

# GIG workers in Argentina, India, South Africa and Spain

## *What can be an inspiration for The Netherlands?*

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## 1. Introduction: platform work

### I. Description and definition of platform work

As is well known, digital gig work has experienced spectacular growth in recent years. Systematic data collection is still at an early stage, however. The term gig work was originally used for the music and theatre industry, referring to the gigs when performing incidentally or in different settings. Since digital platforms facilitate single or short-term work for different clients, comparable to the cultural gig, platform workers are often referred to as gig workers. However, legally as well as practically, there may be a difference. Gig work has a broader scope than platform work in the sense that platforms facilitate gigs through digital platforms, for example Uber and Rappi. In the data gathered for this research the focus lies on these kinds of platforms. Therefore, in this report the term platform workers is used, unless referring to the broader scope of gig work.

Still, defining platform work has its difficulties. The underlying idea of platform companies is to make a particular service more accessible. In that sense they perform like a market: they connect workers and the ones requiring a service. Their focus is not on the labour itself, but just on the connection between demand and offer and with the purpose of increasing market competition. Regulating labour has the opposite goal: market forces are taken out in order to make labour less competitive, to ensure equal outcomes and to set minima for a decent living circumstances for everyone performing labour. Since platforms, besides functions of markets, also perform functions of firms in which employment is essential, it is hard to define platform companies. Eurofound therefore explains 'coordination by platforms' as 'the use of digital networks to coordinate economic transactions in an algorithmic way'.<sup>1</sup> However, a narrower definition seems to be crucial in order to fit in the platform companies in existing regulatory frameworks with the purpose of defining platform workers to fit them in a regulatory system.

In order to narrow down the scope, a distinction between digital networks must be made. Central in this research are platforms that are at the intersection of technological market and labour regulation. If the platform only acts as a 'digital bulletin board' by making known demand and supply of a service, without interfering in any way between the requestor and supplier the platform does not fall under the scope of platform companies as meant in this study. In that event, the platform does have a market function initiated by technology, but it lacks functioning as a firm since aspects as monitoring or instructing the work are missing. Those platforms do not interfere with the acts of performing labour itself. Having a closer look at those platforms that do more than just posting a request of a demander, discussing the usage of Artificial Intelligence (AI) and underlying algorithms is inevitable.

Algorithms describe a targeted result in a logical way, in the simplest form it is a 'if..., then...' -formula. The more sophisticated the set of algorithms becomes, the more it can succeed in performing human tasks. The complexity of the algorithms mainly depends on the used form of AI and its capabilities of finding patterns in data. Data-based Machine Learning techniques such as *supervised* (with human intervention) or *unsupervised* (without human interference steering towards outcomes) *deep learning* can find correlations in large amounts of data that often cannot even be found by human beings. This makes their processing power and ability to control power over platform workers high. Apps running on those algorithms become similar or even more sophisticated than human managers who instruct employees on how to perform their duties. The apps calculate most optimal routes to be taken by a driver, calculate the reward for the specific gig and platform worker and decide what platform worker should get more or less work or even decide who cannot perform on the platform anymore.

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<sup>1</sup> [https://www.eurofound.europa.eu/sites/default/files/ef\\_publication/field\\_ef\\_document/ef18002en.pdf](https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef18002en.pdf)

Recently the Amsterdam District Court decided in three rulings the Ola Cab Company and Uber must give transparency in their algorithmic control, based on Article 22 GDPR.<sup>2</sup> The app used by Ola drivers for instance performed automated decision making by applying penalties and deductions based on ratings of users. Besides that, the app generates a ‘fraud possibility score’, which is an estimation of the chances the platform worker will commit fraud or disobey the rules. Also, bonuses are rewarded by the app, based on parameters such as earnings, availability and ratings. These rulings might be the first steps to more proceedings on algorithmic control by platforms and even become the basis of more labour related proceedings focussing on employees’ subordination to these kinds of apps

## II. Platform work in numbers

This report is part of a broader study done by WageIndicator for the GAK Institute. The aim of this report is to compare the (legal) position of platform workers in the Netherlands to four other countries (Argentina, India, South Africa and Spain) and to present possible options in order to improve the current position of Dutch platform workers. First, relevant Dutch labour law and its applicability to platforms workers is discussed. Second, we assess the current situation of the platform workers in the four other countries with a focus on the law. Third, we supplement the findings of the second chapter with new developments occurring mainly in Argentina and Spain as sources of inspiration. Last, we offer some policy and legislation recommendations for the Netherlands.

Data research on platform work is ongoing on the websites of WageIndicator. In March 2021 the results of the survey ‘Pay for and working conditions for platform workers’<sup>3</sup> showed that platform workers are mostly male (57%). In South Africa, the percentage male platform workers is even 96%. Most platform workers are aged between 15 and 30 years (60%).<sup>4</sup> Platform workers in South Africa and India are of a relatively older age. In South Africa, 52% of the platform workers are 30-39 years old. 69% of the platform workers in India are aged 20-29 years old. In Argentina, almost half of the platform workers (43%) are younger than 20 years of age. In the Netherlands almost 90% of the platform workers is younger than 40.

Data shows with regard to the scope of platform work, that around 2.8% of the workers in Spain fully depends on platform work to provide in their income. About 18% of the Spanish workforce works on a regular basis for a platform.<sup>5</sup> The Dutch numbers are comparable to Spain’s.<sup>6</sup> ASSOCHAM projected in 2020 that the gig economy would rise to a compound annual growth rate of 17% by 2023 in India.

