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International Social Security Review

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Special issue: Social protection for digital platform workers in Europe

- Introduction: Social protection for digital platform workers in Europe
- From precarity to the denial of social status in the Belgian legal order: The social security rights of platform workers in question
- Platform work, social protection and flexicurity in Denmark
- Accommodating platform work as a new form of work in Dutch social security law: New work, same rules?
- Social protection and the platform economy: The anomalous approach of the French legislator
- Platform work and social security in German law: An international law perspective
- Which social security regime for platform workers in Italy?
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- Social security coverage for platform workers in Switzerland: A middle way?

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JULY–DECEMBER 2021

International Social Security Review

Special issue: Social protection for digital platform workers in Europe
Guest editor: Isabelle Daugareilh

Foreword
Marcelo Abi-Ramia Caetano 3

Introduction: Social protection for digital platform workers in Europe
Isabelle Daugareilh 5

From precarity to the denial of social status in the Belgian legal order: The social security rights of platform workers in question
Céline Wattecamps 13

Platform work, social protection and flexicurity in Denmark
Catherine Jacqueson 39

Accommodating platform work as a new form of work in Dutch social security law: New work, same rules?
Saskia Montebovi 61

Social protection and the platform economy: The anomalous approach of the French legislator
Isabelle Daugareilh 85

Platform work and social security in German law: An international law perspective
Eberhard Eichenhofer 111

Which social security regime for platform workers in Italy?
Silvia Borelli and Sofia Gualandi 133

The social protection of platform workers in Romania: Meeting the growing demand for affordable and adequate coverage?
Felicia Roşioru 155

Social security for Spain's platform workers: Self-employed or employee status?
María Luisa Pérez Guerrero and Miguel Rodríguez-Piñero Royo 177

Social security coverage for platform workers in Switzerland: A middle way?
Sabrine Magoga-Sabatier and Anne-Sylvie Dupont 195

Index for 2021 217

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Foreword

The content of this special issue, *Social protection for digital platform workers in Europe*, talks to current debates on social security coverage in a context of evolving labour markets and the digitalization of economic activity. The articles, guest edited by Professor Isabelle Daugareilh of the University of Bordeaux, France, detail and offer a forward-looking analysis of the legal possibilities to extend equality of treatment regarding social security coverage – and thus to deliver effective coverage – to workers engaged in digital platform work. Each article presents country evidence of possible legal pathways to defend and strengthen the rights of all workers under labour law and social security law, to help realize what the International Labour Organization's defines as "decent work".

There is a paradox concerning global debates on the challenges for standard forms of employment and social security coverage arising from the emergence and growth of digital platform work. In richer economies, including the European economies highlighted in this special issue, the growth of digital platform work may be perceived as a threat that may increase precarity in work and weaken existing levels of social security coverage as well as lead to greater fragmentation in national social security systems. In contrast, in developing economies platform work is viewed often as offering the potential to formalize work and extend coverage to workers whose dominant economic activity may have been previously informal. This reality of differing perspectives underlines the need for wider empirical research offering critical analysis salient for all countries.

The International Social Security Association's global online "Country profiles" database of national social security provisions is of unmatched value, offering concise empirical reporting of over 180 countries and territories. However, the major focus lies with reporting the social security rights of employed workers. The growth of self-employment, as well as of atypical and non-standard forms of work, demands improved data reporting concerning the legal and effective social security rights of all workers, regardless of their accorded status. The content of this special issue is an important step in this direction.

A further aim of this special issue is to make an important contribution to knowledge regarding the broader question of social security coverage in the context of labour market transformations, which is one the four topical priorities of the International Social Security Association for the triennium 2020–2022.

International Social Security Review, Vol. 74, 3–4/2021

This knowledge and its dissemination will be instrumental to support the operational objectives of the Association's member organizations.

Marcelo Abi-Ramia Caetano
ISSA Secretary General
International Social Security Association

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Introduction: Social protection for digital platform workers in Europe

Isabelle Daugareilh

University of Bordeaux, France

Abstract This special issue of the *International Social Security Review* addresses the important topic of social protection for digital platform workers in Europe. The special issue highlights the risk that social protection systems may be largely undermined by a decline in social solidarity in favour of individualism, the partial or full privatization of social security, and a reduction in protection levels, all as a result of the emergence of digital platforms and the support they receive from legislators in most countries.

Keywords social security legislation, social protection, atypical work, platform workers, Europe

Introduction: A growing policy concern

Until recently, the social protection of platform workers was not a salient issue in academic literature or government policy, nor in the activities of social security providers. No doubt this was in part down to the low numbers of platform workers, but the issue was also overshadowed by a focus on the legal interpretation of the contractual relationship between workers and platforms. Yet paradoxically, it has been emerging social risks (for example, occupational accidents, or the loss of income due to bankruptcy or disconnection) that have

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led to workers' cases ending up in court.[1] Platform workers are usually regarded as self-employed, but coverage for such risks is generally restricted to employees. However, while social security provision is to some extent dependent on employment status,[2] an analysis of the social protection of platform workers cannot be reduced entirely to the legal interpretation of this status, for several reasons.

First, the level of social security benefits is linked to the amount of contributions made, which in turn depends on the level of wages or professional earnings. However, since platform workers are self-employed, they must bear all of the social protection costs themselves, despite the fact that their work is characterized by insecurity, inconsistency and low qualifications, factors which tend to lead to low incomes or even poverty.

Second, in this context questions inevitably arise as to how effective it would be to incorporate these workers into a social security scheme, given their fragmentary or multiple employment trajectories.

Third, for the self-employed, risks linked to unemployment, or to occupational accidents or diseases, are not usually covered.

Fourth, and finally, social protection depends on the nature of the social security system in the country concerned. Most countries have hybrid systems, combining elements of the Beveridge and Bismarck traditions alongside a process of harmonization of different schemes that sometimes extends to universal coverage (especially for health risks).[3] Regardless, it remains the case that in systems termed "universal", all citizens/residents have the same social protection coverage, irrespective of their employment status (employed/self-employed) or even, in certain cases, regardless of whether they are economically active. In systems with a more occupational base, however, cover remains highly dependent on employment status, even if the legislation has been modified to some extent. For example, in some countries, the scope of labour law has traditionally included workers without an employment contract, or whose working arrangements verge on self-employment, because of a legal presumption of a work or employment contract which gives rise, *ipso jure*, to inclusion in the social security scheme for employees. In these countries, the scope of the social security legislation applicable to employees has also been extended, through assimilation, to cover professionals who do not provide services under an

1. Whereas decisions to modify charging structures have been the subject of collective action, leading to worker organization, either through ad hoc associations or through trade unions, in all the countries considered.

2. This explains why all the contributions to this special issue of the *International Social Security Review* were developed from articles considering the employment status of platform workers; see entire issue of *Comparative Labor Law and Policy Journal*, Vol. 41, No. 2, 2020.

3. See Daugareilh and Badel (2019).

employment contract. It is therefore quite possible in legal terms to decouple legal subordination from social contributions, without abandoning the mechanisms that promote solidarity and redistribution. The point is that the legislator can choose to cover platform workers under both labour law and social security law and, furthermore, inclusion in the latter can be established without reference to the former.

It has taken the global COVID-19 pandemic to highlight the contribution made by many workers, including platform workers, to maintaining (sometimes essential) services, and at the same time to expose their level of financial and social vulnerability as a result of poor or inexistent social protection for risks such as loss of income, occupational health, etc. Setting the current circumstances aside, platform work is presumed to entail various advantages that make it attractive to three parties: businesses, the State and individuals. Since platform work is a new form of serial outsourcing, businesses benefit from an immediate and direct cut to the costs of subcontracting, especially since the social insurance costs are borne exclusively by the workers themselves. From the government's standpoint, platform work can help some groups of people to access the labour market, such as young people, workers with family responsibilities, workers with disabilities or other groups of people who find it hard to obtain more conventional work, or even take part in job promotion schemes. Platform work can also have advantages for workers who need flexibility, and want to choose when they work and for how many hours.

Having said all this, what is the justification for giving these workers less protection, in terms of social security, than more conventional workers? Most of them take these jobs out of necessity. Tasks allocated via the intermediary platform are sub-divided, strictly organized and controlled, and so dispersed in terms of time and location that they do not help to build up professional or social experience or qualifications. They do not lead to any lasting form of employment and, above all, the working conditions are not conducive to decent work. The workers are forced to work excessively long hours, in a highly competitive environment in which wages are forced downwards, causing problems with occupational health and safety and leading to social and professional isolation because of the piecemeal nature of the job. More generally, algorithmic management leads to systemic and addictive forms of surveillance that are regarded as a potential source of risks to social and mental well-being, risks which are as yet little understood. This kind of activity also resembles casual work or a zero hours contract in that it involves multiple parties, none of whom accept legal liability as regards the worker. And yet, the "platformization" of work is gaining ground. It now extends beyond the transport, translation or marketing sectors, and jobs such as driver or rider, to affect hospitality (dishwashers, waiters), healthcare (care home workers), retail (supermarket

cashiers) and legal services.[4] The status of *auto-entrepreneur* in France, or self-employment in other countries, is a boon for the platforms, enabling them to conceal their general manipulation of labour law and the evasion (*fraude à la loi*) of both labour and social security law.

In the countries analysed in contributions to this special issue, the reaction of the legislators and/or the social partners has varied widely, in the absence of any clear guidance from the European Union on the legal employment status arising from the (individual or collective) contract and/or the social protection of platform workers. The discussion below is confined to four main approaches, which have been the source of some controversy.

The first approach, taken by the Belgian Government, has been to exclude any social protection in connection with activities conducted via platforms if they do not generate a minimum level of income. The Belgian legislator introduced tax and social security provisions that treat platforms as part of the sharing economy, an approach which demonstrates the most problematic implications that can arise from decisions as to whether these activities actually count as "labour" at all. The Belgian legislator accepted the ultimate logic of the platforms' understanding, according to which these activities are merely casual work, giving rise to a very low, or even no income (having made reference to concepts such as sharing, voluntary activity, or even a game). On this basis, the Belgian legislator determined that platform activities producing an income below an annual threshold would not count as labour of a kind that could enable someone to make a profit, build up resources or simply earn a living. This approach has some similarities with the way in which Germany or the United Kingdom handle casual work or zero hours contracts. The 2018 Belgian legislation, which posed a direct challenge to the redistributive function of tax and social security law, was annulled by the Constitutional Court on the grounds of a violation of the principles of equality and non-discrimination, and recalled that the State is under a positive obligation to ensure that all workers have a right to social security.

A second approach is to support access to private schemes providing insurance coverage, especially for occupational accidents. This was the course taken by the French legislator when it created a specific status for those self-employed workers

4. "I worked between seven and nine hours a day, seven days a week, bank holidays included. We had to get through a certain number of files an hour – 10, 15 or 20 – it changed all the time. In September 2020, the rate fell from 13 euros (EUR) an hour, gross, to EUR 11. I told the boss that it wasn't right. And overnight I was sacked."…At Monoprix a stock replenisher and then a cashier were taken on, as *auto-entrepreneurs* (sole traders), for four months full time (56–67 hours): "There were several of us with this job status. On 15 May, when the staff who had been on furlough returned to work, they got rid of us … Without the right documents he couldn't get a job. Given the health crisis, healthcare is popular, you can find job offers to work as an *auto-entrepreneur* in a care home". These observations were collected by Aizicovici (2021, p. 16).

whose working conditions and prices are fixed by a platform. Although platform workers are regarded as self-employed for the purpose of determining issues such as the applicable social security scheme, the legislator introduced a way for the platform to reimburse any voluntary or private insurance taken out by the worker. This new provision only covers occupational accidents, not occupational diseases. The costs incurred will only be reimbursed by the platform on application by the worker, and on condition that the worker's income exceeds 13 per cent of the annual social security ceiling. In the United Kingdom, the 2016 Taylor Review (Taylor et al., 2017) recommended legislation to recognize the use of private insurance (with the possibility that the platform might assume the costs). The French legislator provided an alternative to reimbursement, giving the platform itself the option of taking out private cover for occupational accidents. In Spain, Deliveroo reached two agreements on working arrangements with rider associations from Madrid and Barcelona, introducing private insurance so that workers would be covered by a general protection policy for hospitalization, offering daily compensation of EUR 50 for a maximum of 60 days. These agreements also provide for civil liability insurance and include clauses on training in road safety and business skills.

A third approach is to include these workers in the social security regime for employees, either through the application of a legal presumption or by assimilation. This was the outcome of the decision taken by the Spanish legislator, following up on a national agreement reached by the social partners to establish a legal presumption of employee status, albeit only for bicycle riders. The Italian legislator has also assimilated "uberized" workers to workers in a relationship of subordination, adopting a law which includes platform workers in the occupational accidents and diseases scheme and requires the platforms to make the relevant contributions. However, this rule only applies to bicycle riders.

A final option for the legislator would be to adopt a position of strict neutrality and leave matters to the social partners, accepting the risk that the national (or European) competition authorities might intervene to challenge a collective agreement, as was the case in Denmark. The outcome might ultimately be along the lines of the approach in Ireland, with the regulatory role shared between the legislator/government and the social partners.

Given that none of these solutions is satisfactory, how should we understand and organize the social protection of platform workers? Should platform workers whose income falls below a particular threshold be completely removed from the scope of social protection? Should there be a universal income? Do we need a specific arrangement? Should employment or work status be a criterion?

One way forward would be to develop a specific social protection regime for platform workers, analogous to "employed" status. In its 2020 report on digital platform working, the Committee of Experts of the International Labour

Organization (ILO) points out quite rightly that the use of technology to allocate tasks to an indeterminate body of workers is no reason to conclude that these activities are a type of work falling outside the labour market. The Committee recalls that all of the fundamental rights and principles relevant to labour apply equally to platform workers, on the same terms as to any other workers, regardless of their employment status. The treatment of platform workers must therefore be understood in the context of a global trend characterized by the balkanization of employment status, with the engagement of labour through intermediary platforms representing the most extreme form of deregulation to date, combining a lack of both social and worker protection. Both the legal classification of the employment status and insecure incomes (usually both low and inconsistent), prevent workers, in the short term, from insuring themselves against social risks and, in the long term, from building up full entitlements. This is not specific to platform workers; it affects all workers engaged in atypical or non-standard forms of employment. This is why the solution to the social protection issue cannot lie in an attempt to establish a category or even a sub-category for platform workers, following the example of the French legislator. The aim should rather be to encompass all atypical forms of labour engagement, as they become increasingly diverse and disseminated around the world.

Given that intermediary platforms force the workers who use them to adopt self-employed status, is it feasible to allow or even encourage the increased recourse to self-employment without considering the implications for social protection? Historically, the development of social insurance based on employee status was intended to protect workers who lacked income or assets (land, business capital or property) by making them more resilient in the face of social insurance risks to which they would otherwise be hopelessly exposed. But the same situation now affects the newly self-employed – a situation prefiguring the emergence of a new category of poor workers.

Suppose intermediary platform work were a social security laboratory experiment, aiming to determine the elements of a political, economic and legal compromise in which "a bit of social security" might be exchanged for a total rejection of employment rights? In the platforms' strategic push for the deregulation of social protection, one tactic might be for a trade-off, either by finally breaking the link between social security and work (and employment status), or by making the specific employment status irrelevant.

The development of intermediary platform work has certainly revived interest in the progressive harmonization of social security, or even uniform provision for employed and self-employed workers. This could be achieved through various approaches and criteria, for example:

- Instead of developing solutions by category, propose a holistic vision of a new model of employment relations and a readjustment of the work/social protection

relationship. This relationship has paid dividends for developed states; separating the two elements, in fact or in law, would have no benefit beyond the financial advantage to digital platforms and for business more broadly.

