

GIG WORKERS IN ARGENTINA, INDIA, SOUTH AFRICA AND SPAIN

Takeaways for the Netherlands

WageIndicator Foundation & ArbeidsmarktResearch UvA

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WageIndicator Foundation

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WageIndicator Foundation is a non-profit NGO. It develops, operates and owns national WageIndicator websites in 140 countries with labour-related content, using data from its WageIndicator Salary and Working Conditions Survey, Minimum Wages Database, Collective Agreement Database, Salary Checks and Calculations, DecentWorkChecks and related Labour Law Database, and Cost of Living Survey and resulting Living Wages Database. The mission of WageIndicator is to promote labour market transparency for the benefit of all employers, employees and workers worldwide by sharing and comparing information on wages, labour law and career. WageIndicator does so by making this information freely available on easy to reach and read national websites in the national language(s), using sophisticated search engine optimisation. All websites are accessible through mobile phones. For Phase One of the Platform Workers: Decent Rights & Pay project WageIndicator coordinated the project and collected and published on national WageIndicator websites rights, obligations and wages per country per platform.

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ArbeidsmarktResearch UvA BV (ARR) is affiliated to the department of Labour Law and Social Security Law of the University of Amsterdam and was founded in 2010 by University of Amsterdam's Professor Evert Verhulp. The main goal of ARR is to increase the accessibility of the law and to give users an insight into their legal position. The digital, interactive decision trees that provide an estimate of the chances of success in an unfair dismissal procedure are an example of expert systems

developed by ARR. For several projects and research ARR analyses trends in legislation and jurisprudence and converts the results in practical and understandable ways. For Platform Workers: Decent Rights & Pay ARR researchers conducted desk research on the legal position of platform workers in Argentina, India, the Netherlands, Spain and South Africa and wrote the report.

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INTRODUCTION: PLATFORM WORK

I. Description and definition of platform work

As is well known, digital gig work has experienced spectacular growth in recent years. However, systematic data collection is still at an early stage. 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 is an important 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 remains difficult. 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 those who require a service. The focus of platform companies is not on the labour itself, but just on the connection between supply and demand, with the purpose of increasing market competition.

Regulating labour has the opposite goal: market forces are removed in order to make labour less competitive, to ensure equal outcomes and to set minimums for decent living circumstances for everyone performing labour. Platforms are difficult to define because they perform functions of markets as well as functions of firms in which employment is essential.

Eurofound therefore explains 'coordination by platforms' as 'the use of digital networks to coordinate economic transactions in an algorithmic way'.¹ However, a narrower definition seems to be crucial in order to fit platform companies into existing regulatory frameworks with the purpose of defining platform workers and fitting them into a regulatory system.

In order to narrow 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 supply and demand of a service known, 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 requests of persons seeking the provision of a service, looking into the usage of Artificial Intelligence (AI) and underlying algorithms is vital. Algorithms describe a targeted result in a logical way; in the simplest form it is an 'if..., then...'-statement. 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 form of AI used 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*

¹ https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef18002en.pdf

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 have authority 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 the most optimal routes to be taken by a driver or the reward for a specific gig and platform worker. They decide which platform workers should get more (or less) work or even who may no longer perform on the platform.

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.² The app used by Ola drivers for instance performed automated decision making by applying penalties and deductions based on ratings of users. In addition, 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 may even become the basis of more labour related proceedings that focus on employees' subordination to these kinds of apps.

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, fiscal and societal 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, we discuss relevant Dutch labour law and its applicability to platform workers. 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 lay out some policy and legislation options for the Netherlands.

II. Platform work in numbers

Data research on platform work is ongoing on the websites of WageIndicator. To provide an idea of the data being assessed, the results of the survey 'Pay and working conditions for platform workers'³ in March 2021 showed that platform workers are mostly male (57%). In South Africa, the percentage male platform workers is higher at 96%. Most platform workers are aged between 15 and 30 years (60%).⁴ 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, while 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 and in the Netherlands almost 90% of the platform workers is under 40.

Data shows with regard to the scope of platform work, that around 2.8% of the workers in Spain fully depend on platform work to provide their income. About 18% of the Spanish workforce works on a regular basis for a platform.⁵ The Dutch numbers are comparable to Spain's.⁶ ASSOCHAM projected in 2020 that

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

3 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>.

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

5 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).

6 Zie SER rapport

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, 75% of the platform workers work as a food deliverer.⁷

Platform workers were treated initially as self-employed workers in most countries, above all by the platforms themselves. This fits into the larger trend of flexibilisation of labour relations. In the Netherlands permanent contracts were the standard for many years, but now around 60% of all workers are 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).⁸ 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.

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

⁸ 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*).

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.⁹

I. Qualification of an employment contract

Although platforms can and do offer different services and do have various *modus operandi*, from a labour law perspective there are three mainstream legal qualifications of the employment relation in which a platform is involved. 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 discussed further in this report but differs from cleaners who provide services for

the same households (see 2.III).