In all of the countries researched a few platforms dominate the market of a particular industry. Almost 40% of the platform workers in Argentina work for Rappi. More than 50% of the platform workers in Spain work for Glovo. In the Netherlands a mere 75% of the platform workers work as a food deliverer.<sup>7</sup>

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<sup>2</sup> Amsterdam District Court 11 March 2021, ECLI:NL:RBAMS:2021:1019, ECLI:NL:RBAMS:2021:1020 and ECLI:NL:RBAMS:2021:1021.

<sup>3</sup> In total 3,132 platform workers participated in the survey. The total number breaks down as follows over the researched countries: Argentina (895), India (660), South Africa (280), Spain (1000) and in the Netherlands (250). See for more detailed information, <https://wageindicator.org/labour-laws/platformeconomy/platform-company-data-visual>.

<sup>4</sup> Notably, 57% of the interviewees specified their gender as male, 8% as female and 34 % did not specify their gender.

<sup>5</sup> See <https://wageindicator.org/labour-laws/platformeconomy/platform-company-data-visual> (Thuisbezorgd 25,5%, Deliveroo 25,3%, Uber Eats 24,5%, although only 48,19% claims to be food deliverer).

<sup>6</sup> Zie SER rapport

<sup>7</sup> Although asked about a specific occupation about 50% fills out “food deliverer” and about 43% answers “not specified” or “other”.

Platform workers have been treated initially as self-employed workers in most countries, above all by the platforms themselves. This fits in the larger trend of flexibilization of labour relations. In the Netherlands permanent contracts were the standard for many years, but now around 60% of all workers is entitled to an employment contract for an indefinite period and almost 40% form part of the group of non-standard workers (flexible employment and self-employed).<sup>8</sup> Platform workers are thus being deprived of fundamental labour rights and social protection. Around the world there has been societal, legislative and judicial push back.

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<sup>8</sup> Numbers of workers in different forms of employment and growth of self employed in the working population, Netherlands, 2003-2017, both: CBS (Statistics Netherlands) (*Statline*).

## 2. The current Dutch situation

The Dutch debate about the legal position of platform labour is often limited to a debate about the qualification of the employment contract. Some of the major platforms in the Netherlands are competitive mainly because of the avoidance of an employment contract. Should the employment relationship be qualified as an employment contract, the protective employment and dismissal regulations are applicable, the participation in social security is obligatory, and a less favourable fiscal regime has to be taken into account. Obviously, the services rendered by the platform would be more costly. The Dutch government has created a highly favourable tax regime for self-employed persons in order to encourage entrepreneurship. In the Netherlands a fierce debate is going on about the freedom not to conclude an employment contract but instead, to conclude a contract of services. About 15% of the workforce works as self-employed, including nurses and primary school teachers. Almost 2% of the workforce works, or has worked the last year, through a platform.<sup>9</sup>

### I. Qualification of an employment contract

Although platforms can and do offer different services and do have various modes operandi, from a labour law perspective three mainstream legal qualifications of the employment relation in which a platform is involved, are to be found. The first is the contract of services, the second is an employment contract between the platform and the worker and the third is an employment contract between the client of the platform and the worker. This last option will not be looked into further in this report but differs from cleaners who keep cleaning for the same households (see 2.III).

According to Dutch law, Article 7:610 Civil Code, the existence of subordination is the key component in the definition of an employment contract. If there is no room to exercise authority, there is no employment contract. However, in any type of employment relationship the work provider does have a saying in the work or results. Platform employers make an effort not to instruct a worker during the performance of his labour. They can accept a gig and are advised to follow a by the app 'presented' route. Furthermore, the platform companies stress that the worker always has the right to log out from the system, being not available to work, whilst an employee cannot at any time stop working. Regarding these elements, combined with the contractual stipulation that the platform worker always is allowed to be substituted by another worker, the platforms claim the workers are self-employed. It is striking that the contracts that professional platforms conclude with their workers are often drafted in such a way as to create a paper reality that can hardly be refuted by the facts. Important in that sense is the recent ruling of the Dutch Supreme Court.<sup>10</sup> The Court emphasized that the actual *execution* of the contract is leading and not what parties initially agreed on.

Only if the work is executed and qualified as an employment agreement, the employee gains certain rights. As long as platform workers are seen as self-employed, they lack for example overtime compensation, severance pay, paid annual leave or unemployment benefits. In the Netherlands a bill was proposed to regulate a minimum wage for the self-employed. Due to several reasons, this proposal was withdrawn end 2020. Therefore, platform workers are not assigned to any minimum.

Most platforms prefer to conclude contracts of services with their workers above employment contracts.<sup>11</sup> Often, also workers appear (initially) to be comfortable with a contract of services. Most likely, the preference of the platforms is caused by the costs and risks connected to the employment contract. Benefits for the workers are the freedom and flexibility that comes along with a contract of services, together with a higher income due to beneficial tax laws for self-employed. In the

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<sup>9</sup> <https://www.ser.nl/-/media/ser/downloads/adviezen/2020/platformeconomie-hoe-werkt-kluseconomie.pdf>

<sup>10</sup> Dutch Supreme Court 6 November 2020, ECLI:NL:HR:2020:1746 (*Amsterdam/X*).

<sup>11</sup> In the Netherlands Thuisbezorgd works with employment contracts for their deliverers.

Netherlands, employers' responsibilities stemming from the employment contract are perceived as a real burden. For example, the obligation to continue paying wages during the first two years of sickness of an employee together with the obligation to reintegrate the employee in paid labour are found to be very burdensome and expensive. Also, the premiums for employee insurances (unemployment, pensions etc) are steep. These contributions are not owed for self-employed workers.

Thus, having work done under a contract of services is much cheaper than under an employment contract. Importantly, due to tax schemes promoting entrepreneurship the net income of the worker is often at least similar, but often higher compared to the net income of an employee. Of course, the self-employed workers lack the protection of employee insurances and a pension, but his net income is often at least fair. Some workers see the protective legislation surrounding the employment contract as a limitation of their freedom to work the way they prefer, e.g. working multiple nightshifts, overtime etc.