- In line with ILO Recommendation on Social Protection Floors, 2012 (No. 202), establish a principle that all workers, whatever their employment status, should be entitled to, at least, a universal social protection floor, with no differences in the level or scope of benefits depending on employment status.
- Establish a principle of neutrality as regards the impact of employment status on social protection. Ensure that in practice the social protection of platform workers is harmonized with that of employees, bearing in mind that this process of harmonization might properly be extended to include all self-employed workers. However, the implementation of this principle of neutrality and the policy objective must be a matter for the State, and thus for legislation – something the Italian legislator has already taken on board.[5]

Taken together, the contributions to this special issue of the *International Social Security Review* highlight the risk that social protection systems may be largely undermined by a decline in social solidarity in favour of individualism, the partial or full privatization of social security, and a reduction in protection levels, all as a result of the emergence of platforms and the support they receive from legislators in most countries. This trend represents the antithesis of the message addressed to Member States by the International Labour Organization in its Centenary Declaration (ILO, 2019b) and in the Recommendation on Social Protection Floors, 2012 (No. 202).

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5. See Frouin and Barfety (2020, p. 85), as well as the Conseil national du numérique (2020).

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From precarity to the denial of social status in the Belgian legal order: The social security rights of platform workers in question

Céline Wattecamps

Université catholique de Louvain, Belgium

Abstract The right to social security is enshrined in article 23 of the Belgian Constitution. It is the role of the legislator to implement it, to guarantee the right of all to lead a life in accordance with human dignity. Studies show that platform workers face major difficulties in terms of social protection. The aim of this article is to highlight the limits of existing legislative provisions regarding their ability to implement the fundamental right to social security for platform workers. With regard to these legislative provisions, we are interested in both the general regulations that shape the Belgian social security system and the recent measures adopted by the Belgian legislator with regard to the so-called sharing economy. An analysis of these provisions reveals that a number of platform workers are excluded from social security, both de facto and de jure. At the very least, this raises the question of whether the Belgian legislator is complying with the positive obligation to fulfil the constitutional right to social security for platform workers, and the negative obligation, at least, not to undermine it.

Keywords social security legislation, insured persons rights, atypical work, platform workers, Belgium

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Introduction

Everyone has the right to lead a life in keeping with human dignity. To this end, the law must guarantee the right to social security. With these words, the Belgian Constitution states the fundamental nature of the right to social security, which contributes to making every individual a human being with dignity. This constitutional enshrinement – essential but only recent in Belgium[1] – is in the tradition of the founding texts on the protection of human social rights in the twentieth century.[2] It is reminiscent of one of the fundamental features of the "Spirit of Philadelphia", as defined by Supiot (2010). The author reminds us that the principle of human dignity proclaimed in these instruments draws lessons from the worst experiences of commodification of human life and requires us to consider the person's body before their mind. In essence, this principle obliges us to link the imperative of freedom to that of security: "In order to be free to speak and believe, human beings must enjoy physical and economic security" (Supiot, 2010). Consequently, we may postulate from the outset that showing the limits of legislative measures to implement the right to social security is indeed tantamount to underscoring this right's lack of effectiveness in the national legal order. However, it also and above all amounts to noting the shortcomings of a guarantee of human dignity for everyone. For those excluded de facto or de jure from the fundamental right to social security, it is a question of human dignity.[3]

These considerations are of particular interest to platform workers, i.e. people who perform work, virtually or otherwise, via digital platforms, for remuneration or profit.[4] The two forms of work via digital platforms that are usually

1. Article 23 enshrining the right to social security was introduced into the Belgian Constitution in 1994, after several abortive attempts, owing to the determination of Maxime Stroobant, Professor at the Vrije Universiteit Brussel, and then Senator for the Flemish social party (Stroobant, Limberghen and Salomez, 2001).
2. Universal Declaration of Human Rights of 10 December 1948 (Articles 22 and 23); Declaration concerning the aims and purposes of the International Labour Organization (Declaration of Philadelphia) of 10 May 1944 (point II (a)).
3. The concept of human dignity has multiple occurrences in Belgian law (Fierens, 2002, pp. 577–582). It was explored in a particularly interesting fashion in a recent book on law and poverty (Rigaux and Daoût, 2020).
4. This unsophisticated definition results from the exploration of different characteristic elements identified and discussed in Wattecamps (2020). Platform work can be done online or offline, and can involve a variety of tasks. The decisive factor is the mobilization of a workforce, unlike for example the sale of goods or the rental of real estate or a vehicle (Codagnone, Biagi and Abadie, 2016, p. 17). The condition linked to remuneration, or the profit motive, amounts to dismissing the issue of the co-production of value by internet users, or "digital labour", which refers to this new type of "free" work performed when we fill in a form or post a comment and which generates data that can be exploited by third parties (Dujarier, 2014; Cardon and Casilli, 2015). Finally, the work is done through a digital platform. What is characteristic is the business model of digital platforms. We will return to this briefly in the next section. In principle, a distinction should be made between platform owners and platform operators, but we shall leave aside this distinction in this analysis.

distinguished, namely crowdwork and work-on-demand via app, are therefore covered (De Stefano, 2016, pp. 471–504).[5] International studies have shown that a significant proportion of these workers face major difficulties in terms of social protection (Berg, 2016, pp. 543–576; Berg et al., 2018, pp. 59–61). This has preoccupied many researchers working on these issues using different approaches. It has led some to recommend the "emergence of new forms of employment, such as work on digital platforms, requires that existing social protection systems adapt to the specific situation and needs of such workers, as to realize the human right to social security for all" (Behrendt, Nguyen and Rani, 2019, p. 17; see also La Salle and Cartoceti, 2019). In this regard, the challenge of guaranteeing platform workers' right to social security extends to Belgium too.[6]

While not formulating recommendations that could underpin a possible reform of the Belgian social security system or even calling for its modification, we wish to use this analysis to understand how this system may prove inadequate for platform workers. In this regard, we ask the following opening question: under Belgian social security law, to what protection are platform workers actually entitled? In order to assess the adequacy of that protection, the proposed approach examines the constitutional right to social security. In particular, the aim is to highlight some of the limits of existing legislative provisions as regards their ability to implement platform workers' fundamental right to social security. For these legislative provisions, we will first look at the general regulations that shape the Belgian social security system, in terms of both access to and content of social security coverage. Then, we examine the recent initiatives adopted by the Belgian legislator in the field of the so-called "sharing economy" to regulate the social status of platform workers. In conclusion, we will question the legislator's action from the point of view of the obligations to fulfil and not to undermine platform workers' fundamental right to social security.

It is not within the scope of this article to propose an in-depth analysis of the rules in force, to give a detailed and exhaustive account of the limits of these legislative provisions. Nevertheless, we believe that the elements put forward

5. See the comparable distinctions between "Online Labour Markets (OLMs)" and "Mobile Labour Markets (MLMs)" (Codagnone, Biagi and Abadie, 2016) and "crowd employment" and "ICT-based mobile work" (Mandl and Curtarelli, 2017, pp. 51–79). Given its inherently global nature and its online execution, crowdwork obviously presents its own challenges in terms of applicable law. However, an analysis of the realities of work organization and work on digital platforms shows that there are significant similarities between crowdwork and work-on-demand via app with regard to the limits of workers' access to social security, as a result of which this article covers these two forms of platform work.

6. The first labour and social security law analyses in Belgium focused on a general approach to issues surrounding the development of the platform economy; see Clesse and Kéfer (2019); Dumont, Lamine and Maisin (2020); Wattecamps and Lamine (2020).

provide a basis for a useful examination of the effectiveness of the fundamental right to social security for platform workers and, a fortiori, of the adequacy of the Belgian social security system for such workers. Our intention is to take a critical look at current legislation as part of an evaluation of the legislator's action in accordance with article 23 of the Constitution. However, the developments that follow are not intended to demonstrate systematically a violation of this article, as would be understood by the competent jurisdictional bodies; this is why we postulate the "limits" in the legislator's action.

The constitutional right to social security and its implementation in Belgium

An overview of the principles

The right to social security is enshrined in article 23 of the Constitution. It stipulates that everyone has the right to lead a life in keeping with human dignity. To this end, the law guarantees economic, social and cultural rights and determines the conditions for exercising them.[7] The article specifies that "these rights include among others [...] the right to social security, to health protection and to social, medical and legal assistance".[8]

It is therefore the role of the legislator[9] to implement, give concrete form to and make effective the constitutional right to social security. It is the legislator who makes the fundamental policy choices, adopts the necessary texts, defines the central concepts, makes the budgetary trade-offs, and so forth (Dumont, 2017, p. 54). The legislator's involvement in this respect is substantial, as evidenced by the extent of the existing regulations and the countless reforms of these undertaken over the years, forming the basis of what can be commonly referred to as the "Belgian social security system". However, this is not about trumpeting the legislator's action, which, rather than constituting the homogeneous and coherent outcome of a rational process aimed at, and necessarily contributing to,

7. It is specified that account should be taken of "corresponding obligations", or commitments to which the right to social security may be subject. They are admissible only insofar as they enable everyone to lead a life in keeping with human dignity (Dumont, 2017, pp. 43–52).

8. Article 23, paragraph 3, (2) of the Belgian Constitution. The legal provisions that fall under the constitutional right to social security are not precisely defined. As suggested by Dumont (2017), reference can be made to the definition given by the Charter of the Socially Insured (*Charte de l'assuré social*), which refers mainly to all the branches that cover persons subject to the social security system for salaried workers, self-employed workers or the public sector, as well as those of the social assistance system; and the body of rules relating to the collection and recovery of social security contributions and tax resources (Law of 11 April 1995 aimed at instituting the Charter, Belgian Monitor (*Moniteur belge* – MB), 6 September 1995, Article 2, paragraph 1, (1); ibid., pp. 20–30).

9. For details on who is deemed to be "the legislator" in Belgium, see Dumont (2017, pp. 26–42).

the implementation of the fundamental right to social security, in fact appears somewhat erratic. This system has undergone successive modifications, some of these being essential or structural,[10] according to the public policies implemented. These policies are themselves the result of power struggles between social and political groups in given contexts, to meet given challenges (changes in the means of production, globalization, new demographic realities, economic crises, spread of new technologies, etc.) (Vanthemsche, 1994). The unity of time, place, career and authority that crystallized around the factory worker on which the social security system was based in the early twentieth century has become ever more fragmented. The Belgian social security system is struggling to move beyond the emblematic figure of the "worker" that it was originally intended to protect (Kéfer, 2019, pp. 223–237). The development of non-standard forms of employment and precarious work, which seems to have undergone a kind of radicalization in recent years with the success of work on demand, is leaving an increasing number of workers on the fringes of the social security system. All this raises the question of these workers' fundamental right to social security.

Yet, workers partially or totally excluded from social security coverage cannot invoke a subjective right to a particular benefit before a court on the basis of article 23(3)(2). It is generally accepted that the fundamental right to social security has no direct effect.[11] Nevertheless, even in the absence of a direct effect, the constitutional right to social security remains invocable in objective litigation. It can be used as a reference point to verify the compliance of a legal or regulatory norm in the competent courts (Dumont, 2017, pp. 54–58).[12] This, in turn, implies clarifying the obligations that arise from the constitutional text and that are incumbent upon the legislator. In the absence of specific developments in article 23 of the Constitution on this issue, it is useful to draw on the literature on international human rights law (Roman, 2012, pp. 279–293). Such

10. In a forthcoming issue of the *Revue belge de sécurité sociale*, P. Vielle and E. Ceulemans outline the evolution of the characteristic features of the management and financing of the Belgian social security system for salaried workers. In particular, the authors report on the ideological shift that this system has undergone through the questioning of the legitimacy of the public management of the social security budget, the challenging of the efficiency of its management by social partners as well as the growing promotion and implementation of activation policies. The defederalization of the system and further recent structural changes in its financing and management are then addressed by the authors as manifest institutional ruptures.

11. This issue remains debated in the literature, see Jamoulle (2001, pp. 121–147); Schoukens (2016, pp. 223–238).

12. In Belgium, the Constitutional Court (*Cour constitutionnelle*) and the Council of State (*Conseil d'État*) are competent for objective disputes. In the context of a dispute before a judicial court, such as a labour court, concerning subjective rights, a conflict of norms may be raised incidentally on the basis of Article 159 of the Constitution. This article may involve the setting aside of a regulatory norm deemed incompatible with the fundamental right to social security.

an approach allows Dumont to recall that all fundamental rights impose both positive and negative obligations on the authorities, including in particular the "obligation to fulfil", which requires the State to take legal, material and financial measures to ensure that everyone can effectively enjoy their fundamental rights, and the "obligation to respect", which requires the State to refrain from infringing on citizens' fundamental rights (Dumont, 2017, p. 61).[13]

The legislator's obligations to fulfil and respect the right to social security

The legislator's positive obligation to fulfil the right to social security is programmatic. As such, the enshrined right is as vague as the concept of human dignity, and article 23 of the Constitution on its own cannot be conceived as a guide to interpretation (Neven et al., 2011, p. 1341).[14] It is therefore not surprising that the competent courts, to date, have never found a violation of article 23 of the Constitution in the positive aspect of the obligation it places on the legislator. However, as Dumont reminds us, a constitutional provision can, despite being vaguely worded, gain normativity through interpretation. In this respect, priority can be given to an integrated approach to human rights law. In Dumont's view, we should not lose sight of the fact that Belgium has signed up to various international commitments that are binding on the legislator in terms of fundamental social rights.[15] These instruments constitute international reference standards, which are interpreted by established supervisory bodies. The Constitutional Court has consistently held that when a treaty provision binding Belgium has a scope similar to a constitutional provision, the guarantees enshrined in that treaty provision constitute "an indissociable whole" with the guarantees enshrined in the constitutional provision in question. As a result, when read in the light of the aforementioned international provisions, the positive dimension of article 23 of the Constitution implies a duty on the part of the Belgian legislator to engender "a process of progress in the field of social protection" (Dumont, 2017, p. 64).

The negative obligation not to infringe the right to social security corresponds to the obligation in principle not to regress – the well-known "standstill" obligation. It prevents the competent legislator from significantly reducing the

13. The positive obligation to "protect" must be mentioned. It charges the State to prevent and sanction private behaviour that hinders the enjoyment of fundamental rights, i.e. to enforce fundamental rights in horizontal relationships between individuals. We do not address this here.

14. The authors explain that the Constitutional Court favours a systemic reading of the applicable provisions to assess their constitutionality.

15. In particular, the International Covenant on Economic, Social and Cultural Rights, the fundamental International Labour Organization (ILO) Conventions, the European Social Charter, etc.

level of protection afforded by the applicable legislation without there being grounds for doing so in the general interest.[16] This legal mechanism offers the twofold benefit of circumventing the problem of an imprecise constitutional text and avoiding having to clarify the reference standard. When assessing whether a given reform is compliant with the standstill obligation of article 23 of the Constitution, the norm that is taken into account is the one that was in force when the reform was adopted. As regards the legal regime of the standstill obligation, it should be noted that the case law definition of a "significant" regression in social protection is open to discussion. Moreover, according to Dumont, there should be rigorous monitoring of any regression by the legislator. Indeed, such regression is in principle only acceptable if it is duly justified, i.e. if it is based on a general interest ground, if it is appropriate and even necessary with regard to this ground, and if it does not have disproportionate consequences for the rights of the persons concerned (Dumont, 2017, pp. 70–94).

