisation of platform workers.

Last but not least, this study has shown, in its second section, the potential role of an unexpected yet very relevant player: local authorities. As seen in Seattle (United States) with its "Qualified Driver Representatives", but also in certain European cities and regions such as Barcelona, the Andalusian Labour Relations Council and the Catalan social partners (Spain), the Riders Bureau of Milan (Italy), the Charter of Fundamental Digital Workers' Rights in Bologna (Italy): many local or regional authorities are becoming involved in the debate over platforms and their societal responsibilities, in line with a specific vision of economic, social and territorial cohesion. This intersection of local and global trends certainly deserves more attention. While the competences of local authorities are obviously sometimes limited, their creativity and often original initiatives can help put these debates on the agenda of more appropriate government levels. This alone underlines their important role.

These observations allow us to remain optimistic, backed by the prospect of new and wider-based alliances between workers' collectives, new and old social organisations, local councillors and regional administrations. The goal is not to fight the platform economy but to get it to comply with social legislation, public interest and the rules and regulations introduced via democratic processes over the last two centuries. As emphasised by Prassl, "*platform speaks the language of market but operates like old-fashioned employers*"[2]; and this is exactly how they need to be dealt with to prevent technological disruption becoming synonymous with social dereliction.

1. Fulton L. (2018) Trade Unions protecting self-employed workers, Brussels, European Trade Union Confederation.
2. Prassl J. (2018) Humans as a service: the promise and perils of work in the gig economy, Oxford, Oxford University Press.