When the employment relation is to be qualified as a contract of services, some bargaining advantages may still be at hand. The Dutch law on collective labour agreements includes the possibility for self-employed to conclude a collective agreement. This possibility has become obsolete, or almost obsolete, by the implementation of EU competition law. Although the Dutch competition laws are -in accordance with EU-law- quite strict, The Dutch Competition Act does not automatically preclude the making of arrangements for self-employed persons on remuneration or other terms of employment. The Dutch competition authority permits such arrangements for self-employed persons who are comparable to employees.<sup>12</sup> This possibility is used by architects and musicians to conclude a collective labour agreement that also regulates the honoraria of self-employed architects and of substitutes in orchestras. So far, no collective labour agreements have been concluded in the Netherlands for platform workers, but looking at the modus operandi of the major platforms, a collective labour agreement covering those platform workers will likely be possible within the scope of the exception the Dutch competition authority allows. Due to the low affiliation rate of platform workers and workers in the sectors where platforms are operating, we think that trade unions will not easily be able to force a platform to conclude a collective labour agreement for their self-employed workers. The right to collective bargain implies a right to collective action, including strikes. As the right to collective bargain is granted to some groups of self-employed, these groups can also exercise their right to collective action without trespassing competition laws.

## II. Rights of self-employed

The Dutch legal system does not provide any social benefits for platform workers, apart from 'Bijstand', which is a benefit for every Dutch citizen older than 18 years that cannot provide income, has no financial reserves left and does not qualify for other social benefits. Second, also self-employed qualify for old age pension. Extra pension insurances are not mandatory.

Also, self-employed women do have a right to maternity income for 16 weeks during pregnancy. The amount is equal to the minimum wage if the self-employed worked a minimum of 1.225 hours a year, if not the income is lower.

## III. Dutch case law

Some cases about the qualification of the employment relation have been brought to court. Most recent is the Amsterdam Court of Appeals decision on the status of workers employed by Deliveroo.<sup>13</sup> On 17 February 2021 the Court qualified the deliverers employed by Deliveroo as employees. The overarching argument was that also 'algorithmic management' can form subordination and therefore contribute to the qualification of the employment as an employment agreement. This ruling differs

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<sup>12</sup> Downloadable via <https://www.acm.nl/nl/node/18807>, latest visit March 2021.

<sup>13</sup> Court of Appeal Amsterdam 16 February 2021, ECLI:NL:GHAMS:2021:392.

from previous rulings of lower courts and whilst more authoritative, there is no guarantee the outcome will be the same in similar cases.

In the case of *Helping*, a platform that matches cleaners and households, workers clean customers' homes. Customers pay *Helping* an amount per hour, and *Helping* pays part of the amount to the cleaners. *Helping* contractually excludes employment contracts with cleaners but is not clear about whether it forms employment contracts between cleaners and customers. In proceedings initiated by the largest Dutch trade union, the Amsterdam District Court ruled that *Helping* is not the employer in this structure, but that the customers are the employers of the cleaners. This is because *Helping* does not give any instructions or directions on how cleaners are to perform their duties. According to the court, the relationship of authority is found with customers, who are in fact able to give cleaners instructions and where the work is also actually performed. The court is of the opinion that *Helping* is engaged in job placement; it creates employment contracts between other parties.<sup>14</sup>

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<sup>14</sup> Amsterdam District Court 1 July 2019, ECLI:NL:RBAMS:2019:4546 (*Helping*). A comparable opinion is the decision of the Rotterdam District Court about a nanny who started working as a babysitter through a platform: Rotterdam District Court 30 July 2020, ECLI:NL:RBROT:2020:7877 (*Nanny*).

### 3. Current situation in other countries

Platform workers generally receive 'service agreements', also referred to as 'clickwrap agreements' which are covered under the Commercial and Civil Code. In none of the jurisdictions under scrutiny, obligatory stipulations or mandatory rights for self-employed in the platform economy are implemented, except for Spain. In all countries the contracts concluded between the worker and a platform are standard contracts, drawn up by the platforms, and sculpted around the notion that the worker is not employed by the platform. The platforms offer no possibility to negotiate about the content or stipulations of the contracts.

In all countries, platform workers or their trade unions have litigated to achieve employment protection for platform workers, but only in few cases the courts decided to accept an employment contract.

In all countries, including the Netherlands, some workplace rights are not applicable in any form (unless agreed on) on platform workers:

- Employment status
- Minimum wages
- Overtime compensations
- Notice requirements
- Severance pays
- Unemployment benefits

#### I. Argentina

As platform workers in Argentina are qualified as self-employed, they have limited access to the social security system. They can however claim the same state pension, invalidity benefit and dependents' and survivors' rights as employees can. Self-employed have the option to enrol into a complementary system for what they pay 27% of their declared salary and that covers old age, disability and death. For the lowest incomes and some specified groups of workers a simplified program is set up.

For other protection rights such as maternity benefits, work injury benefits and sick leave they are not eligible, nor for overtime compensation or annual vacation.

Platform workers are protected against sexual harassment by general provisions and are obligated by specific law to arrange adequate protection against harassment on any personal or social circumstance or condition. Equal treatment legislation has a broad scope with the result that platform workers may not be discriminated on any of the grounds covered by the National Constitution. Victims are eligible for repairment of the moral and material damage caused.

Unionization is allowed for self-employed workers, but collective bargaining is not. An example of the organization of workers of some platforms is the Asociación de Personal de Plataformas (APP), further described in paragraph 4.II.