Platform workers and the social security system

Management by algorithm and income insecurity: Understanding the precarity of social status

To make a useful assessment of how platform workers fit or do not fit into the categories and conditions of the Belgian social security system, whether in terms of access to social security coverage (i.e. legal provisions that concern the personal scope of application and contribution obligations) or in terms of entitlement to benefits, it seems essential to call upon contextual data relating to the phenomenon of platform work. With this in mind, we propose to review a number of elements from selected studies. In these studies, the authors have sought to understand the realities of work organization that are as close as possible to the business model and concrete functioning of digital platforms, as well as the work realities that are as close as possible to the working conditions and profile of platform workers.[17]

16. The three supreme courts have had an opportunity to consider the question of the legislator's compliance with the standstill obligation, particularly in the area of social assistance for foreigners and mobility aid for disabled persons. See the case law cited and analysed by Dumont (2019, pp. 601–628), as well as the recent case law regarding disability benefits (C.C., 12 March 2020, No. 41/2020) and unemployment (Cass., 14 September 2020, S.18.0012.F).

17. These data go beyond the Belgian context, where studies that attempt to capture the realities of platform work specific to Belgium are very limited. The selected studies are nonetheless relevant in our view, particularly insofar as these analyses concern platforms that are active globally.

Without dwelling on the analysis of the business model of digital platforms as multi-sided markets (Hatzopoulos, 2018, p. 9)[18] and its characteristics,[19] it is relevant to look once more at their role as intermediaries. Digital work platforms connect different groups of users, most often people who order a given work service from people who are willing to perform that service, and facilitate their interactions. In this model, work providers are first seen as consumers of the digital infrastructure, who then become producers.[20] It is recognized that platforms add value by attracting more and more users on both sides, and by facilitating transactions between them as much as possible. As a result, their model requires platforms to fulfil this intermediary role as efficiently as possible. To do this, platforms use algorithms, based on the collection and processing of innumerable amounts of data (Hatzopoulos, 2018, pp. 11–12).[21] These elements inevitably lead digital platforms to embody certain policy stances, insofar as they will seek to control their "fundamental architecture" in order to maintain control over all interactions (Srnicek, 2018, pp. 52–53; Van Alstyne, Parker and Choudary, 2018, p. 5).[22]

Choudary has examined the architecture of digital work platforms in particular. In his study, he provides a very thorough summary of the mechanisms that enable these platforms to attract and retain users, and to orchestrate their interactions in ways that encourage repetition (Choudary, 2018, pp. 2–6).[23] In his view, to ensure market liquidity, some work platforms really do focus on organizing and managing work, which they optimize through algorithms. He gives the example of Deliveroo, which for example requires workers to sign up in advance for certain time slots and then automatically allocates work requests to registered providers, while limiting their ability to accept or reject requests. For Uber, Rosenblat highlights this "management by algorithm" in a very detailed analysis that has become a standard case study on the subject (Rosenblat, 2018).

To propose a rational approach to digital work platforms according to the degree of their involvement in the organization and management of work, De Stefano and Aloisi (2018) analysed the concrete functioning of digital platforms in three sectors: i) passenger transport services, ii) professional tasks completed

18. Hatzopoulos (2018) elaborates on the definition of "multi-sided markets" and refers to the rich literature on these markets, in particular to its pioneers, J.-C. Rochet and J. Tirole.
19. In particular, with regard to price structure and network effects, see Srnicek (2018, pp. 49–50); Hatzopoulos (2018, p. 10); Graef (2016, pp. 20–24).
20. We encounter the term "prosumers" in support of this view; see. Drahokoupil and Jepsen (2017, p. 108).
21. This personal data is furthermore commercialized and, therefore, has value in and of itself. See Srnicek (2018, pp. 44 ff.).
22. Digital platforms are not designed to be democratic (Silberman and Irani, 2016, p. 539).
23. Choudary also discusses the lean startup management and management by metrics techniques used by digital platforms (2018, p. 6).

online and iii) manual or interpersonal services carried out on household premises. They use five criteria to describe this functioning: i) access to the platform and registration, ii) the selection and hiring process, iii) the power to order and perform the service, iv) monitoring and rating (and deactivation), and v) payment of remuneration for the tasks performed. This effort to understand how digital platforms operate has allowed the authors to assess the various practical aspects of the relationship between platforms and workers. They present the findings of this assessment in a very useful summary table. In this way, they were able to highlight, among other things, that managerial and supervising power over workers are particularly prevalent on crowdwork platforms, which concern repetitive micro-tasks, and work-on-demand via app platforms, which concern "simple" activities at customer's premises such as meal delivery or passenger transport (De Stefano and Aloisi, 2018, p. 47).

It is often recognized that digital work platforms provide access to new sources of income for workers and remove barriers to market access through the flexibility they promote. However, if market efficiency so requires, the role of digital platforms, which these platforms see as supporting entrepreneurship,[24] will instead revert to that of exploiting workers. In particular, platforms could even create an ecosystem where workers are forced to engage in interactions that are barely profitable or unprofitable, and in working conditions and behaviours that may be detrimental to them (Choudary, 2018, pp. 6–8).[25] Ultimately, they could even contribute to "pulverizing the stable employment relationship". On closer examination, this particular model allows for the management of an external workforce, mobilized "on demand", which can respond to peaks in demand while placing the burden of fluctuations on the shoulders of workers. The advantage of platforms would then essentially lie in their non-compliance with labour and social security law regulations (De Stefano and Aloisi, 2018, pp. 14–15). It is obviously cheaper to rely on self-employed workers, who use their own equipment and bear all the costs associated with the activity (investment, maintenance, insurance and depreciation) (Srnicek, 2018, pp. 81–82 and 87–89).

However, this model can cost workers dearly. Some pay the price in terms of their physical and mental health, their economic security, and their voice not being heard. The insecurity in which many platform workers find themselves is

24. Ravenelle (2017, pp. 6–7) returns to the "Janus-faced marketing strategy" of digital platforms. Indeed, as they must win away market share, they will present themselves to "work consumers" as offering the unique, altruistic or practical experience of working with "individuals, not companies", and at the same time develop an entrepreneurial discourse to convince "work producers" to join them and offer their resources and free time "to the cause".

25. Choudary proposes a framework for understanding the exploitation of platform workers arising from design choices that platforms make. He discusses various factors such as unequal distribution of power, unfair allocation of risks, lower and more standardized skills, labour management mechanisms, reputation systems, etc. (2018, pp. 9–30).

increasingly documented.[26] Without going back over the difficult working conditions linked to social isolation and the various health problems that have been reported, or the loss of control over intensive or particularly inconvenient working hours, income insecurity in the platform economy is a concern that we are obliged to return to. The very competitive environment within the platform economy has impacted income levels, which in some cases have plunged below the national monthly minimum wage. It has led workers to suffer from massive income disparities, with particularly low incomes for those lacking a strong reputation gained through customer reviews and rankings. Beyond the amount of income that can be earned, it is also the unstable nature of this income that is considered as an issue within the platform economy. Platform workers have no formal job security. They can "lose their job" at any time, i.e. they can have their contract terminated at any moment without notice, and be replaced. Studies report unilateral arbitrary deactivations, whereby platform workers suddenly found their registration with the platform suspended, often with no explanation or warning.[27]

Of course, not all platform workers suffer from income insecurity to the same degree. However, it is difficult to establish a classification of typical profiles of platform workers, defined according to their personal and professional situations (both inside and outside of platform work), which would represent a kind of scale of adversity. There are a variety of digital work platforms, each with its own ecosystem, and it is clear that even on the same platform, worker profiles can vary greatly. Nevertheless, from the studies consulted,[28] we believe that two sets of platform workers can be distinguished. Broadly speaking, we feel that it is possible to identify a first set of fairly autonomous platform workers who value the flexibility offered by this type of work because they can count on sufficient and relatively stable resources from at least one primary professional activity or from a protective socio-familial framework. These workers enjoy a certain economic security, which goes beyond the income from the platform work performed and probably includes adequate social security coverage through the primary professional activity exercised or through derived rights. In contrast, analyses of the profile of platform workers consistently show that a number of other workers, who would constitute a second set, rely on this source of income to a significant

26. We have focused on certain studies covering a variety of countries and (types of) platforms. Each study has its own definition of platform work, some of which concern online as well as offline platform work, while others only relate to online platform work. In this article, we summarize the main results of these studies regarding working conditions within the platform economy, without systematically specifying the scope of the study that delivered them.

27. See, for instance, Wood, Graham and Lehdonvirta (2019); Berg (2016, pp. 553–559); Berg et al. (2018, pp. 49–78); Pesole et al. (2018, pp. 46–51).

28. See footnote 27.

extent or even solely to earn enough to support themselves and their families. As a result, they do not benefit from this economic security, but remain deprived of sufficient and stable resources and, a fortiori, of adequate social security coverage.

Effective exclusion of platform workers from social security

In principle, workers who are bound to an employer by an employment contract are subject to the social security regime for salaried workers.[29] An essential feature of the employment contract is the existence of a relationship of legal subordination. This implies a power of management and supervision, i.e. authority granted to the employer. Correlatively, it implies that the worker is obliged to obey the orders and instructions issued by the employer (Jamoulle, 1994, p. 112; Clesse and Kéfer, 2018, p. 180). The parties are free to choose the nature of their relationship, an employment contract or a services agreement, as long as it is in line with the actual performance of the relationship.[30] The question of whether the actual performance of the relationship reveals a relationship of authority is a complex issue, which has long been the subject of dense case law and detailed analyses in the Belgian literature. In 2006, the legislator wanted to provide some legal certainty, in particular by enshrining the general criteria of freedom to organize working time, freedom to organize work and the possibility of exercising hierarchical control in order to assess the existence of a relationship of authority.[31] In addition to this general principle of subordination, Belgian law presumes the existence of an employment contract, which it may or may not be possible to rescind, and extensions of the social security regime for salaried workers (full or partial coverage) to certain workers who are not bound as such by an employment contract (Wouters, 2019, pp. 203–206). By including certain workers in the scope of social protection of the salaried workers, including labour law protection for the most fortunate, the legislator has in fact recognized the insecurity in which these economically dependent workers have found themselves.[32]

In addition, natural persons who carry out a professional activity in Belgium (i.e. an activity carried out for profit and on a regular basis), outside the bonds of an employment contract or a status, are subject to the social security regime for self-employed workers. Self-employed persons are obliged to register with a social insurance fund and to pay social security contributions corresponding to a percentage of their professional income (i.e. less professional expenses and losses).

29. Law of 27 June 1969 revising the Decree-law of 28 December 1944 concerning the social security of workers, MB, 25 July 1969, article 1.
30. Programme Act (I) of 27 December 2006, MB, 28 December 2006, article 331.
31. Programme Act (I) of 27 December 2006, MB, 28 December 2006, article 333.
32. For analyses in Belgian law on the role of legal subordination and economic dependency in the employment relationship, see Gilson (2017).

Without going back over the mechanism of provisional contributions and the very limited case of exemption from contributions payments, it should be noted that the minimum final contributions during the first year of activity for self-employed persons who can be considered as "primostarters" amount to 371.65 euros (EUR) per quarter, and in the following years to EUR 719.68 per quarter (figures for 2021).[33] Where the self-employed habitually carry out another professional activity, for example as salaried workers whose working time corresponds to at least 50 per cent of a full-time job, they are considered as complementary self-employed workers and benefit from a special regime for social security contributions. In this case, the amount of the minimum final contributions is EUR 79.62 per quarter (figures for 2021).[34] Students also benefit from a special regime for social security contributions[35] provided conditions are fulfilled, leading in some cases to a total exemption from paying contributions.[36]

Social security coverage for salaried workers includes insurances for pensions, unemployment, work-related accidents and illnesses, family benefits, health care and sickness/disability. Social security coverage for the self-employed does not include unemployment insurance but only a "bridge" right (*droit passerelle*), mainly in case of bankruptcy or financial difficulties,[37] and there is no specific insurance for work-related accidents and illnesses. The social security regime for self-employed workers has undergone major changes since its introduction leading to an extension and a strengthening of the social security benefits available. In most of the social insurances concerned, whether it is the social security regime for salaried workers or that for the self-employed, there are conditions for the granting of social benefits. In particular, without analyzing these aspects in a systematic and detailed way, one can note that the entitlement to social security benefits can be subject to the following:

- a waiting period (*stage d'attente* – the insured person must have this capacity at the beginning of the social risk and, during a period preceding this risk, he/she must have paid social security contributions and/or completed days of work or equivalent days);

33. The percentage of the final contributions is 20.50 per cent on the part of the revalued professional income of the reference year not exceeding EUR 60,638.46, and on a minimum income of EUR 7,251.66 for primostarters, and EUR 14,042.57 in general (figures for 2021).

34. The same percentage (20.50 per cent) of the final contributions is foreseen for the complementary self-employed on the part of the professional income of the contribution year not exceeding EUR 60,638.46, and on a minimum income of EUR 1,553.58 (figures for 2021).

35. The same percentage (20.50 per cent) of the final contributions is foreseen for self-employed students on the part of the revalued professional income of the reference year from EUR 7,021.29 (figures for 2021).

36. Royal Decree No. 38 of 27 July 1967 organizing the social status of self-employed workers, MB, 29 July 1967; see INASTI website.

37. Some observers have noted the limits of this "bridge" right, see for example Dumont (2020).

• a career duration (the insured person must have paid social security contributions and/or completed days of work or equivalent days, but these conditions must not be fulfilled during a reference period preceding the beginning of the social risk);
• an uncompensated period (*délai de carence* – the insured person is entitled to social benefits only after the expiration of an uncompensated period during which the risk occurred and continues to exist;
• a duration for social benefits (the payment of social benefits is interrupted after a certain period of time, even if the social risk continues) (Van Limberghen et al., 2021).

Digital platforms consider workers as self-employed. An analysis of their business model and how they actually operate challenges this position, at least in the case of some of them. In their race for efficiency, digital platforms seek to control their basic structure in order to maintain control of interactions. Accordingly, some work platforms use procedures and techniques that clearly enable them to organize work and manage workers as optimally as possible. In this context, observing the "management by algorithm" practised on certain digital platforms, such as Deliveroo and Uber, but also on other work-on-demand via app platforms that concern so-called "simple" activities at the customer's premises, as well as crowdwork platforms which concern repetitive micro-tasks, sheds a different light on the existence of an authority relationship between the platform and its workers. The extent to which workers on these platforms are controlled and monitored leads us to question their classification as self-employed workers. We would argue that they should come under the social security regime for salaried workers because of the existence of an employment contract linking them to the platform. This is also true in the case of certain economically dependent workers for whom, due to particular factors such as the type of activities carried out or the manner in which they are carried out, the Belgian law presumed the existence of an employment contract (which it may or may not be possible to rescind).