In the Netherlands, having work done under a contract of services is much cheaper than under an employment contract. 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 combined 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. Most platforms therefore prefer to conclude a contract of service rather than an employment contract.¹⁰

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 say in the work or results. Platform employers make an effort not to instruct a worker during the performance of his labour. Workers can accept a gig and are advised to follow a route presented by the app. Furthermore, the platform companies stress that the worker always has the right to log out from the system, thus not being available to work, whilst an employee cannot at any time stop working. Regarding these elements, combined with the contractual stipulation that the platform worker is always allowed to be substituted by another worker, the platforms claim the workers are self-employed. It is striking that the contracts that professional

9 <https://www.ser.nl/-/media/ser/downloads/adviezen/2020/platformeconomie-hoe-werkt-kluseconomie.pdf>
10 In the Netherlands Thuisbezorgd works with employment contracts for their deliverers.

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.¹¹ The Court emphasised that the actual execution of the contract takes priority over the written terms of the contract in case the agreement merely creates a paper reality.

As it happens, workers appear at least initially to often accept the status of self-employed. Part of the workers do so because the contract of service is beneficial to them. 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 and may end up in a worse financial situation after all, but their net income is often at least fair. Furthermore, some workers see the social protection surrounding the employment contract as a limitation to their freedom and flexibility (e.g. working multiple nightshifts or overtime).

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 over 18 who cannot provide income, has no financial reserves left and does not qualify for other social benefits. In the Netherlands a bill was proposed to regulate a minimum wage for the self-employed. For several reasons, this proposal was withdrawn at the end of 2020. Therefore, platform workers are not assigned any minimum wage. Self-employed people do qualify for old age pension provided by the state. It is not mandatory for self-employed to take out a private pension insurance. Also, self-employed women have a right to paid ma-

ternity leave for 16 weeks during pregnancy. The amount is equal to the minimum wage if the self-employed woman worked a minimum of 1,255 hours a year; if not the income is lower.

When the employment relation is qualified as a contract of services, some bargaining advantages may still exist. The Dutch law on collective labour agreements includes the possibility for the 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 quite strict, in accordance with EU-law, 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.¹² 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.

¹¹ Dutch Supreme Court 6 November 2020, ECLI:NL:HR:2020:1746 (*Amsterdam/X*).

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

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.¹³ On 17 February 2021, the Court qualified the deliverers employed by Deliveroo as employees. The overarching argument was that ‘algorithmic management’ can also form subordination and therefore contribute to the qualification of the employment as an employment agreement. This ruling differs 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 Helpling, a platform that matches cleaners and households, workers clean customers’ homes. Customers pay Helpling an amount per hour, and Helpling pays part of the amount to the cleaners. Helpling 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 Helpling is not the employer in this structure, but that the customers are the employers of the cleaners. This is because Helpling 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 Helpling is engaged in job placement; it creates employment contracts between other parties.¹⁴

¹³ Court of Appeal Amsterdam 16 February 2021, ECLI:NL:GHAMS:2021:392.

¹⁴ Amsterdam District Court 1 July 2019, ECLI:NL:RBAMS:2019:4546 (*Helpling*). 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*).

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. Of the jurisdictions under scrutiny, only Spain has obligatory stipulations or mandatory rights for self-employed in the platform economy are implemented. 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 rights are not applicable in any form (unless agreed on) to platform workers:

- Employment status
- Minimum wages
- Overtime compensations
- Notice requirements
- Severance pay
- 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 that employees can. Self-employed workers 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 benefits. 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 platform workers are not eligible. Nor are they eligible 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.

Unionisation is allowed for self-employed workers, but collective bargaining is not. An example of the organisation of workers of some platforms is the *Asociación de Personal de Plataformas* (APP), which is 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 wor-

kers are provided with social protection rights such as life and disability coverage, 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-month 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.

Despite the Code, platform workers still do not qualify for paid vacation or annual leave, nor employers care. 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 recognise 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.

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.¹⁵ 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.¹⁶ 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.¹⁷ 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.¹⁸ 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.¹⁹

Some platforms, such as JustEat, seem to be content with the initiative because it limits competition between platforms regarding the cost of labour.²⁰ Riders X Derechos²¹ 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.²² A solution offered by this riders’ collective is to register platforms and algorithms to support the labour inspectorate and ensure

15 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.

16 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.

17 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/>.

18 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>.

19 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>.

20 G. Ubieto, 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>.

21 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.

22 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 CEOE, 11 February 2021, <https://www.elsaltodiario.com/falsos-autonomos/riders-x-derechos-rechaza-propuesta-ceoe>.

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 emphasised 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.²³ 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 organised South-America's first digital strike. After Rappi unilaterally changed its order allocation algorithm, riders started to exchange their discontent via various WhatsApp groups.²⁴ 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.²⁵ Oxford's The Fairwork Project suggests that union suppression by platforms is more widespread.²⁶

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.²⁷ On 3 October 2018 the APP requested formal recognition at the Minister of Labour²⁸. 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.²⁹ On 19 March 2019 an Argentinian court decided in first instance that Rappi's blocking of unionised workers amounts to a violation of freedom of association.³⁰ The appeal is still pending.