#### II. India

In India platform workers are qualified as self-employed and therefore lack the labour security regular employees have. However, due to the enactment of The Code of Social Security in September 2020, platform workers are provided with social protection rights such as life and disability cover, health and maternity benefits, accidental insurance and old age pension. In the Code gig workers are described as "a person who performs work or participates in a work arrangement and earns from such activities outside of traditional employer-employee relationships" and platform workers as "a



person engaged in undertaking platform work". Due to these wide scopes, social security benefits apply to a wider group of workers. Registration is mandatory and workers must be older than sixteen and younger than sixty. There is a minimum of 90 working days in a 12-months period to qualify for benefits. More than a dozen companies in India including Amazon, Flipkart, Swiggy, Ola and Uber have already committed about Rs 500 crore (equivalent to 58 million euros) to the social security fund in order to provide social security benefits to one million gig workers. The Social Security Code allows for payment of contributions by the platforms at the rate of 1-2% of the annual revenue of the platform or maximum of 5% of wages paid to the platform worker. The above amount is equal to 1% of the annual revenue of platforms. There shall also be a monthly contribution of up to Rs 100 from the gig worker.

Regardless the Code, platform workers still do not qualify for paid vacation or annual leave, nor employers cares. Also, their working and employment conditions are not regulated through the central and state labour inspection departments, which means they do not fall under the scope of Labour Inspections.

As a result of different Acts gig (including platform) workers do have the right to join and form trade unions. They can collectively bargain, although the work provider has no obligation to recognize a union or to engage in collective bargaining. The result of this possibility may therefore be limited.

### III. South Africa

Platform workers in South Africa are qualified as self-employed workers. However, some labour rights do apply on platform workers. First, contracts between workers and platforms are written. Most of such contracts are referred to as 'click wrap agreements', in which the worker checks a box that states he agrees with the offer made.

Second, minimum wages are set at sectoral and area level and there is no general minimum wage. Since there is no specific reference to the platform workers, no binding minimal standard exists, and platforms differ in their agreements. Contracts may be terminated by both parties immediately and can be extended without limitations on the number of contracts.

In South Africa the employer is obligated to provide a safe working environment which results in an obligation for any employer to provide instructions, training, supervision and information based on a proper risk assessment. Since self-employed workers fall under the scope of legislation on safe working environments, and since they are legally regarded to be employers, it is their responsibility to meet these standards.

Whilst self-employed workers do not have access to the standard old age pension, they are eligible for 'State Old Age Pension'. This pension is paid to people over 60 years old, who are not receiving any other social grant, not earning a minimum wage or do not have minimal assets. Other requirements such as citizenship apply. People under 60 can qualify for a general invalidity benefit, in case the invalidity lasts over six months and the additional requirements are met. Also, survivors of a platform worker can claim death benefits.

Self-employed do not fall under the scope of the more specific Employment Equity Act, but regulations on sexual harassment are binding to the State of South Africa and all persons, therefore platform workers included. Victims of sexual harassment can undertake civil action and resort to criminal prosecution.

Discrimination against any type of workers is prohibited and everyone is free to choose their trade, occupation or profession. However, there is no explicit provision under South African law that generally requires equal pay for equal work.

Other working rights, such as paid vacations, maternity and unemployment benefit and the right to join, form or negotiate collectively are not applicable on platform workers.

#### IV. Spain

Spain initially qualifies platform workers as self-employed workers, if there is no employment contract. In absence of such a contract, the existence of an employment relationship is leading. Spanish legislation differentiates between two types of self-employed workers, with the key factor being economically dependent on the counterparty. Written or oral contracts are both valid for self-employed workers, as long as the worker has been informed of the economic consequences of entering such contracts.

Minimum wages apply to workers in all occupations and are set annually, in accordance with representative unions and economic developments. Minimum wages do not apply to self-employed workers.

Self-employed workers in Spain must register for social security and contribute to the system, whereafter they are entitled to similar social protection in comparison to regular employees, such as maternity leave or temporary disability. This also includes the receiving of old-age benefits commencing at 67 years old and the survivor's pension. Paid leave does not apply to self-employed workers. However, if self-employed under the TRADE-regime (see paragraph 4.I), they are entitled to interrupt their working activities for a period of time, annually.

Self-employed workers have the right to their physical integrity and to adequate protection of their safety and health at work. Legislation concerning sexual intimidation and discrimination is binding for both employees and self-employed workers.

Employers who hire self-employed workers are obligated to maintain workers' compliance to rules that should prevent occupational hazards, when workers perform their duties and on the premises of the employer. Moreover, the competent public administrations must assume an active role in preventing of occupational risks for self-employed workers.

## 4. Recent developments

### I. Spain

Back in 2007 Spain introduced the so-called “TRADE regime” to overcome the legal uncertainty of the misclassification of workers. Workers who fall within the scope of this regime are considered to be self-employed, but they nevertheless receive some social protection due to their economic dependency on one client.<sup>15</sup> The TRADE regime has proved to be rather ineffective. Self-employed do not have a real incentive to register as TRADE because of the lack of protection the regime offers.<sup>16</sup> Also, the introduction of a third category is in general controversial because it opens up a whole range of new demarcation issues.