Consequently, some platform workers in Belgium are effectively[38] excluded from access to the legally applicable social security coverage while being subject to the incorrect social security regime. The labour courts have not yet ruled on this issue.[39] Notwithstanding, three decisions of the Administrative Commission

38. In this article, "effective" refers to that which exists in fact or actuality.

39. Proceedings opened by the Brussels Labour Auditorate before the French-speaking Labour Tribunal of Brussels are pending against Deliveroo. See also the judgement of the French-speaking Business Tribunal of Brussels of 16 January 2019, against which an appeal has been lodged, in which the question of the social status of Uber drivers is dealt with incidentally. The Tribunal denied the existence of employment contracts. However, in its consecutive arrest of 15 January 2021, the Brussels Court of Appeal has decided to refer the case to the Constitutional Court by way of preliminary questions. For an overview of Belgian social law concerning Deliveroo and Uber platforms, see Verwilghen and Ghislain (2020, p. 533 and p. 570).

for the Settlement of the Employment Relationship (*Commission administrative de règlement de la relation de travail* – CRT), which is part of the Federal Public Service – Social Security (*Service public fédéral – Sécurité sociale*), allow Deliveroo and Uber workers to be recognized as linked to the platform by an employment contract. This Commission, as part of its preventive social ruling mission, decides on the classification of specific employment relationships. Without going through a systematic analysis of the said decisions and the question of presumptions, it is interesting to mention that the Commission takes into consideration a series of elements related to the above-mentioned management by algorithm. Remarked is that the workers concerned do not have any freedom to organize their working time and their work, and that the platform does indeed exercise hierarchical control. In the case of Deliveroo, the elements singled out are the procedures for booking work sessions, the consequences of not being available during the agreed time slots, the very precise instructions on dress and interaction with the restaurants to be frequented, the practice of monitoring by geolocation, and the possibility of terminating the relationship in the short term by excluding the worker from the platform. For Uber, focus falls on the lack of information about the customer and the trip to be undertaken prior to acceptance, the consequences associated with refusing trips, the possibility of being permanently excluded from the platform when beyond a certain rate of cancellation of accepted trips, the obligation to follow a given route, the prohibition on fixing the price of the trip, and precise instructions on the way in which trips must be undertaken.[40]

Even when digital work platforms use management by algorithm to a more limited extent in which case there may not be a conclusive link of authority between the platform and the workers, while no presumption applies, the question of effective exclusion from access to social security nonetheless remains. Left aside the issue of the lucrative and habitual nature of the professional activity allowing for coverage under the self-employed workers' regime, the difficulties appear most acute in terms of social security contribution obligations. When a self-employed person is not able to pay social security contributions, but cannot obtain an exemption, he or she has no access to effective social security coverage. The ecosystem controlled by digital platforms where workers participate in interactions that are barely profitable or unprofitable make it impractical or at least hypothetical for many of them to contribute to the social security system for self-employed workers. While they use their equipment and have to bear all the costs related to this activity, it is likely that their very limited

40. CRT, Decision No. 116 of 23 February 2018; CRT, Decision No. 113 of 9 March 2018; CRT, Decision No. 187 of 26 October 2020; see the *Commission administrative de règlement de la relation de travail* website.

income does not enable them to pay the minimum social security contributions, at least not in the long term. These considerations could also apply to the cases of reduced contributions as a complementary self-employed worker or student, since in principle the earned income is adjusted in proportion to a shorter working time, but in a less obvious way in view of the lower amounts of social security contributions foreseen.

In both the salaried workers and the self-employed social security regimes, the effective exclusion of platform workers from social security can be found not only in terms of access to coverage but also in terms of gaining entitlement to benefits. These are the hypotheses under which the conditions for granting social benefits cannot be met in fact because of specific work realities, i.e. requirements regarding waiting period, career duration or waiting period. Indeed, it is likely that the particularly unstable and insecure character of platform workers' income and occupation represent obstacles preventing them from gaining entitlements to benefits. A systematic and detailed analysis, which is beyond the scope of this article, would be useful to highlight all these potential situations of gaps in the content of coverage preventing platform workers from being entitled to benefits. While similar issues have been examined in an article that pointed out part-time workers' difficulties in meeting some requirements for the granting of benefits (Remouchamps, 2017), a recent large-scale study rigorously identifies the various shortcomings of the Belgian social security system in terms of effective and adequate social security coverage for salaried and self-employed workers. Taking into account the particularly precarious situations of platform workers, many of the potential gaps identified in this study will concern them directly and can be seen as indications of the difficulty platform workers have in accessing adequate social security benefits (Van Limberghen et al., 2021). This will impact platform workers differently, however, depending on their profile. Fairly autonomous platform workers who value the flexibility offered by this type of work because they can count on sufficient and relatively stable resources from at least one primary professional activity, or from a protective socio-familial framework, will suffer less from these legal shortcomings. In contrast, platform workers who rely on this source of income to a significant extent, or perhaps solely, to earn enough to support themselves and their families will remain deprived of effective and adequate social security coverage.

From the point of view of access to social security coverage or entitlement to social security benefits, it is clear that platform workers may be effectively excluded from social security. These developments raise the question of whether this effective exclusion does not impede the constitutional right to social security of platform workers and, consequently, if the legislator meets its obligation to respect this fundamental right.

Platform workers targeted by recent legislative initiatives

Formal exclusion of platform workers from social security

The *loi-programme* (Programme Act) of 1 July 2016[41] (law of 2016) introduced a special tax and social security regime for workers in the so-called sharing economy. During the drafting stage, it was indicated that several goals were pursued under this regime: fighting undeclared work; stimulating entrepreneurship and supporting this new form of the economy, which the government viewed as having the potential to create activity while putting in place a simple attractive framework; and introducing fiscal, social and administrative legal certainty for users and providers.[42]

Practically speaking, the law made provision for tax cuts on income resulting from services rendered by the taxpayer, outside the exercise of a professional activity, to third parties through an approved electronic platform.[43] Some of the conditions for the application of this reduced tax rate were that income may not exceed the annual amount of EUR 6,340 (2020 income year), that the electronic platform must be approved,[44] and that the services must be rendered to natural persons who are not acting in the course of their business.[45] From a social security perspective, the law stipulates that persons who carry out activities in Belgium that produce such income are not subject to the social security system for self-employed persons for the activity related to this income.[46] As a result, certain platform workers are formally excluded from social security.

41. Programme Act of 1 July 2016, MB, 4 July 2016.
42. Draft Programme Act, Explanatory Memorandum, *Parliamentary Documentation* (Chambre des Représentants de Belgique), ordinary session 2016–2015, No. 1875/001, p. 13.
43. Articles 90, 171 and 37bis of the 1992 Income Tax Code. A rate of 20 per cent and a flat-rate charge of 50 per cent are set, leading to an effective taxation on this income of 10 per cent.
44. A Royal Decree of 12 January 2017 (MB, 24 January 2017) set out the terms for approval of electronic platforms in the sharing economy. These are very summary and are limited to criteria that allow the identification of platforms, such as the fact that the platform is hosted within a company or a non-profit association constituted in accordance with the legislation of a Member State of the European Economic Area, which has its registered office, its principal place of business or its place of management or administration, within the European Economic Area, etc. The list of approved platforms is available on the website of SPF Finances (FPS Finance) website. Among them are Ubereats, Deliveroo, Happysitting and Listminut.
45. In principle, there is therefore no tax and social security exemption when work via digital platforms is provided to companies. It is therefore highly questionable whether this condition is met in the case of platforms that can be considered as "organizing work" (mainly through algorithms), since in this situation work would be performed for the benefit of the platform first, i.e. a business, even if the task has been ordered by a final consumer.
46. Article 5ter of Royal Decree No. 38 of 27 July 1967 organizing the social status of self-employed workers.

Despite criticism of the law of 2016,[47] within less than two years the legislator went further, by modifying this special tax and social security regime for platform workers and supplementing it with two other types of ad hoc status, for associative workers and for persons who provide occasional services to other citizens (law of 2018).[48] The aim was to allow the generation of additional, fully tax-exempt income, more broadly for anyone who already has a primary status (employee, self-employed or pensioner) as well as to workers in the sharing economy, within the limits set (Chambre des Représentants de Belgique, 2017, p. 149).[49]

Without going into the technical details of the regulation, let us note an essential element introduced by the law of 2018: the formal exclusion of a greater number of platform workers from social security. It was provided that, when a person worked under one of the three types of ad hoc status, in particular that of occasional services rendered between citizens and that of the sharing economy, which are of particular interest to us, they did not come under the social security system, either for self-employed workers or for salaried workers, and were not subject to labour law. In labour law, specific provision was made to exclude these categories from the application of all the most fundamental protective laws relating to protection of remuneration, labour relations, well-being in the workplace, working hours, etc.[50]

There was unanimous opposition to this latest legislative initiative. Both the employers' and trade union organizations within the National Labour Council (*Conseil national du travail* – CNT) and the legislation section of the Council of State (*Conseil d'État*) sharply criticized these measures during the parliamentary debates. As with the law of 2016, concerns were raised about the risks of

47. During the parliamentary debates, the bill was strongly criticized. First, the discussions focused on the legislative procedure: the law was adopted as an urgent matter, without prior consultation of the social partners even though it definitely fell within their scope of competence. Moreover, there was no prior substantial analysis, by the government, of the phenomenon, the issues at stake and the many possible impacts of the projected measures. Second, major concerns were expressed by deputies regarding the special tax regime and social exemption per se. They highlighted the obvious limits of the planned new regime: in particular, its impact on the financing of the social security system for self-employed workers, the inequalities of treatment it introduces between workers according to their status, the unfair competition it allows or the fiscal and social dumping it encourages, and the precarity that it institutionalizes (Lamine and Wattecamps, 2021; Chambre des Représentants de Belgique, 2016).

48. Law of 18 July 2018 on economic recovery and the strengthening of social cohesion, MB, 26 July 2018.

49. The two new types of ad hoc status covered an extensive list of activities. It is important to note that platform workers who do not fall under the status foreseen for the sharing economy, mainly because the platform through which they work is not approved, can claim the application of the status of services rendered between citizens if the conditions are met.

50. Article 26 and following of the Law of 18 July 2018 on economic recovery and the strengthening of social cohesion.

de-professionalization, unfair competition and the shifting of jobs from the regular labour market to these new schemes, as well as a clear breach of the principle of equality. More fundamentally, there was also concern about the exclusion from the application of social legislation as a whole. The social partners felt that such provisions undermined the very model of social protection built up over the years with different governments and the systematic improvements made to various special statutes, in both labour and social security law. Domestic workers, cleaning staff, artists, athletes, taxi drivers, childcare workers and casual workers were particularly affected. Another element challenged was the compliance of the new legislative provisions with European and international legislation on minimum requirements for workers protection.[51]

With regard to these two recent initiatives that specifically targeted platform workers, the legislator actually overlooked a long list of crucial issues (Lamine and Wattecamps, 2021). Some critical points have caught the attention of the Constitutional Court (*Cour constitutionnelle*), as we shall see in the next section, and of various actors consulted as part of the evaluation of the law of 2018.[52]

Denial of social status annulled by the Constitutional Court

An appeal for the annulment of the law of 2018 was lodged with the Constitutional Court by a number of trade unions and organizations representing both salaried and self-employed workers. Among the grounds put forward, these bodies argued that people who provided occasional services between citizens and those working via platforms approved under the new ad hoc status were favoured and competed unfairly with self-employed workers, given that they were completely exempt from tax and social law obligations for the same activities. Moreover, these persons were treated differently from salaried workers engaged in identical activities under an employment contract governed by the Law of 3 July 1978, particularly in light of the right to safe and fair working conditions and to fair remuneration, the right to social security, the right to freedom of association and the right to collective bargaining. A violation of the principle of equality was therefore postulated, with the workers' trade unions expressly calling for the combination of this principle with a long list of articles from international

51. Draft law on economic recovery and strengthening social cohesion, CNT opinion No. 2.065 of 29 November 2017, Parliamentary Documentation, Chambre des Représentants de Belgique, ordinary session, 2018–2017, No. 2839/001, p. 2 (executive summary); Opinion of the Council of State 62.368 of 1 December 2017, op. cit. p. 512.

52. See the report published in 2020 by the Federal Public Service – Social Security *Évaluation de la loi de relance phase 2: évaluation de la loi du 18 juillet 2018 relative à la relance économique et au renforcement de la cohésion sociale.*

instruments and European directives laying down the most essential rules in social law.

In a ruling issued on 23 April 2020, the Constitutional Court annulled the 2018 law in its entirety,[53] after finding a violation of the principle of equality and non-discrimination enshrined in articles 10, 11 and 172 (with particular application in tax matters for the latter article) of the Constitution. According to the Court, the differences in treatment introduced by the law of 2018 were not reasonably justified. It is regrettable that the Court did not rule on the plea of violation of article 23 of the Constitution, i.e. on the question of platform workers' fundamental right to social security. The main elements on which the Court based its decision are developed below.

First, there is the question of the justification given for the introduction of the specific tax and social security regime linked to the particular circumstances in which the activities are allegedly carried out under the different types of ad hoc status. Here, reference is made to the fact that for persons who render occasional services between citizens or via an approved electronic platform, the income from these activities is assumed to only be secondary. This is insofar as such services would be provided "occasionally and during free time", unlike employees who work "to support themselves and their families", or self-employed workers who pursue "a commercial aim and a profit-making policy". The Court unequivocally rejected this justification, considering that neither the condition that the person be already engaged in a primary activity (which, as it pointed out, was not imposed on workers in the sharing economy) nor the limitation of the amount allowed was relevant for determining the personal intention of the worker or for judging that such income was "secondary" for the worker.[54] In the Court's view, that reasoning was based on unfounded assumptions and did not meet the conditions attached to these statutes. Consequently, it could not justify the difference in treatment. The Court added that even if income was complementary to a worker's income, this did not justify a more "favourable" regime than income that was supposed to enable the worker to meet his or her needs. Finally, it noted that, for workers in the sharing economy in particular, there was a contradiction between the assumption that income was secondary and the aim of the original legislator (law of 2016), which was to use the creation of this status to stimulate entrepreneurship and offer a springboard to self-employed status.

53. Constitutional Court, ruling No. 53/2020 of 23 April 2020. As a transitional measure, the effects of the law were maintained for services provided up to and including 31 December 2020.

54. The condition that the activities must not be part of the professional activity of the person concerned does not in any way change this consideration, according to the Court.

Second, with regard to occasional services rendered between citizens, the consideration that such services comprised a limited number of activities offering a particular social value-added also did not justify the difference in treatment. It did not appear that all the activities listed by the law of 2018 would provide greater social value-added than any other activities. For workers in the sharing economy, the Court noted that there was no limitation on the nature of the services that could be performed. The Court therefore found that it had not been demonstrated that the difference in treatment was intended to support activities with a social value-added.

Finally, it was clear from the preparatory work that the legislator had intended to allow persons who were engaged in a primary activity to receive additional income without taxation, in order to discourage undeclared work. However, the Court stated that the objective of avoiding undeclared work did not justify complete exemption from social security and tax for the income received for the services concerned. In the Court's view, the conditions for applying the status of occasional service provider did not prevent a shift from the status of self-employed person to the status of occasional service provider. Thus, a measure aimed at preventing undeclared work created, on the contrary, the possibility of a shift from a status that was subject to social security and tax obligations to a status that exempted the person concerned from all such obligations. Those same considerations also applied to the status of workers in the sharing economy.

With regard to the latter category of workers, the Court noted that the legislator also wanted to create legal certainty for their social status. In that respect, it stated in particular that the lack of clarity as to the correct classification of the relationship did not justify legislative provisions providing for total exemption from labour law legislation, from any social security coverage and from tax obligations.