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.³¹ The Argentinian executive office issued a proposal for a statute for delivery workers who are being employed via digital platforms on May 6th, 2020. The statute aims to extensively regulate the relationship between

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

24 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.

25 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.

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

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

28 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.

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

30 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.

31 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>.

workers and platforms and includes a minimum remuneration.³²

III. UK

Another notable development is the UK Supreme Court's ruling of 19 February 2021 on the status of Uber drivers.³³ 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 factors³⁴:

- 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.³⁵

Uber initially responded in a blog post to the ruling.³⁶ 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.³⁷

32 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-2020-30383748-APN-DGDMTMPYT.pdf>

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

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

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

36 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>.

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

INSPIRATION FOR THE NETHERLANDS

In this paragraph we lay out various options, without raking or prioritizing them, that could provide inspiration for the Netherlands. Some of the ideas are deducted from the discussed countries and developments. Others are more generally based on the ideas of labour regulation or the possible problems that may arise when using platforms and algorithms.

I. A status for platform workers

A 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.I, 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.³⁸ Advantages of this option are that there is no 'unfair' competition between different types of workers and between platforms. It may also offer workers and work providers more legal certainty.

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 qualify as self-employed. Second, platforms could provide a stepping-stone 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 being employed to combine multiple responsibilities like child-care 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 tailor-made solutions 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 suit 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 the '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, especially 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.

II. Status undefined

A strategy 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.³⁹ 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. When the status of platform workers is left *a priori* undefined the actors involved could be deployed in different ways in an effort to find middle ground between protection and flexibilisation.

a. Empowerment of platform workers

An approach could be to empower platform workers by providing them with better information about their rights and by handing

them tools to enforce those rights. Due to the complexity of the labour and related laws and regulations it is quite impossible for a substantial group of workers to independently assess their legal position. Consequently, workers often cannot stand up for their rights without legal assistance because understanding the rules requires a high degree of expertise and knowledge of professional language. Requesting legal aid often costs money without having the security of getting result. As a solution, legal expert systems could offer platform workers high-quality support by offering them insights into their legal position and help them with making decisions that affect their legal position. Also, these kinds of interactive decision trees created by experts could provide clear information applicable for that specific worker and tools like tailor-made letters in order to empower the workers.

b. Protective measures initiated by the platforms

Another option is to welcome and support the efforts of the platforms that do want to provide social protection. Deliveroo, for example, provided liability and accident insurance for its workers. However, giving workers extra rights and benefits may lead to an important caveat. 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. As said, the Dutch judiciary weighs all circumstances and facts in order to see whether there is an employment contract or a contract of services. As a result, it may be that in the current system platforms are 'punished' by acting in a more socially responsible way because these elements are weight in support of an employment contract. As we move forward with finding solutions, this is something that warrants attention.

An out-of-the-box solution may be to change

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

to the provision of benefits which are more generic in nature. For example, building up a 'piggy bank' by the platform for the worker and add money to it 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 money should not necessarily be earmarked for specific purposes, but be left to spend freely on work-related purposes such as pension money, unemployment benefits or training by the worker. Apart from monetary gains, platforms could provide collectively arranged benefits such as discounts on work related material and education or training. These more generic benefits could be a solution to circumvent possible sanctions for acting more socially responsible.

c. Trade unions

Another 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?

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.

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.

Second, the unions could also 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.⁴⁰ After a certain period of time the employee is entitled more protective rights which will keep increasing during the employment relation-

⁴⁰ 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>

ship. 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 more easily 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 customisation, but it will in the end lead to the same protective rights as under an employment contract.

Third, an important step trade unions in the Netherlands could take is to organise 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.⁴¹ It seems that the FNV prefers to turn to the judge instead of organising 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, collectivising of platform workers is more advanced. Dutch trade unions could take inspiration from developments in Spain and Argentina.

Fourth, 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 of negotiating collective labour agreements and start seeking other collective solutions that improve the situation of the platform worker in an organisation. This option needs an introduction: for decades important values of labour are authority, competence and relation. Most of the other presented options in this report relate to autonomy; the importance of being able to build up a life through paid work.⁴² 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 organisation 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 organisation. As a result, productivity is likely to increase, and conflicts between the company and worker likely decrease.⁴³ 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.

d. 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

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

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

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

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 point that regulation mainly targets combatting discrimination at the recruitment phase. It can be a good opportunity to expand the enforcement to discriminatory algorithmic decision-making in general.

e. 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.

Finally, a self-employed worker competes with an employee on labour costs and risks. Overall, the self-employed 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 social insurances obligatory for self-employed. The idea behind this solution is that when the costs of labour are similar, regardless of the form of the contract, the preference for a contract of services will change. Disadvantages could be that entrepreneurs will be obliged to participate in the social insurance system that is primarily meant to protect subordinated workers and that it may become cost prohibitive due to possible moral hazard.

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