A more fruitful endeavour may be the legislative initiative brokered between Spain’s labour ministry, the unions UGT and CCOO, and the association of employers CEOE. The initiative is aimed at improving the rights of (food) delivery workers who are employed via digital platforms. If the initiative becomes law, these workers will be considered to be ‘permanent staff’ by default instead of being self-employed.<sup>17</sup> Consequently, the burden of prove is reversed and it will be up to the platforms to demonstrate that these workers are in fact autonomous workers. The initiative is the codification of a trend already revealing itself in the courts’ case law. It entails that riders working via platforms are considered to be subordinate and not autonomous workers. Also, part of the initiative is the right to information regarding the labour implications of the mathematical calculations and algorithms used by these platforms granted to workers’ representatives. If the cabinet approves the bill, companies have 90 days to implement it.<sup>18</sup> According to an update, the Minister will not send the bill to the cabinet before Easter 2021 in order to grant companies a bit more time to adapt.<sup>19</sup>

Some platforms, such as JustEat, seem to be content with the initiative because it limits competition between platforms regarding the cost of labour.<sup>20</sup> Riders X Derechos<sup>21</sup> fears, on the other hand, that platforms will come up with new ways to circumvent legislation which will subsequently lead to new battles in court.<sup>22</sup> A solution offered by this riders’ collective is to register platforms and algorithms to

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<sup>15</sup> See more extensively, e.g. A. Todoli-Signes, Workers, the self-employed and TRADEs: conceptualization and collective rights in Spain, *European Labour Law Journal* 2019 10(3) 254-270; T. Haipeter, D. Owczarek, M. Faioli and F. Iudicone (eds), *Don’t Gig Up Final Report*, January 2020; A. Todoli-Signes, ‘Peer Country Comments Paper – Spain’ in *Platform work: protection through case law while the law is amended*, September 2020.

<sup>16</sup> A. Todoli-Signes, Workers, the self-employed and TRADEs: conceptualization and collective rights in Spain, *European Labour Law Journal* 10(3) 254-270, p. 266.

<sup>17</sup> Euractiv, New Spanish Law to make food delivery workers ‘permanent staff’, 12 February 2021, <https://www.euractiv.com/section/economy-jobs/news/new-spanish-law-to-make-food-delivery-workers-permanent-staff/>.

<sup>18</sup> SIA Daily News, Spain – Government Passes Landmark Law Classifying Food Delivery Riders as Employees, 12 March 2021, <https://www2.staffingindustry.com/eng/Editorial/Daily-News/Spain-Government-passes-landmark-law-classifying-food-delivery-riders-as-employees-56982>.

<sup>19</sup> C. Alonso, Pacto entre bambalinas CEOE-Díaz para atrasar la ley rider y dar margen a Glovo, 15 March 2021, <https://www.lainformacion.com/economia-negocios-y-finanzas/pacto-ceoe-diaz-atrasar-ley-riders-margen-glovo/2832228/?autoref=true>.

<sup>20</sup> G. Ubieta, Trabajo pacta con patronal y sindicatos que los riders sean, por defecto, asalariados, 10 February 2021, <https://www.elperiodico.com/es/economia/20210210/trabajo-pacta-patronal-sindicatos-riders-11509236>.

<sup>21</sup> Riders X Derechos is a nationwide collective which fights for labour rights and decent living conditions for (especially) delivery workers who are employed via digital platforms.

<sup>22</sup> Riders X Derechos, Riders X Derechos rechaza categóricamente la propuesta de la CEOE, 11 February 2021, <https://www.ridersxderechos.org/?p=3253>. Also, D. Sabadell, Riders X Derechos rechaza la propuesta de la

support the labour inspectorate and ensure compliance with (labour) laws and regulations. But this idea was abandoned during negotiations of the legislative initiative by the parties involved. Riders X Derechos also emphasized that the legislation should be expanded to all workers hired by all digital platforms. Pro self-employment groups such as APRA, AAR, AsoRiders are critical about the initiative because it puts the autonomy of the platform workers in jeopardy.<sup>23</sup> Platforms offer migrant workers in Spain an opportunity to earn a relatively decent income, often allowing them to support also their family abroad. These pro-self-employed groups fear that the initiative will limit working hours and the capacity to work simultaneously for various platforms. It remains to be seen whether interests of migrant workers will be taken into account.

## II. Argentina

In 2018 Rappi's delivery workers organized South-America's first digital strike. After Rappi unilaterally changed its order allocation algorithm, riders started to exchange their discontent via various WhatsApp groups.<sup>24</sup> On 15 July 2018 workers decided to accept orders but turn them down two hours later with the pretext that an accident had occurred during peak hours. Consequently, Rappi increased its rates as incentive to fulfil the orders. After the strike, the workers appointed spokespersons for each region and voiced demands to their managers which was the beginning of informal dialogues between labour and management. Some of these spokespersons as well as (union-affiliated) riders experienced repercussions and got fewer orders or were even permanently blocked from the platform.<sup>25</sup> Oxford's The Fairwork Project suggests that union suppression by platforms is more widespread.<sup>26</sup>

The events ultimately led to the establishment of the Asociación de Personal de Plataformas (APP) which represents *inter alia* platform workers from Rappi, Glovo and Uber.<sup>27</sup> On 3 October 2018 the APP requested formal recognition at the Minister of Labour<sup>28</sup>. The application is still being processed. One of the obstacles APP faces is that the Union Associations Act of Argentina prohibits granting union status to groups that do not represent dependent workers.<sup>29</sup> On 19 March 2019 an Argentinian court decided in first instance that Rappi's blocking of unionized workers amounts to a violation of freedom of association.<sup>30</sup> The appeal is still pending.

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CEOE, 11 February 2021,

<https://www.elsaltodiario.com/falsos-autonomos/riders-x-derechos-rechaza-propuesta-ceoe>.

<sup>23</sup>

<https://www.lainformacion.com/economia-negocios-y-finanzas/razones-miles-riders-piden-seguir-autonomos/2831581/>

<sup>24</sup> L. Perelman, M. Mangini, B. Perrot, M. Belén Fierro and M. Sol Garbarz, Proudly Delivered by App: The struggle of Latin America's first union for platform workers, Friedrich Ebert Stiftung: September 2020, p. 6 and 7.