However, the Constitutional Court has not yet ruled on the law of 2016, which initially introduced a special tax and social security regime for workers in the so-called sharing economy. As a reminder, this law only provided for a reduction in taxation and exclusion from social security for self-employed workers, within the limits set. The question therefore arose as to whether this regime would rise from the ashes of the law of 2018. At the end of December 2020, a law was passed to this effect, confirming the regime of the law of 2016 with only a few adjustments.[55] The ruling of the Constitutional Court has therefore not led the legislator to question the formal exclusion of certain platform workers from social security, even if this exclusion is less extensive than under

55. Law of 20 December 2020 on various urgent tax and anti-fraud provisions, MB, 30 December 2020.

the law of 2018. Nevertheless, we believe that this regime remains problematic, including with reference to arguments developed by the Constitutional Court. In the context of this contribution, we question in particular whether it is relevant, in the name of the fight against undeclared work, to introduce a lighter tax regime and an exemption from the social security regime for self-employed workers, which has the effect of neutralizing all or part of the revenue that could have accrued to the tax and social security administrations as well as the recognition of social rights that could have been enjoyed by newly declared persons. More fundamentally, there are these questions: What legal certainty can the exemption of self-employed workers from social security provide, when sociological and legal studies show that many platform workers should in fact be considered as having an employment contract with the platform and do not meet the conditions for such exemption? Is it justified to remove workers from the scope of social security in order to encourage them to set up as self-employed workers? How does Belgium intend to comply with its international commitments in the field of labour law, including the collective rights of workers, and social security law with regard to platform workers? Notwithstanding these questions, of which the above is only a partial list, we do not see how the formal exclusion of platform workers from social security can be considered an appropriate response to the problem of the effective exclusion of platform workers from social security, as mentioned above.

Conclusion

This brief analysis of the Belgian social security system has shown how some platform workers are formally or effectively excluded from social protection, or granted access to inadequate social protection. In terms of access to social security coverage, considering the realities of the organization of work, which takes the form of management by algorithm on some digital platforms, this leads us to conclude that the workers concerned are effectively excluded from the social security system for salaried workers that should apply to them. Concerning access to social security coverage related to contribution obligations for self-employed workers and entitlement to social security benefits in both regimes, the realities of work – which reveal the insecurity of income within the platform economy affecting the most vulnerable workers – inevitably lead us to the conclusion that these workers are, or would be, effectively excluded from social security.

One question that may be raised is whether this effective exclusion of platform workers from social security can lead to a finding that the legislator has failed to meet the positive obligation to fulfil the constitutional right to social security. It

is to be recalled that the State must take legal, material and financial measures to ensure that everyone can effectively enjoy the right to social security. To compensate for the vague and programmatic nature of this right, the interpretation of the constitutional text with regard to international instruments that are binding on the Belgian legislator in social security law can be defended. A rigorous analysis of these provisions could then lead the legislator, who must drive progress in the field of social protection, to take the necessary positive action in favour of platform workers' right to social security. Most of these instruments enshrine the right to effective and adequate social security coverage. Belgian law must take these instruments into account when implementing platform workers' right to social security.

Consequently, the legislator should be taking action that is directly opposed to the two recent initiatives concerning platform workers. The law of 2016 provided for a reduction in taxation and an exception from the social security system for self-employed workers under certain conditions. The law of 2018 went much further, by introducing a broader exclusion from social security coverage for self-employed and salaried workers and from the application of labour law – in a ruling of 23 April 2020, the Constitutional Court annulled it in its entirety.

The fact remains that the formal exclusion of platform workers from social security persists, albeit to a more limited extent. This exclusion can be challenged – at least theoretically – on the basis of article 23 of the Constitution. The State has a negative obligation to respect the fundamental right to social security, i.e. it must refrain from infringing this right itself. In accordance with the obligation of principle not to regress or standstill, this means that the legislator may not significantly reduce the level of protection offered by the applicable legislation, without there being grounds for doing so in the general interest. Compared to the situation that prevailed when the special tax and social security regime for workers in the so-called sharing economy was introduced by the law of 2016, there has been a decline in platform workers' social coverage. This is potentially significant insofar as it may lead to exclusion from all social security coverage where a primary activity, for example, does not allow for coverage. The finding that the worker can always turn to social assistance is not relevant (Flohimont, 2008, pp. 87–88). Rigorous scrutiny of the grounds justifying the introduction of this derogation system according to the Belgian legislator should be allowed, in particular in view of the very incomplete formal motivation that prevailed (Dumont, 2019). The grounds given by the legislator – combating undeclared work, encouraging entrepreneurship and providing legal certainty – do not, in our opinion, stand up to such scrutiny. Even if the general interest can be accepted for these grounds, it is difficult to argue that the formal exclusion of platform workers from social security is appropriate and necessary

in pursuit of these grounds, and that it does not have disproportionate consequences for the rights of the persons concerned.

The COVID-19 public health crisis has highlighted the legitimacy and usefulness of a strong social security system providing adequate social coverage in the event of social risks that are likely to increase. There is no shortage of reports and appeals warning of the dramatic consequences for those who fall into precarity and poverty. The legislator has a role to play in providing security for workers excluded from social protection, as is the case for too many platform workers. There is even an obligation to do so under article 23 of the Constitution, because "providing security" should not mean helping companies to circumvent social law (Méda, 2021), but rather to guarantee the dignity of these workers as human beings.

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Platform work, social protection and flexicurity in Denmark

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Abstract Are online platform "workers" in Denmark effectively and adequately protected against social and labour market risks? This article discusses this fundamental issue in the context of the Danish labour market, which is known for having high levels of job insecurity but a rather generous social security system. The article finds that the Danish statutory social security system provides a necessary cushion against risk, but also identifies gaps in protection, which brings into question the system's effective coverage and the adequacy of benefits.

Keywords social security legislation, atypical work, platform workers, self-employed, coverage, gaps in coverage, Denmark

Introduction

The social security coverage of platform "workers"[1] of digital platform services is an important but thorny issue, which currently sits high on the European Union's (EU) agenda. Typically, work mediated through digital platforms is deemed more "insecure" or "flexible" than conventional forms of employment. For most workers, it does not constitute the provision of full-time work, and workers are not considered to be employees. Moreover, such work, which is

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1. The term "worker" in this contribution is used in its neutral form, encompassing all those who perform work mediated through digital platforms. Thus, it does not refer to the legal status of those performing through platforms, such as that of employees, the self-employed or a third category.

based on tasks or "gigs", is by its intermittent nature likely to rhyme with precarity in low paid types of jobs (Garben, 2019; Schoukens, 2020).[2]

The European Commission is working on two strands of action: a labour law pathway to enhance the social protection of platform workers, and a competition law pathway aimed at clearing the way for collective bargaining in the sector.[3] Yet, for the time being, the issue of the social protection of platform workers is mainly left to the EU Member States.

In Denmark, because platform-mediated work is not regulated as such, it must be addressed using the existing legal framework. Denmark is widely known for having a rather generous universal welfare state, a high level of employment supported by active labour market policies (ALMPs), as well as a high level of job insecurity; this is the so-called "flexicurity" model. Thus, on the one hand, the Danish system is characterized by labour market flexibility that facilitates the dismissal by employers of employees. On the other hand, Denmark has a comprehensive and generous social security system that includes unemployment benefits and ALMPs. This article investigates whether "platformity", the realities of online platform work, are compatible with the Danish "flexicurity" system. In particular, the article will test whether the flexicurity model provides inclusive and adequate social protection. Thus, the research question is whether platform workers are adequately protected against social and labour market risks.[4] More specifically, does the Danish welfare system provide platform workers with a cushion against risk? Are there identifiable gaps in social protection for platform workers?

In answering these questions, this article will use the EU Recommendation of the Council on Access to Social Protection as a yardstick (Council of the European Union, 2019). We will concentrate mainly on two of the four requirements[5] set out in the EU Recommendation: i) effective coverage in terms of access to social protection systems when applied to atypical employment, such as platform work, and ii) formal coverage in terms of access to social protection when applied to the self-employed.[6]

2. Platform work also raises important issues of workers' health and safety, which this article does not address. See Garben (2019) for a discussion of these issues, and for an analysis in the Danish context, see Hvidt (2021).

3. See the press release of the EU Commission of 30.6.2020 on the issue of collective bargaining for the self-employed (within the Digital Services Act Package) and EC (2020, No. 9, p. 2). See also the legislative train schedule of the European Parliament on an initiative to improve the working conditions of workers in the platform economy.

4. The focus of this article is on labour platforms as opposed to capital platforms. Some authors call for a different approach that includes "capital" platforms such as Airbnb; see Schoukens (2020) and Ilsøe and Larsen (2020).

5. The Recommendation's four requirements are for formal coverage, effective coverage, adequacy and transparency.

6. The Recommendation also addresses the issue of transparency and adequacy of protection, concerning which this article only addresses the latter briefly.

The volume of work mediated through online platforms, such as Uber (gig work delivered on location) or Amazon Mechanical Turk (crowdwork through teleworking), is still small in Denmark, but the labour market has changed irrevocably. Platform work involves at least three parties connected through an electronic application (an app), wherein the intermediary (the platform) matches providers with customers through the use of algorithms. The triangular provider-intermediary-client service model is already well-known owing to its use by temporary work agencies. However, the specific features that define platform-mediated work make it difficult to align such forms of work with the existing legal framework.

Characteristically, there is usually a lack of reliable data concerning the phenomenon of labour platforms. Denmark, however, has produced data using a survey undertaken in 2017 and replicated in 2019 (Ilsøe and Madsen, 2017; Ilsøe, Larsen and Bach, 2021). The surveys were based on approximately 18,000 citizens aged 15–74 randomly selected through the Danish Labour Force Survey as well as through administrative register data. The findings show that approximately 42,000 persons undertook work mediated through online platforms and 1 per cent of the population had reported income arising from labour platforms. The reported earnings from labour platforms is rather modest, indicating that either workers top up their income with other sources of revenue or are at serious risk of precarity (Ilsøe and Larsen, 2020). Thus, in 2017, 61 per cent of those generating income through labour platforms reported annual earnings of less than 3,330 euros (EUR) within the last 12 months. The respective figures for 2019 were similar (Ilsøe and Madsen, 2017, p. 40; Ilsøe, Larsen and Bach, 2021, p. 12). For a growing share of Danish platform workers, the income generated through such work is complementary and does not constitute the only source of income (Disruptionsrådet, 2018). Thus, "in 2019, 64 per cent of those active on a labour platform combined their online income with a conventional job compared to 49 per cent in 2017" (Ilsøe, Larsen and Bach, 2021, p. 11). In 2017, platform workers who did not have a conventional job were essentially students and the unemployed (Ilsøe and Madsen, 2017, p. 43). Both surveys (2017 and 2019) also document that many workers may be marginal to the labour market and thus vulnerable. Indeed, for those working on labour platforms, the 2017 survey finds an overrepresentation of fixed-term and temporary agency workers who have low earnings and low tenure, compared to employees with other types of employment contract (Ilsøe and Madsen, 2017, p. 43). According to the 2019 survey, "41 per cent of labour platform service providers belonged to the lowest income quartile" (Ilsøe, Larsen and Bach, 2021, p. 10). Thus, online platforms "especially attract groups with low individual risk protection in that they are more likely to be at the margins of the Danish labour market" (Ilsøe and Larsen, 2020, pp. 12–13). Finally, studies of the survey data find an overrepresentation of people younger

than age 29 among service providers (Ilsøe and Madsen, 2017 p. 42; Ilsøe, Larsen and Bach, 2021, pp. 11–12).

Concerning workers' legal status, many of those performing platform-mediated work are self-employed without employees (so-called "solo" self-employed). Yet, a few platforms qualify their providers as employees or agency workers. For example, the platforms Legalhero and Hilfr, respectively, act as employers for the lawyers and cleaners operating through their platforms. The platform Chabbers acts as a temporary work agency for its waiters under the EU directive for agency work, with zero hours contracts paid under the sectoral collective agreement in force (Ilsøe et al., 2020). Social security coverage in Denmark is to some extent connected to the status of the person performing the work along the binary divide of employee and self-employed, where employees are in principle (still) better protected. In practice, labour market regulation is usually geared largely to full-time standard employment and this is to some respect reflected in the conventional design of statutory social security protection. Thus, atypical employees might struggle to meet the minimum contribution and work history thresholds and conditions for eligibility to social security benefits. In contrast, social protection for the self-employed is generally left to the individual or to statutory social security benefits. Only on rare occasions will self-employed workers be covered by workplace agreements, and experience shows that this would most likely be seen as an illegal cartel under competition rules. Indeed the Danish Competition Authority ruled in August 2020 that agreements concerning minimum hourly fees for self-employed cleaners operating through platforms such as Hilfr and Happy Helper were illegal agreements that created a "price floor" and thus breached competition rules (Schmidt-Kessen et al., 2021).[7]

The Danish regulatory framework on social security protection has attempted to go beyond this binary split between employed and self-employed workers, to cover all workers regardless of status in respect of basic rights such as sickness benefits, maternity benefits and maternity/paternity leave.

The remainder of this article is structured as follows. The next sections explain the importance of collective agreements for workers' social protection in Denmark and considers the gaps in social security protection. We first address coverage for the most precarious employees. In turn, we look at the position of self-employed workers, who have some degree of protection. We then specifically consider the issues of the effective coverage and adequacy of social protection based on the identified gaps and the interplay with other support mechanisms, before offering final concluding thoughts.

7. See Decision of the Danish Competition Authority (*konkurrencerådet)* of 26.8.2020 and the decision of the same day concerning Happy Helper.

One of the first: A collective agreement for "platform cleaners"

Before analysing issues of legal and effective coverage, it is useful to look at one of the first collective agreements for platform workers, the Hilfr agreement for cleaners in Denmark.

In Denmark, more than 80 per cent of the labour market is covered by collective agreements (Ilsøe and Madsen, 2018, p. 15). These provide a level of protection against arbitrary dismissals, thus moderating the "flexible" part of the "flexicurity model" and guarantee agreed levels of pay (Munkholm and Schjøler, 2018, p. 143). Generally, they also include social security provisions that are more generous than the minimum floor set in the regulatory framework, such as guaranteeing full pay during a period of sick leave or maternity leave. Yet, this is not necessarily always the case, as demonstrated by the collective agreement entered into by Hilfr, a Danish-owned platform for cleaning services, and a trade union. As a business strategy, Hilfr branded itself as a socially sustainable platform and entered into one of the first collective agreement with its workers in the world. This was unusual in several respects (Ilsøe et al., 2020). From a labour law perspective, it is unusual as well as problematic in that the cleaner providing the service can choose between the status of salaried worker or self-employed, as objectively one must be either one or the other (Munkholm and Schjøler, 2018, p. 143). The collective agreement grants a right to a (basic) pension, which is financed in equal measure by Hilfr and the employee, and health insurance that is financed entirely by Hilfr. Unlike most collective agreements, the Hilfr agreement does not guarantee pay for absences due to illness, but only refers to the statutory right to sickness benefits and only for the scheduled working hours planned. Surprisingly and contrary to the statute, the agreement only entitles Hilfr employees access to sickness benefits after the second day of illness (Ilsøe et al., 2020). Thus, the afforded protection might be seen as lower than that provided by similar agreements in Denmark, but it may flow from the platform's position as a start-up company and levels of protection might be expected to increase over time (Ilsøe et al., 2020).

More negotiations concerning collective agreements covering employees of digital platforms might arise in the near future, but for the time being many platforms impose a status of self-employed on their "providers".[8] This status as a provider can be requalified by courts, appeal boards and other bodies if their situation is considered more comparable to that of an employee, essentially

8. For example, the employer organization for businesses (DE) has entered into a branch agreement for food delivery, that the platform Just Eat has acceded to.

because of their subordination to an employer.[9] In a separate example, the Social Appeal Board in Denmark ruled in a claim for sickness benefits that a freelance journalist was in fact an employee, as did the Supreme Court in another case concerning a freelance journalist in a tax matter.[10] Different bodies might, for issues falling within their competence, requalify the contractual relationship.

Unexpectedly, the Danish Competition Authority (DCA) assessed on its own initiative the compatibility of the Hilfr agreement with competition law.[11] It raised doubts as to whether members of one of the two groups of workers covered by the agreement, the so-called "Super-Hilfrs", genuinely held the status of employees. Thus, the DCA found that it was not clear that Super-Hilfrs were subordinated to the platform, as they could freely choose their working time and the platform did not supervise their work. The DCA also considered that Super-Hilfrs bore most of the economic risks, as the platform was not responsible for deficient work or delays in completing work undertaken by the Super-Hilfrs. The platform changed its rules, providing for more supervision of its employees, and reduced their economic risks to comply with the DCA's decision.

Gaps in employees' social security protection?

We turn now to the statutory protection of employees, which sets a minimum floor in terms of social security rights.

Among different types of workers, employees are in principle better protected against social and labour market risks, such as accidents at work or income insecurity in old age. However, more than a third of workers in Denmark are on atypical contracts, including part-time and fixed-term employees, freelance and agency workers. A recent study in Denmark of four sectors, including the cleaning and construction sectors, has shown that, in practice, agency employees, fixed-term employees and individuals working less than 15 hours a week encounter problems in accruing social rights and benefits in the applicable collective agreement (Mailand and Larsen, 2018).

Many online platform employees can be considered as atypical employees, in the sense that they do not have the status of a full-time employee and are not covered

9. This is what has happened in several EU Member States where supreme courts requalified an independent contractor operating on platforms as an employee.

10. Ruling of principle No. 16-03 from the Social Appeal Board of 25.7.2003 and ruling of Supreme Court U 2004.362 H. Such employee status was also attributed to freelance journalists in other cases by the competition authorities and by the labour court/arbitration courts.

11. See footnote 7.

by a collective agreement. This atypical status has implications for their access to social security coverage.

Another factor that influences coverage is the financing model used for benefits. Social security benefits for employees in Denmark can be tax financed (non-contributory) or contributory.

Non-contributory but labour market connected rights

Employees' access to coverage for some social security benefits is dependent not on the payment of contributions but on previous work history and current employment. This is the case for sickness benefits in Denmark. The Act on Sickness Benefits is broad in who it covers and many employees will receive compensation in the event of illness.[12] To be eligible, employees must fulfil the double condition of satisfying a minimum period of work history and be employed at the time of the illness. These conditions, however, can be problematic for employees of digital platforms. Under the Act, employers pay sick leave for the first 30 days for employees who have worked for at least a minimum of 74 hours during the 8 weeks preceding the illness. If this condition is not fulfilled, the municipality assumes the responsibility for paying the compensation. The municipality operates with a longer reference period and provides sickness benefits to persons who have been employed for at least 240 hours in the last 6 months, including at least 40 hours of work in five of those months.[13] Sickness benefits are calculated on the basis of the number of working hours completed, up to a ceiling. While most employees will receive sickness benefits paid at a rate equivalent to less than 100 per cent of their normal wages (Kristiansen, 2020, p. 397), this may not necessarily be the case for those on low income.[14]

Specifically, the rules of the Act on Sickness Benefits pose a challenge for employees who are without any guaranteed working hours, which is likely to be the case for most employees of digital platforms. Platform employees might not be covered against the risk of illness if they are not considered to be in employment when they fall ill. In one case, the Social Appeal Board ruled that an agency worker in temporary employment was not "in employment", the last day

12. Consolidated Act No. 107 of 2.2.2020 on Sickness Benefits.

13. It also provides benefits when the employers' obligations end after 30 days of illness, or before if the contract ceases within the first month.

14. Workers might enjoy better protection, such as a right to full pay from the applicable collective agreement, or if they fall within the scope of the Act on Salaried Work, cf. Consolidated Act No. 1002 of 24.8.2017 on Salaried Workers, which covers employment in the service sector such as in shop or office work, technical or clinical work or management. The Act has also special maternity provisions providing half of the salary for up to 14 weeks after birth. Yet, it is unlikely to apply to platform workers who have no guaranteed working hours.

of work having been completed some days before the illness and having no scheduled work thereafter.[15] Moreover, for platform employees, even when the work history condition is fulfilled and the person is considered in employment, the employer is only obliged to pay sickness benefits for the days for which the person has scheduled work. Despite this, in July 2020, the Social Appeal Board ruled that the municipality shall in such a situation pay sickness benefits for the days with unscheduled work within the first 30 days of illness and thereafter.[16] Thus, both the employer and the municipality might have responsibility (but not simultaneously) for the worker's right to sickness benefits within the first 30 days of illness. After this period, the responsibility lies with the municipality alone. This recent ruling might be read as a reinforcement of the social protection of atypical employees, which could also benefit platform workers with the status of employee. Yet, the financial burden might usually be expected to fall largely on the municipality, as platform workers typically have little in the way of future scheduled work. Furthermore, owing to the nature of their work, with their fluctuating connection to the labour market, platform workers might have problems satisfying the eligibility conditions of a minimum number hours of work as well as employment on the day of the onset of illness. Therefore, in such instances the financial burden will be borne by the municipality.

Atypical employees might also satisfy the eligibility conditions for coverage for the contingencies of pregnancy, childbirth, or the adoption of a child and have a right to maternity/parental leave and benefits. To be eligible, employees must meet the condition of a minimum 160 hours of work within the last 4 months, with at least 40 hours of employment per month in three of the four months prior to the onset of the contingency.[17] As for sickness benefits, maternity and parental benefits are calculated on the basis of the previous salary, up to a weekly ceiling. Employers, who continue to pay their employees on leave a salary in this period, can seek partial compensation from the municipality. As is the case for sickness benefits, workers with no guaranteed hours of work, such as employees of digital platforms, might not be eligible for maternity/parental benefits as they may be unable to fulfil the conditions of being employed at the onset of the leave period and meeting the minimum employment period threshold. For these benefits, there is no financial burden imposed on the employer as the municipality finances these through general taxes – unless the worker is covered by a collective agreement/individual contract that provides for a higher level of protection. Thus, unlike sickness benefits, the responsibility for the provision of maternity/parental leave and benefits normally lies with the municipality.

15. Social Appeal Board (*Ankestyrelsen*), ruling of principle 100-15 of 21.12.2015.
16. Social Appeal Board, ruling of principle 18-20 of 2.7.2020.
17. See case of the Eastern Appeal Court (*Øster Landsret*) of 15 June 1994, U.1994.763 on the rights to maternity pay for medicine students, who had shifts as nurses at hospitals.

Nevertheless, in practice, it is commonplace for collective agreements to provide for full compensation (of earnings) during periods of maternity leave (Kristiansen, 2020, p. 409).

Contributory social security rights

There are two contributory social security schemes: i) occupational pensions, when provided through a collective agreement; and ii) unemployment benefits, which are voluntary. Occupational pensions, when provided by collective agreements, are compulsory and are financed jointly by the employer and the employee. Part-time employees and especially marginal part-time workers (working less than 15 hours per week), face the risk of poverty at pensionable age as the replacement rate of earnings-related occupational pensions and the universal state retirement pension[18] might not be sufficient to cover their household expenditure needs (Mailand and Larsen, 2018, pp. 30–31).

Unemployment insurance is provided through a state-subsidized voluntary scheme financed by employees' contributions. Normally, employers do not contribute on behalf of employees. Given the reality of Danish "flexicurity", wherein it is relatively easy for employers to lay off workers, it is puzzling that contribution to the insurance scheme is voluntary. Unemployment benefits are paid proportional to the previous salary, up to a ceiling. Benefits are thus lower than previous earnings, especially so for workers with higher earnings. Part-time workers can choose to be part-time insured, which means a lower contribution rate as well as a lower benefit replacement rate. Eligibility to benefits is conditional upon one year of membership of an unemployment fund and upon meeting a threshold level of earnings in the previous three years. On meeting the conditions of eligibility, entitlement to benefits lasts for a maximum of 24 months spread across any 3-year period.

The unemployment insurance scheme is compatible with part-time work, and it has recently become more flexible in terms of its eligibility conditions. As such, it might thus meet the needs of those performing work mediated through platforms. Following a 2018 reform aimed at accommodating increased forms and levels of atypical work, eligibility – which was previously tied to fulfilling a period of economic activity as an employee or as self-employed – has become based on previous income regardless of work status. It can thus include earnings from platform work regardless of status, but capital income and income from

18. The state retirement pension (*folkepension*) is a universal non-contributory (tax-financed) pension provided to residents of Denmark at retirement age who satisfy a residency test. According to SSA and ISSA (2018), the pension consists of an earnings-tested basic pension and an income-tested supplemental pension.

remunerated hobbies and the like do not count for eligibility purposes.[19] Yet, some forms of platform work might not meet these conditions. Indeed, in a decision of May 2020, the Centre for Unemployment Insurance Complaints found that transporting goods and persons in one's own car was salaried work, but nonetheless could not be taken into account to fulfil the required earnings threshold. Specifically, such work did not fulfil the additional requirement of taking place under usual employment conditions, as the work and salary conditions departed considerably from those specified in the corresponding collective agreements.[20]

Gaining access to unemployment benefits is one of the biggest challenges facing atypical employees, who are among those most in need of it. They might face difficulties in fulfilling the income requirement and, more importantly, the cost of contributing to an insurance fund might be too high given the modest salary. As we will see below, the same is true for those platform workers who have the status of self-employed.

Social protection for the self-employed

Recent reforms have attempted to accommodate labour market modernization and to enhance the social security protection of the self-employed, assimilating them to an important degree with employees.

In its Recommendation on Access to Social Security, the European Commission initially proposed that social protection for the self-employed should be mandatory, with the exception of unemployment benefits (Schoukens, 2020). Yet, the final version of the Recommendation only makes it voluntary, with the possibility of making it mandatory "where appropriate" (Council of the European Union, 2019, para. 8(b)). This decision runs contrary to the very essence of social protection, aimed at social redistribution, equal protection and an equal playing field across groups (Schoukens, 2020). As we discuss, one the one hand, the Danish system offers protection against basic risks that is more limited for the self-employed. On the other hand, it places the self-employed on an equal footing with employees in respect of unemployment insurance. This follows from statutory provisions, which are common to both employees and the self-employed.

With regard to protection against health risks, the Sickness Act provides for a minimum level of coverage, which is lower than that for employees, unless the

19. See Act No. 1670 of 26.12.2017 on Unemployment Insurance and ruling of principle 17-16 of the Social Appeal Board of 17.5.2016. There is a requirement of earning at least EUR 30,446 within the last 3 years with a maximum of of EUR 2,537 income per month counting for the purpose of the calculation.
20. Decision of Center for Klager om Arbejdsløshedsforsikring of 20.5.2020.

self-employed insure voluntarily. The Sickness Act covers the self-employed, provided that they have had an economic activity for a minimum period of 6 months within the last 12 months. In addition, the activity shall amount to at least half of the normal weekly hours pursuant to the collective agreement in the sector. Apart from these thresholds, there are three major difficulties for the self-employed in fully accessing sickness benefits. First, compensation is limited, as it only starts from the tenth day of illness.[21] The self-employed can increase their coverage, however, by affiliating to a public insurance scheme.[22] Second, self-employed workers cannot include income earned as an employee in order to meet the income threshold, which can potentially be a barrier to accessing compensation.[23] Third, the level of benefit is based on previous revenue, up to a weekly ceiling. The self-employed can secure at least two-thirds of the maximum weekly benefit by affiliating to an insurance scheme proposed by the municipality.

The self-employed also enjoy a right to maternity and parental leave and benefits on a similar footing as employees.[24] They must satisfy the same thresholds as for sickness benefits, including within the month preceding the claim for maternity benefits. The benefits are essentially calculated on the basis of previous income derived from their business. If the person has been self-employed for less than 6 months, income from previous work as an employee is included. The scheme is flexible as it is possible to return to work part-time (up to 50 per cent) during the leave period and retain receipt of part of the benefits.

A further crucial issue for the self-employed is protection against the risk of loss of economic activity. Like employees, the self-employed can choose to contribute to an unemployment fund, either on a full-time or a part-time basis. As mentioned, the scheme covers all unemployed workers, regardless of status, where the person has earned income above a minimum threshold over the last 3 years, and where income, both, from self-employment and employment is recognized.[25] The ministerial guidelines for self-employed workers explicitly state that income earned from activities in the so-called "sharing economy" count for the purpose of eligibility to unemployment benefits, provided that the person has received an income/honorary subject to taxation irrespective of status.[26] Thus, it is possible for self-employed workers to be insured against unemployment and

21. Act on Sickness Benefits and Social Appeal Board, decision of principle 12-20 of 13.05.2020.
22. See Chapter 16 of the Act on Sickness Benefits.
23. Article from the Association of Journalists.
24. See Consolidated Act No. 235 of 12/02/2021 on Maternity Leave and Benefits and Ministerial Regulation No. 853 of 17.09.2019 on establishing the work condition and calculating the maternity benefits.
25. Consolidated Act No. 199 of 11.3.2020 on Unemployment Insurance, § 53.
26. Guideline No. 9808 of 26.9.2018 and Brief from the Danish Labour Market Agency (STAR) of 14.6.2018 on the sharing economy and the unemployment benefits.

the person can choose to supplement low levels of income with supplementary unemployment benefits. However, self-employed workers who have an economic undertaking as a main occupation are only entitled to unemployment benefits upon termination of the latter.[27] This condition is a major barrier to effective access to unemployment benefits. For platform workers, who may have low earnings, another major barrier is the financial cost of paying contributions to the unemployment fund.

Protection against old-age risk is the Achilles' heel of coverage for the self-employed, especially for those with low or unstable levels of income. As discussed, occupational pensions are not mandatory in Denmark and the schemes are negotiated by the social partners in the form of collective agreements. Yet, citizens have access to a universal state pension (*folkepension*) if they can document 40 years of residence in the country since age 15 at retirement age (currently age 67). The universal pension does not reflect the level of previous income and is, for most persons, not sufficient to ensure a decent living. Thus, a number of trade unions have taken the initiative to offer pension schemes to the self-employed that are administered by private pension funds or insurance companies. These private pension schemes are similar to the occupational pensions that workers might be entitled to, pursuant to collective agreements (Ilsøe and Madsen, 2018, p. 22).

Finally, another major difference between employees and the self-employed relates to the protection afforded for occupational diseases and work injuries. The Act on Occupational Diseases covers employees only, and requires mandatory insurance by the employer. The statutory scheme thus omits self-employed workers unless they have chosen to affiliate to the scheme.[28] Significantly, the definition of the concept of "employee" is generous and broader than that used in other contexts, including, for example, unpaid work and temporary and casual work. The aim is to cover as many workers as possible.[29] Following from case law, it includes, for example, freelance, solo self-employed and other self-employed workers who can be assimilated with employees and agency workers.[30] Yet, the criterion of subordination is central and, at the time of writing, it is uncertain whether it might include all those performing work mediated through platforms. A pending legal case concerning a person injured while delivering food for the platform Wolt (Box 1) might permit greater clarity on this issue (Junker, 2021).

27. Ministerial Regulation No. 1417 of 16.12.2019 on self-employed and the system of unemployment benefits.

28. A self-employed worker and his or her employed spouse have thus a right – but not a duty – to be insured.

29. Consolidated Act No. 376 on Occupational Diseases of 31.3.2020.

30. For example, Social Appeal Board of 1.12.2009 concerning a lawyer, ruling of the Eastern Appeal Court of 9.10.1995 concerning a builder and the Social Appeal Board decision of principle of 2010-08-31 on an agency worker.