<sup>25</sup> C. Audibert, An Argentinian platform workers' union, the first of its kind in the region, is fighting for the rights of delivery workers and revitalizing the union struggle, Friedrich Ebert Stiftung: September 2020, p. 2.

<sup>26</sup> The Fairwork Project, The Gig Economy and Covid-19: Fairwork Report on Platform Policies, April 2020, p. 12.

<sup>27</sup> New union launched in Argentina to battle 'platform economy',

<https://morningstaronline.co.uk/article/new-union-launched-in-argentina-to-battle-platform-economy>.

<sup>28</sup> Perelman, M. Mangini, B. Perrot, M. Belén Fierro and M. Sol Garbarz, Proudly Delivered by App: The struggle of Latin America's first union for platform workers, Friedrich Ebert Stiftung: September 2020, p. 9 and 10.

<sup>29</sup> E. López Mourelo, Work on delivery platforms in Argentina: Analysis and policy recommendations, ILO Country Office for Argentina November 2020, p. 83.

<sup>30</sup> Perelman, M. Mangini, B. Perrot, M. Belén Fierro and M. Sol Garbarz, Proudly Delivered by App: The struggle of Latin America's first union for platform workers, Friedrich Ebert Stiftung: September 2020, p. 9.

In the meantime, the riders continue to protest against precarious working conditions. They also host online meetings and post social media content to gain traction and disperse information.<sup>31</sup> The Argentinian executive office issued a proposal for a statute for delivery workers who are being employed via digital platforms on May 6<sup>th</sup>, 2020. The statute aims to extensively regulate the relationship between workers and platforms and includes a minimum remuneration.<sup>32</sup>

### III. UK

Another notable development is the UK Supreme Court's ruling of 19 February 2021 on the status of Uber drivers.<sup>33</sup> The Court ruled that Uber drivers are workers and are therefore entitled to minimum wage and holiday pay. In support of its decision the Court put forward the following five main factors<sup>34</sup>:

- Uber sets the fare and drivers are not allowed to charge more than the set fare.
- Uber unilaterally sets the terms of the contract.
- Once a driver has logged onto the app, Uber restricts the driver's freedom to accept or reject a request.
- Uber exercises significant control over the way in which the service is to be delivered.
- Uber restricts communication between passenger and driver.

Consequently, the drivers are in a "position of subordination and dependency to Uber". No real opportunity exists for the drivers to develop their "professional or entrepreneurial skill" which means that a pay increase could only be achieved by working more hours. The in-depth elaboration by the Court of how Uber controls its drivers could be used by courts outside the UK.<sup>35</sup>

Uber initially responded in a blog post to the ruling.<sup>36</sup> It put forward that the ruling applies only to a small number of drivers using the app in 2016 and that many examples mentioned by the Court are obsolete. The company also claims to have made many substantial changes over the past years. Last, Uber insists its drivers want to work as an independent contractor due to the flexibility it provides. As of now, Uber seems to be willing to pay all of its drivers the minimum wage.<sup>37</sup>

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<sup>31</sup> M. Pskowski, They Aren't Anything Without Us: Gig Workers Are Striking Throughout Latin America, 11 August 2020, <https://www.vice.com/en/article/jgxazk/they-arent-anything-without-us-gig-workers-are-striking-throughout-latin-america>.

<sup>32</sup> Poder Ejecutivo Nacional, Estatuto del trabajador de plataformas bajo demanda, 6 may 2020, via <https://ignasibeltran.com/wp-content/uploads/2018/12/Estatuto-del-Trabajador-de-Plataformas-Digitales-IF-20-30383748-APN-DGDMTMPYT.pdf>

<sup>33</sup> Supreme Court UK, Uber BV and others v Aslam and others, Hilary Term [2021] UKSC 5.

<sup>34</sup> Supreme Court UK, Uber BV and others v Aslam and others, Hilary Term [2021] UKSC 5, par. 94-100.

<sup>35</sup> J. Moyer-Lee, UK Supreme Court's Uber decision is a victory for all gig workers, Aljazeera: 25 February 2021.

<sup>36</sup> Uber, <https://www.uber.com/en-GB/blog/supreme-court-verdict/>. Also, Uber, A Better Deal: Partnering to improve platform work for all, <https://uber.app.box.com/s/tuuydpqj4v6ezvmd9ze81nong03omf11>.

<sup>37</sup> BBC, Uber 'willing to change' as drivers get minimum wage, holiday pay and pensions, 17 March 2021, <https://www.bbc.com/news/business-56412397>.

## 5. Inspiration for the Netherlands

In this paragraph we conclude with options that may be an inspiration for the Netherlands, without any preference or specific recommendation. Some of the ideas are deducted from the discussed countries and developments, others are more generally based on ideas of labour or possible problems that may arise when using algorithms.

### I. A status for platform workers

The first option is to include all platform workers within the scope of Article 7:610 Civil Code, so they all *a priori* become employees. As discussed in paragraph 2.1, the key element for a labour relation to qualify as an employment relation is subordination. As outlined in paragraph 1, platforms often exercise to greater or lesser extent authority over the platform worker chiefly by means of their algorithms. The Amsterdam Court of Appeal decided that the algorithm used by Deliveroo is part of the control exercised by the platform over the worker and leads to the subordination of the worker.<sup>38</sup> Advantage of this option is that there is no 'unfair' competition between workers.

There are, however, several downsides to this idea. First, the extent to which platforms exercise control can differ widely. It is perhaps beyond the scope of labour law to include platform workers who are relatively autonomous and rightly qualified as self-employed. Second, platforms could provide a steppingstone for workers who are new to the labour market (e.g. (high school) students) or workers with a distance to the labour market. Third, platform work offers flexibility to workers. The self-employed status gives the worker more opportunities compared to an employment contract to combine multiple responsibilities like childcare and studying next to working. Last, the services rendered by platforms are affordable for large groups of consumers and as a result, creates employment opportunities. To *a priori* deem all labour relations between platform and worker to be employment relations can negatively affect labour market opportunities and may generate negative consequence for certain sectors and industries more generally.