Box 1. The pending Wolt legal case

A Wolt bicycle courier fell and, as a result of a partly but permanently damaged elbow, could not work for 6 months. The courier received EUR 346 in compensation from the private insurance company from which Wolt had bought insurance cover against occupational accidents. The trade union 3F complained before the competent authority to have the case taken to court. According to 3F's legal advice, Wolt acted as the employer as the courier exclusively provided services to the platform and was acting under its instructions.

As in the Wolt case, most labour platforms affiliate with a private insurance scheme covering self-employed workers providing "gig" work mediated through the platform. However, as shown by the Wolt example, private insurance schemes offering insurance against occupational accidents might not provide the same level of coverage as the statutory scheme, leaving workers under-protected (Olsen, 2018). This is the case of the insurance scheme subscribed to by the platform Happy Helper, both in terms of the scope of coverage and the level of compensation. Thus, a Happy Helper cleaner is entitled to compensation for a permanent injury, and for reasonable and necessary treatment within the first 12 months after an injury, such as for a broken bone, or accident.[31] Yet, this protection is subject to conditions, with compensation payable up to the maximum of EUR 66,666. The statutory social security protection is more comprehensive, as it covers a wider range of treatments and, in addition to compensation for permanent injury, grants compensation for loss of earning capacity, a grant in case of the death of the insured, compensation for loss of capacity as a provider, and compensation for the eligible survivors. Furthermore, whereas the private insurance scheme only guarantees lump-sum payments, the statutory scheme also secures continuous payments for loss of work/earning capacity and does not have a payment ceiling. Such discrepancy in coverage is also evident in the previously discussed collective agreement entered between the cleaning platform Hilfr and a trade union, where the contribution paid by Hilfr to the insurance scheme for the coverage of freelance cleaners is lower than the contribution rate paid to the statutory scheme in respect of cleaners with employee status.

To sum up, there is a political willingness to grant the self-employed a similar level of social protection to that of employees in respect of basic risks. This is in accordance with the EU Recommendation requiring formal access to social

31. Factsheet concerning the insurance agreement between Tryg and Happy Helper.

protection (Council of the European Union, 2019). In principle, self-employed workers, like employees, are automatically insured against the contingencies of illness and parenthood and likewise have access on a voluntary basis to state-subsidized unemployment insurance. Thus, with the exception of coverage for work accidents and occupational diseases, the statutory schemes formally guarantee to some extent a level playing field across different groups of workers, offering similar levels of protection (Schoukens, 2020, p. 447). Yet, in practice, some of the eligibility requirements might be difficult to meet, which poses the question as to whether the coverage is effective as well as adequate. It is to these questions that we now turn.

Effective and adequate social protection for platform workers

In principle, platform workers regardless of their status enjoy some protection against basic social and labour market risks. Typically, this social protection is mainly financed through general taxes or by the workers themselves, with little in the way of contribution from the platform. Furthermore, there are identified gaps in the statutory support by the social security system, which raise concerns about the nature of the effective coverage and the adequacy of the benefits provided by the Danish social protection system.

Mind the gaps

Essentially, we can identify three important gaps in social protection. The first gap concerns the eligibility criteria. While the social protection system has gained in flexibility in recent years, this does not cover all benefits and situations. For sickness, maternity and parental benefits, the work history and employment condition threshold for access to coverage is not high, but it might still be difficult to meet for those who combine work as an employee with an activity as self-employed, as in principle they cannot combine their hours. Thus, the legal status of the provider matters and it might disqualify many whose work is mediated through labour platforms. Again with regard to sickness, maternity and parental benefits, the second eligibility criterion of being in employment at the time of the onset of the risk causes major difficulties for those platform workers with the status of employee. Finally, and regardless of the fact that the unemployment benefit system has gained in flexibility, and where the combined earnings from a patchwork of economic activities can open the right to benefit, earnings from some forms of platform work are still not recognized.

The second gap in protection concerns access to unemployment benefits. While there is legal access to unemployment insurance, this is voluntary for employees and the self-employed alike. As earnings from platform work are relatively low for many workers, this might make the cost of contributing to unemployment insurance unaffordable, irrespective of the state subsidy. In addition, the eligibility conditions of being a member of the unemployment fund for at least one year and satisfying the minimum earnings conditions for the previous three years, act as important barriers to effective coverage for platform workers.

Finally, while self-employed workers might have formal legal access in respect of coverage for basic risks (as addressed above), the adequacy of their effective coverage, for example, under the Act on Sickness Benefits might be compromised because the right to benefits for the self-employed commences on the tenth day of illness; unless they affiliate with a public insurance scheme. The same is true in respect of old-age protection as well as protection against occupational diseases and work accidents. The former is important in a Danish context, as occupational pensions are the domain of the social partners and collective agreements.

In this regard, collective agreements undeniably protect employees in respect of job security, level of pay and working conditions, but might be less efficient in terms of the social protection of employees of digital platforms, as the Hilfr agreement shows. The Super-Hilfrs are entitled to statutory cover only in respect of sickness benefits administrated in accordance with the law and only in respect of scheduled working hours. It remains to be seen how this will be applied in practice. Furthermore, while Super-Hilfrs accrue a right to a pension, the future value of the pension benefit is likely to be relatively low, not least because the employer is contributing initially 4.1 per cent of the salary and only after the worker has completed 320 hours of cleaning work within the last 3 years.

Thus, there are important weaknesses in Danish social security coverage for atypical forms of work, such as platform work. Some risk contingencies, however, are better covered than others. As mentioned, old-age risk is mitigated by a statutory universal state pension (*folkepension*) for those who have resided in Denmark at least 40 years. Furthermore, the universal social assistance system should ensure a minimum level of income security. Social assistance might provide income security in periods of unemployment for those whose work is mediated through labour platforms and who are not voluntarily insured by an unemployment fund. Yet, social assistance is equally subject to strict eligibility conditions and is reserved for those who cannot provide for their own needs, who do not have any household savings or assets, and might exclude many immigrants.[32] Moreover, the conditions of access to social assistance have

32. Act of an Active Social policy mentioned above.

tightened over time (Mailand and Larsen, 2018), which raises the question as to whether social assistance effectively protects the most deprived.

Of course, the low levels of income and economic activity of some platform worker might encourage dependence on social assistance benefits. In such cases, social assistance might function as a part-time unemployment benefit, and platform work might function as middle ground between unemployment and the world of work.

Labour platform work as a labour market entry point

Labour platforms seem to "especially attract people who seek to gain a foothold in the Danish labour market", such as unemployed workers, young persons and immigrants (Ilsøe and Larsen, 2020, pp. 16–17). It also follows from the 2017 study (Ilsøe and Madsen, 2017) that many of those proposing gig and crowdwork are in receipt of public financial support, such as students in receipt of study grants and those receiving social assistance or unemployment benefits.[33]

Social assistance might be compatible with platform work as long as the recipients are fit and available for work and do not refuse proposed work and activities on these grounds.[34] On the one hand, all income received while on social assistance is deducted from benefits, thus reducing the incentive to accept platform mediated work.[35] On the other hand, recipients of social assistance have to document 225 hours of unsupported work after one year to keep their benefits payable at the full rate. Work through platforms might count for fulfilling this work requirement. Indeed, the Danish Labour Market Agency affirms that the requirement can be met through work as an employee, a self-employed worker, or a combination of both, and that it is irrelevant whether the work has been mediated through direct contact or through a platform.[36]

Platform work might also be compatible with the status of insured unemployed. Furthermore, it follows from statutory provisions that the municipality provides

33. In theory, EU citizens in Denmark might even be able to use platform work to qualify as an EU worker or self-employed, and thus have equal access to all social advantages including students grants, cf. case from the ECJ, C-46/12, *LN*. Yet, Ilsøe and Madsen (2018) reported that, in practice, EU citizens providing services through platforms had problems being recognized as EU workers or self-employed and thus access study grants.

34. Yet, self-employed workers with an undertaking might have problems accessing social assistance in practice as they have to document that there is no activity in their undertaking at the time of the claim and in most cases that they have gone bankrupt.

35. See, for example, decision of principle of the Social Appeal Board No. 35-19 of 3.7.2019. Yet, recipients of social assistance are entitled to retain some income, up to a ceiling.

36. To be classified as a self-employed worker, the worker must have an economic activity that corresponds roughly to 20 hours of work per week as an employee, and social assistance should not have been received in this period.

sickness and maternity/parental benefits for the insured unemployed, trainees and other categories marginal to the labour market if they are enrolled as jobseekers prior to the materialization of the risk and available for work. Thus, platform work might function to help bridge the gap between work and unemployment, especially since the unemployment insurance system enables beneficiaries to be covered while in part-time economic activity and also insured against basic risks during their unemployment period. Workers, who are unemployed but also engaged in part-time work, might be entitled to supplementary benefits (part-time unemployment benefits; known as *supplerende dagepende*) to top up their income from the economic activity. The period during which this is allowed has been reduced to avoid an indirect salary subsidy by the State. Since 2008, those in part-time work can receive benefits for up to 30 weeks within a 104-week period. Since 2018, self-employed workers can also have an economic undertaking while receiving benefits for a 30-week period. After the 30-week period, it is possible for the unemployed worker to acquire a new right to supplementary benefits. This is achieved upon recommencing full-time work that satisfies the criteria of a minimum of 146 hours of work during 6 months within the last 12 months, or having earned a minimum of EUR 30,666 (gross) in the previous year without receiving benefits.

Of course, platform workers do not necessarily perform their activities with the same continuing intensity and thus do not generate the same level of income as do standard employees and self-employed workers, and their right to reacquire supplementary benefits might thus be compromised. However, the flexible nature of platform work in terms of working time and periods makes it easily compatible with the eligibility requirement of being available for work during the period of the payment of supplementary part-time unemployment benefits. Likewise, the authorities seem to have a broad definition of work, which encompasses income generated through capital platforms such as renting out one's car through a platform.[37] In a 2016 case concerning the rent of a person's own car to users through the platform GoMore, the Centre for Unemployment Insurance Complaints considered that the person was exercising an economic activity as a self-employed person.[38]

Finally, unemployed workers can reacquire a right to unemployment benefits after completing 1,924 hours of work, which, in principle, could include work mediated through online platforms. In practice, using hours of work from platform work to reacquire entitlement might not be advantageous to the claimant, as the benefit is calculated using the average income of the 12 "best

37. Capital income as such and income from leisure activities will not count for the purpose of eligibility.

38. Decision of Center for Klager om Arbejdsløshedsforsikring of 13.10.2016.

paid" months within the preceding 24-month period. Given the expectation that average earnings from platform work will be low over the entire period, the unemployment benefit for the new period would also be low.

To sum up, workers who are insured unemployed might be able, in principle, to maintain/reacquire access to benefits through platform work. Furthermore, such "unemployed" platform workers may be effectively protected against basic risks. Yet and more generally, even if workers fulfil the eligibility thresholds and conditions set out in law, this raises the crucial question of the adequacy of protection for those with low incomes. Indeed, the focus in most EU Member States and in the EU Recommendation on Access to Social Protection is still on work-related risks and only guarantees protection in respect of the (limited) work period expected/provided. Thus, it does not aim at guaranteeing adequate minimum benefits that are structurally of a higher level than the income upon which the contributions are based, calculated or assessed (Schoukens, 2020, p. 447). The Recommendation calls for effective coverage that acknowledges the reality of fragmented insurance records and work histories, but remains silent on what is a decent level of social protection (Schoukens, 2020, p. 448). In respect of part-time work/economic activity, the general rule in Denmark is to reduce accordingly the value of earnings-related benefits. This is true, for example, in respect of sickness, maternity and unemployment benefits, unless the applicable collective agreement has more favourable conditions. In respect of earnings-related occupational pensions, this means that part-time workers are unlikely to receive the same level of pension as full-time workers.[39] Mitigating old-age risk might be an area where the Danish system offers protection that is more adequate. As mentioned above, Denmark's universal statutory state pension (*folkepension*) covers all long-term residents and provides a basic tier of old-age coverage that is not dependent on contributions or previous work history. However, the value of the pension is low, the retirement age is rising (currently age 67) and the system is disadvantageous to those immigrants who do not satisfy the residency test. With the exception of the universal state retirement pension and study grants, there is not much interplay between social security *stricto sensu* and the other social protection schemes that are not related to work, which brings into question the adequacy of the social protection available to persons with lower incomes.

39. Furthermore, in most cases, it is difficult to prove a discrimination of part-time workers. Thus, in 2018 the Supreme Court ruled that there was no discrimination of part-time and fixed-termed lecturers at university level who were, unlike their colleagues in an open-ended and full-time contract, not entitled to an occupational pension. The Court found that the positions of the two groups were not comparable as the former did not have any research obligation, cf. case, *Akademikerne v Roskilde Universitet* of 17 April 2018. See also case *Centralorganisationen af 2010 (CO 10) v Det Kongelige Teater* of the Danish Supreme Court of 21.2.2021 on the situation of choir singers at the Royal Opera.

Concluding observations

To conclude, the Danish social protection system has some difficulty in assuring income security to those whose work is mediated through online platforms. While acknowledging the Danish system's flexibility and adaptability, this article has identified gaps, which need to be addressed to ensure effective coverage for platform workers. The effects of the economic crisis resulting from the COVID-19 pandemic, which have negatively affected those in atypical work, including platform workers, confirm this. Indeed, a high number of agency workers lost their jobs in the first wave of the pandemic (Larsen, Ilsøe and Bach, 2020, p. 42). As an innovative response, the Danish government attempted to tailor support packages for some atypical workers, but very few appear to have benefitted.[40] Thus, the salary compensation scheme directed to employers affected by the pandemic and the lockdown covered employees who were employed part-time with guaranteed working hours, but did not extend to fixed-term employees with guaranteed hours or to employees with no such guaranteed hours. In contrast, the government did tailor help packages especially for certain solo self-employed workers who were forced to cease their activity due to the lockdown. For example, it proposed a help package for small business owners who could document a more than 30 per cent loss of income, and a package for freelance workers with a maximum monthly income of EUR 1,330 and a yearly maximum income of EUR 107,000 (Larsen, Ilsøe and Bach, 2020, pp. 40–41).

At present, there may be political momentum within and across the EU Member States to address the social protection needs of vulnerable workers, and especially those who perform essential roles in society. Different avenues are proposed in this direction, such as extending the concept of worker to include solo self-employed workers who provide personal work and do not comprise an undertaking (Countouris et al., 2020). This is a path that has recently been taken by several national courts at the highest level concerning *Uber* drivers and crowdworkers.[41] The broad definition of the concept of worker, which has been adopted in some instances by the European Court of Justice (ECJ) might here compel or inspire national authorities (Jacqueson, 2020).[42] Yet, the case law is not clear-cut, and the Court's recent order in Yodel, concerning a delivery platform, points in the opposite direction. The discretion left to the courier to

40. In response to the pandemic, the right to unemployment benefit and social assistance have also been extended and a job rotation scheme has covered (previously) uninsured workers provided that they became insured.

41. See for example, for France, case No. 374 of 4.3.2020 – Cour de cassation – Chambre sociale; for the United Kingdom, Supreme Court, *Uber BV and others (Appellants) v Aslam and others (Respondents)* of 19.2.2021, [2021] UKSC 5; for Germany, Bundesarbeitsgericht, Urteil, 1.12.2020 – 9 AZR 102/20.