Another option is to establish platform workers (in a code, like India, or possibly by law) as a specific group of workers and grant them specific rights and obligations. By doing so, the debate about the qualification of the employment relation between platforms and their workers could be settled. The advantages of defining platform workers as a specific group is that platforms and their workers have clarity about the position and their rights. It also offers room to create a tailor-made solution for the legal needs and wishes of this group. It is conceivable to offer this group employment related social security or to grant them specific rights and obligations that suits their work-related methods. This is why some labour experts propose the introduction of a new contractual form, an in-between category placed between the employment contract and the contract of services. The advocates of this 'in between form' point at the UK, where the concept of 'a worker' exists. The UK worker is entitled to a minimum wage and paid annual holidays, but not to dismissal protection (see chapter III). This contract form offers the worker a minimum of employment protection.

Disadvantages are that it is still hard to legally identify the group properly, without creating new debates about the definition and therefore the scope of this group. Besides, it can possibly create a market advantage for platforms or for platform workers, which are not granted to regular employers and employees, and therefore disturbs the level playing field. Since the definition of the group expands the definition of the employee, EU competition law could thwart collective bargaining opportunities for this group to regulate their market behaviour, like the settling of wages or other terms of employment. Vice versa, when (part of the) platform workers are employees according to EU law, the denial of EU social rights is illegal.

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<sup>38</sup> Amsterdam Court of Appeal 19 February 2021, ECLI:NL:GHAMS:2021:392.

## II. Status undefined

An option could be to embrace the idea that not all jobs should enjoy full labour law protection and that a one size fits all approach may sometimes do more harm than good. Platform workers generally do have a weaker bargaining position vis-à-vis the platform because they are a cog in the greater business process of the platform.<sup>39</sup> This means that the space they have to conduct themselves as entrepreneur/self-employed is limited (by the platform). On the other hand, platform workers do have (a lot) more flexibility to decide when they work compared to employees. The extent to which the platform exercise control and the extent to which platform workers enjoy flexibility differs per industry and branch. An option is to introduce a generic third category, for which a more decentralised, sector or industry specific, approach could be introduced. We distinguish options that may be executed by trade unions or by the platform companies themselves, by Inspection Bodies and through taxes.

### a. Trade unions

Reasoning from a place between the idea of the market and the idea of the firm as set out in paragraph 1, an alternative solution could be construed. On the one hand, platform workers act partially as market participants because they enjoy greater freedom, e.g. as regard working time. In the current framework, the platform does not control the worker with regard to the number of hours worked, when the worker performs the labour and cannot demand alternative tasks to be performed. On the other hand, platform workers lack real opportunities to conduct themselves as entrepreneurs (as employees do) due to the extent of control of the platform. This in-between market and firm position may justify that their social protection is also met in the middle.

An option could be to downwardly adjust social protection offered by the law in some regards and entrust social partners negotiate a fair balance between protection, flexibility and efficiency. Do pension rights or transition payment really benefit the worker when the payment is extremely low? Is sick pay for the duration of two years proportional if the work is considered to be just a temporary side job?

For every platform it differs to what extent the workers are part of the platform company, to what extent they have a saying in serving customers or to even win customers by setting out their own strategy. Thus, the extent of entrepreneurship differs. An option may be that depending on the ratio of market versus labour, workers can get more protection, or, looking from the platform company's side, the company has less obligations towards the worker, based on the level of entrepreneurship. Unions and associations of employers are better equipped to create (labour) standards that fit the particulars of a branch or industry compared to the legislator. By downwardly adjusting social protection offered by the law in some respects and leaving room for collective bargaining, the costs and risks connected to the employment contract can be decreased in relation to the degree of autonomy the worker has. In exchange, the platform worker must get some minimum protection, for example a minimum number of paid hours if he is logged on to the platform and available for work. After all, it lies within the scope of entrepreneurship to decide to be available, but it tends towards an employment relationship not being able to win customers and deciding the fee *when* available for work. The platform company can restrict the for the workers available spots to prevent too many workers are available at the same time, which then again fits the idea of free market forces.

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<sup>39</sup> J.H. Bennaars & E.F. Grosheide, 'Platformwerkers: sociale noodopvang door de EU?', *Tijdschrift voor Arbeidsrecht in Context* 2019/1, par. 3.2.

Second, the unions could, for example, take inspiration from an EU proposal to create a single open-ended contract in which the rights of the workers 'grow' along with their seniority.<sup>40</sup> After a certain period of time the employee is entitled more protective right, what will keep increasing during the employment relationship. Over time, the worker will gain the same protective rights as under a regular employment contract. The advantage of this system is that a sustainable relation is embedded in the actual relation. For some platforms, working with a fast-changing population of workers, this system of a single open-ended contract will offer them the desired flexibility. This option might be easier executable since it is easier to measure the duration of the relationship between the platform and the worker than having to negotiate in order to reach customization, but will in the end lead to the same protective rights as under an employment contract.

An important step trade unions in the Netherlands could take is to organize platform workers. In the Netherlands this did not happen automatically as of yet. The major Dutch trade union FNV started legal proceedings to force platforms to qualify the contracts of services as employment contracts. The Deliveroo case is one of them, and recently the FNV started proceedings against Uber.<sup>41</sup> It seems that the FNV prefers to turn to the judge instead of organizing these (new type of) workers. A reason for this could be the threat of EU competition law. As this rapport showed in other countries, including an EU Member State, collectivizing of platform workers is more advanced. Dutch trade unions could take inspiration from developments in Spain and Argentina.

Also, there are different ways for trade unions to engage with the discussion, to empower platform workers and as a result strengthen their own position and importance for all who perform labour. To achieve these objectives the unions must perhaps step a bit out of their classic role and besides negotiating collective labour agreements start seeking other collective solutions that improve the situation of the platform worker.

Giving workers extra rights leads to an important caveat. Currently, if platforms themselves want to offer their workers some kind of social protection or want to include platform workers in some way, they run the risk that the labour relation is labelled as an employment relation. The Dutch judiciary weighs all circumstances and facts in order to see whether there is a labour contract in stead of a contract of services. As a result, it might seem that in this current system platforms will be 'punished' by acting in a more socially responsible way. As we move forward with finding solutions, this is something that warrants attention.

In that light, an option which might be a bit more out-of-the-box is building up a 'piggy bank' by adding money, besides the wages, for every time a platform worker performs a task or for every time the worker is available on the platform. With this money the worker gets the opportunity to save and spend. That might be regulated and guided, for example for pension money or unemployment benefits if the worker chooses so, but it could also be optional to spend it on holidays. Other from money they could aim for collectively arranged advantages and possibilities, like discounts on work related material and education or training. This option aims to capitalize rights, without deciding for the worker what rights he will gain, in order to stay away from the labour contract.

A final option that has less to do with social protection of workers directly, but does have health and organizational benefits, has to do with being included in an organization. Here also, there is a less traditional role for the trade unions to defend the interests of workers. This option needs an introduction: for decades important values of labour are authority, competence and relation. Most of

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<sup>40</sup> An Agenda for new skills and jobs: A European contribution towards full employment, 23 November 2010, COM (2010) 682 , <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0682:FIN:en:PDF>

<sup>41</sup>

<https://nos.nl/artikel/2356776-fnv-legt-eisenpakket-neer-bij-uber-over-positie-chauffeurs-rechtszaak-verwacht.html>



the other presented options in this report relate to autonomy; the importance of being able to build up a life through paid work.<sup>42</sup> Workers need security and to more or less extent the freedom to own a task in which they can grow and through which they contribute to the organization as a whole (competence). Inclusion creates important social relations and enforces the feeling of being needed. From previous research it can be concluded workers need such a relation to identify themselves with a group as individual, with the values of that group and with the rules within the organization. As a result, productivity is likely to increase, and conflicts between the company and worker likely decrease.<sup>43</sup> Thus, creating something to empower the feeling of autonomy and relation is beneficial for both the platform company and the worker. Offering meeting points as canteens or hubs where workers can meet, chat, have a drink and bond are easy solutions to facilitate these feelings.

### *b. Inspection bodies*

The labour inspectorate may contribute to enforce some of the regulation already in place. Although a third category does not exist in the Netherlands, some regulations regarding the workplace are broader in scope than the employment relation. The Dutch laws on labour conditions and working time are applicable to self-employed, but these laws are badly enforced. Stricter inspection protects workers from over hours and help safeguard health and safety at work. These rules may make it harder for workers to earn a sufficient income or sometimes to meet the flexibility they desire, because these rules limit the maximum number of hours they are allowed to work. An option is to combine these rules with for instance a new law on minimum wages for platform workers.

Also, by increasing control through inspections, inequality and injustice may be reduced to a minimum. As described in paragraph 1 platforms under scrutiny use artificial intelligence that play an important role in deciding how much a worker gets paid, how much work they get or when they are dismissed from the platform. Since all these decisions fall under the scope of article 22 GDPR, because they are automated decisions changing the legal position of the worker, the Amsterdam District Court ruled the workers must get an insight in the data used by the algorithms. This outcome fits the idea behind legislation in the making on algorithmic discrimination and the broadening tasks of the Inspection of the Ministry of Social Affairs to enforce anti-discriminatory rules in order to get more transparency and less inequality. At this moment that regulation mainly focusses on discrimination during the recruitment phase. Since it is still under construction it can be a good opportunity to expand the enforcement to discriminatory algorithmic decision-making in general.

### *c. Taxes and social security*

Another option could be found in taxing labour equally and provide social security independent of the qualification of the labour relation. If protective measures will not be connected to the employment status but to the *performance* of labour, regardless the qualification of the contractual relationship, platform workers (and other - likely - self-employed workers) can claim the same protection as employees in the Netherlands can now, for example social security.

This can be done in the form of an insurance, even an obligatory insurance, but could also be financed through the State's general budget. Advantage of this option is that it makes an insurance against labour market risks like unemployment and illness possible for all workers or residents, based on solidarity and that the funding can be premiums or general tax incomes. Another advantage is that it reduces the importance of the type of labour relation between parties and will reduce competition on labour conditions.

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<sup>42</sup> E. Deci, J. Connell, R. Ryan, Self-determination in a work organization. *Journal of applied psychology*, 1989, 74(4), p. 580.

<sup>43</sup> M. Gagné & E. Deci, Self-determination theory and work motivation. *Journal of Organizational behavior*, 2005 26(4), p. 331-362.

Final, the self-employed competes with the employee on labour costs and risks. Self-employed overall enjoy a fair net income pre social insurance. A much-heard solution for this so called 'unjustified' unequal treatment is to abandon the advantageous tax schemes for self-employed and to make the social insurances obligatory for self-employed. The idea behind this solution is that when the costs of labour are, regardless the form of the contract, similar, the preference for a contract of services will change. Disadvantages could be that real entrepreneurs will be obliged to participate in the social insurance that is primarily meant to protect subordinated workers and above all, due to possible moral hazard, that a system like this might become expensive.