42. See, for example, C-232/09, *Danosa*, ECLI: EU: C:2010:674; C-316/13, *Fenoll*, ECLI:EU: C:2015:200 and indirectly C-434/15, *Uber Spain*, ECLI: EU: C:2017:98.

choose and refuse tasks mediated through the Yodel platform was likely to indicate a lack of subordination, disqualifying the courier from being considered as an employee and excluding the courier from being covered by the EU directive on working time (Jacqueson, 2020; Hvidt, 2021).[43] Regardless, the recently adopted directive on transparent and predictable working conditions with its ambitious personal and material scope pushes for a basic level of universal protection across all contractual forms of employment. It might thus support a broader reading of the status of employee, which could encompass platform workers and grant them some substantive rights such as a minimum guarantee of working hours (Bednarowicz, 2020, p. 426; Garben, 2019, p. 15).[44] Another pathway for the improved protection of platform workers is to allow such workers to defend their position through collective agreement (Schiek and Gideon, 2018; Schmidt-Kessen et al., 2021). While this would improve job security and pay, it might not necessarily lead to much better social protection, at least in the short term. Therefore, in the context of the Danish system of flexicurity with its rather generous state-supported welfare system, a way to strengthen further the social protection of the growing atypical working population would be to seek to better accommodate workers with fragmented and intermittent work histories and low average earnings.

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Accommodating platform work as a new form of work in Dutch social security law: New work, same rules?

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Abstract In the Netherlands, the social security rights of platform workers have still not been formally defined. At present, the level of social security protection accorded to all workers is derived directly from the labour law qualification. In the continuing absence in the Netherlands of specific legislation for platform workers, specifically as regards labour law and social security law, the existing legislation is steering. This means that the platform worker is either included using the status of employee with the corresponding extensive protection package, or the status of self-employed with limited social protection. For the majority of platform workers, this second option is applied to date. Nevertheless, recent developments point to possible improvements in the social security position of platform workers in the Netherlands.

Keywords atypical work, platform workers, social security legislation, coverage, self-employed, social protection, labour market, Netherlands

Introduction

Platform work offers multiple opportunities for the platform worker, as well as for the consumer and the platform (SER, 2020; TNO, 2020; WRR, 2020). For the

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platform worker, for example, it is often an easily accessible way to generate income. Even for those who are not (yet) on the job market, this form of work can be a suitable source of income that leads, among other things, to greater financial independence. In addition, flexibility is a very attractive factor, and autonomy is often taken into consideration when considering switching to platform work.

In addition to the positive aspects, there are negative aspects associated with platform work (SER, 2020; TNO, 2020; WRR, 2020). These negative aspects are not always immediately apparent but can have a longer-term bearing on workers' well-being. This mainly concerns the lack of clarity and uncertainty about the status of the platform worker, low levels of income and limited protection in labour law and social security legislation.[1] In this contribution, we focus precisely on the latter element. The main research question is as follows: what is the state of affairs of platform workers in the Netherlands with regard to social security protection?

To start to address this question, as of 2020, the Netherlands does not yet have any specific labour or social security legislation for platform workers. The main reason for this has been an assumption that this form of work was – and would remain – marginal. This assumption remained unchallenged for a considerable period. It was also assumed that the labour market status of self-employed best suited those who were attracted to this new form of work.

However, the strong growth in the size of the group with self-employed status[2] – sometimes owing to the emergence of platform work, but also in the classic form of this assignment – has forced the Dutch government to take action. To secure the position of these non-standard workers and ensure decent income protection (in times of need), it is no longer possible to leave such decisions to the market – i.e. the platforms and the self-employed workers themselves.[3] In the Coalition Agreement of October 2017, the Government promised to investigate the options for wider and improved social protection for "solo self-employed" workers, a group also known as "self-employed without personnel" (in Dutch: *zelfstandige zonder personeel* – zzp).[4] The options included coverage for statutory insurance for incapacity and a supplementary old-age insurance.[5] In 2020, steps towards this extended protection for the solo self-employed – including now platform

1. For an overview of the significant gaps in social security coverage for workers on digital crowdwork platforms, see also Behrendt, Nguyen and Rani (2019).
2. See CBS StatLine opendata (in Dutch).
3. Concerning definitions of the concepts of standard workers and non-standard workers, see below.
4. The solo self-employed are synonymous with the self-employed persons without personnel. The term "freelancer" is also sometimes used.
5. For more information, see VVD et al. (2017, pp. 25–26). In Dutch.

workers – were taken, but this has not yet materialized into law. We will return to this point below.

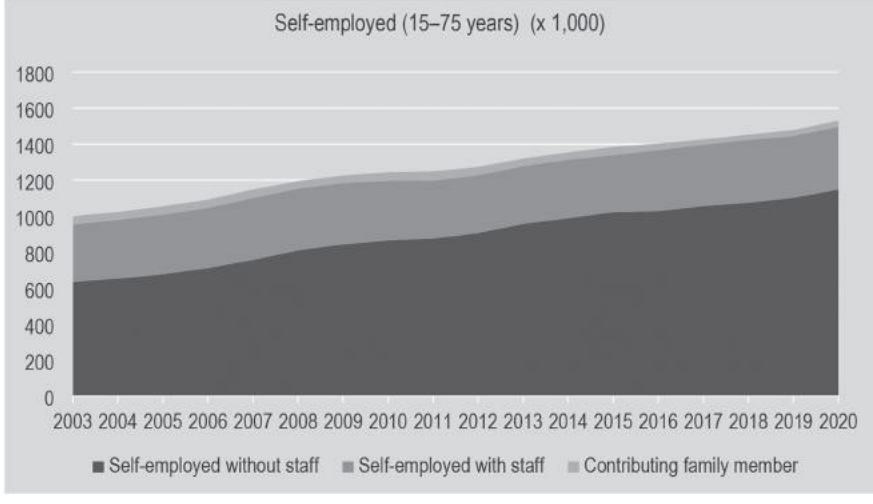
Figure 1 shows the continous growth in number of solo self-employed among the self-employed in the Netherlands. By way of comparison, the numbers of self-employed with staff or with an assisting family member have remained relatively constant over the last two decades.

Given that specific legislation for platform workers is still lacking in the Netherlands, the existing rules that apply to employees or the self-employed are used to determine the position and social protection of platform workers. Platform workers who qualify for employee status have access to a better level of protection. In contrast, platform workers whose status is self-employed have much less generous social protection for the contingencies of illness, old age or unemployment.

At present, platform work is mainly performed as a (solo) self-employed person and sometimes as a part-time employee (Schoukens, Barrio and Montebovi, 2018, pp. 232–233). Therefore, as a point of departure, it is important to analyse the Dutch social security framework and the current level of social protection provided.

Dutch regulations have not yet been adapted to the new digital era. That has raised doubts and provoked discussions about the future direction of social law in Dutch society, including at the level of the national legislator. The COVID-19 pandemic has made it very clear how vulnerable solo self-employed and platform

Figure 1. *Growth of the self-employed on the Dutch labour market*



Source: CBS (2020).

workers are under the current legislation and how there is an urgent need for a new framework. However, in the continuing absence of such a new framework, current regulations prevail.

Like many European Union (EU) Member States, the Netherlands distinguishes classically between employees and the self-employed.[6] What does differ fundamentally from the other Member States is the minimum protection provided to the self-employed for multiple risks. In most other EU Member States, self-employed workers are insured, voluntarily or otherwise, for the same risks as employees, although often under different conditions (e.g. longer waiting periods or lower benefits).[7]

The statutory social security of the self-employed in the Netherlands is limited to the compulsory health insurance (*Zorgverzekeringswet*), the old-age pension (first pillar, *Algemene Ouderdomswet*), the child benefit (*Algemene Kinderbijslagwet*) and a survivors' pension (*Algemene nabestaandenwet*). The old-age pension level is aligned with the minimum subsistence level in the Netherlands.[8]

In addition, the Decree on Assistance Support (*Besluit bijstandverlening*) sometimes offers temporary financial support to established self-employed persons and to those starting out in self-employment.[9] Another specific scheme supports older and partially incapacitated former self-employed persons aged 55 or older who have had to terminate their business or professional activities because their income was permanently below the social minimum.[10] For self-employed persons who cannot provide for the necessary costs of existence, assistance is possible through the Participation Act (*Participatiewet*). These three social assistance (income support) schemes, which are administered and paid out by the municipality, are not the focus of this article, but contribute to the full framework of social security for the self-employed.

With regard to the legal social security coverage of employees in the Netherlands, in addition to the universal schemes there is a package of employee insurances. These include benefits provided under the Sickness Benefit Act

6. See www.missoc.org for a comparison of European countries concerning their social security regulations.

7. For a comparative study of social security for the self-employed in 12 EU Member States, see Klosse and Montebovi (2020); see also ter Weel, Bussink and van Kesteren (2019, pp. 8–10).

8. Only self-employed workers who were previously compulsorily insured as employees have the option, under strict conditions, to take out voluntary insurance with the Dutch Employee Insurance Agency (*Uitvoeringsinstituut Werknemersverzekeringen* – UWV) for employee insurances. In 2019, only 2 per cent of the self-employed made use of this option. See Scheepers and Zegers (2019, pp. 3–4).

9. See Decision on assistance for the self-employed 2004 *(Besluit bijstandverlening zelfstandigen 2004)*. In Dutch.

10. See Act on Income provision act for older and partially incapacitated former self-employed persons 1987; known as the IOAZ Act (*Wet Inkomensvoorziening oudere en gedeeltelijk arbeidsongeschikte gewezen zelfstandigen 1987*). In Dutch.

(*Ziektewet* – ZW; short term incapacity), the WIA (*Wet werk en inkomen naar arbeidsvermogen*; long-term incapacity assessed at least 35 per cent) and the Unemployment Act (*Werkloosheidswet* – WW). The replacement rate of these benefits is 70–75 per cent of earned wages (except for certain parts of the WIA). Employees are also eligible for basic financial assistance under the Participation Act. Moreover, employees may often receive financial supplements on top of the statutory social security benefits via supra-statutory schemes, such as a collective bargaining agreement, or from an employer. In case of illness, not only does the Sickness Benefit Act have a role, but also the Civil Code (article 729 of Book 7), according to which the employer is obliged to continue payment for a maximum of 104 weeks for employees who are employed under a contract. The Sickness Benefit Act is applicable only for those employees who do not, or no longer, have an employer while ill (e.g. for employees with a fixed-term contract that ends during the illness).

In spite of the normally clear and fundamental distinction between employees and self-employed, in certain work situations this distinction is challenged by a category of self-employed persons who are assimilated to employees. These self-employed persons are employed in a fictitious employment relationship and, therefore, also fall under the protection of the employee insurances. These persons include, for example, musicians, artists and high-level athletes but also the self-employed who work from home on behalf of another person.[11] They perform personal work for remuneration and their position is socially and economically equivalent to that of employees in an employment relationship.[12]

Up until about two decades ago, placing workers into one of the two labour market categories – employees or self-employed – was sufficient to accommodate almost the entire labour force.[13] This model offered employees and the self-employed their own arrangements and a respective degree of protection which was straightforward, based either on one being an employee (or equivalent) or self-employed.

The self-employed – entrepreneurs – are usually fully aware that they have to provide their own income protection in case of a future risk event (e.g. illness, crisis, bankruptcy, old age). This they may do by taking out private insurance and by having secured equity capital in their household property or business.

The significant growth in the number of solo self-employed (see Figure 1) – as a special form of self-employed person/entrepreneurs – has produced a group of

11. See the Identification of Employment Relationship as Employment Decree (Besluit aanwijzing gevallen waarin arbeidsverhouding als dienstbetrekking wordt beschouwd 1986 (Rariteitenbesluit)). In Dutch.

12. See *artikel 5 Ziektewet* and *artikel 5 Werkloosheidswet*. In Dutch.

13. As from 2003 the National Bureau for Statistics (CBS), started to count this specific group as a separate part of the labour force on the Dutch labour market (CBS, 2020a).

self-employed people who do not adequately insure themselves privately against risks (IBO zzp, 2015, pp. 66–69). As a result, and excluding the coverage offered by the Dutch universal schemes, approximately one million workers are currently not insured or under-insured for a number of risks.

From the persperctive of the EU, the Dutch solo self-employed present considerable challenges for social protection and are a cause for concern. In its country-specific recommendations, the EU has repeatedly called on the Netherlands to take action to regulate the lack of protection for the solo self-employed (EU, 2016, para. 2). In 2019, the EU noted that:

> There has been *limited progress* in the following areas: Reducing the incentives to use temporary contracts and self-employed without employees, while promoting adequate social protection for the self-employed …
>
> There has been *no progress* in the following areas: Tackling bogus self-employment. The government is expected to inform Parliament on the previously announced measures addressing bogus self-employment in spring 2019 (EC, 2019, p. 5).

In the recommendation of May 2020, the EU reiterated that the Netherlands should "promote adequate social protection for the self-employed" (EC, 2020a).

The Organisation for Economic Co-operation and Development (OECD) also states that in the Netherlands (OECD, 2018):

> The Survey points out that work contracts are increasingly flexible and offering lower levels of protection, while the share of non-standard forms of work, including self-employment, has risen rapidly. An increasing number of workers are no longer covered for sickness and disability risks, while tax incentives are promoting further migration to self-employment, which is close to 17 per cent of total employment.

In order to solve this, typically Dutch, problem, the protection of the self-employed (the *zzp*) needs to be better regulated. The OECD therefore urges the Netherlands to implement reforms (OECD, 2018):

> To tackle the challenges posed by these developments, the Survey proposes a range of new reforms. It suggests the self-employed be supported in a more inclusive manner, including the phase-out of the permanent self-employment tax deduction and introduction of minimum coverage for sickness and disability insurance for workers, regardless of contract type.

In 2020, however, an agreement was reached on compulsory disability insurance for the self-employed.[14] The concrete elaboration will follow in the coming years. In 2020, the COVID-19 pandemic also led to the development of a number of temporary income support measures for certain groups of the self-employed.[15]

In summary, for as long as specific regulations for platform work and platform workers are absent, platform workers must rely on the existing social security framework that distinguishes two main groups: employees and self-employed. In practice, it is common for the platform workers to be categorized as self-employed, which consequently leads to limited social security protection.[16]

In this article, three themes will be further discussed. The first is with regard to the fragmentation on the Dutch labour market. This phenomenon is of national as well as European-level concern. Further examination of the various types of worker in the labour market is therefore worthwhile. This will permit to identify standard and non-standard workers; and (solo) self-employed as well as platform workers. An important task is to explore the social protection of these different groups of workers in the Netherlands, not least because wide disparities in different groups of workers' social protection may pose a threat to the labour market and society. The second theme addressed refers to the challenges related to adequate and sustainable social security measures for non-standard workers. Specifically, we address the poverty risk, solidarity and issues of financial sustainability. The third theme is concerned with the transformations to be expected, or which have already started, in policy as well as in the law-making process. A concluding section offers final thoughts on the pace and direction of policy and legislative change in the Netherlands.

The Dutch labour market dichotomy

The Dutch labour market may be characterized by an undesirable and growing dichotomy. On the one hand, there are those who have an employment contract for an indefinite period and are assured of good conditions of work and social

14. See Compulsory disability insurance for the self-employed *(Verplichte arbeidsongeschiktheids-verzekering voor zelfstandigen)*. In Dutch.
15. See Information about the Temporary Bridging Scheme for Self-Employed Persons (Tozo) *(Informatie over de Tijdelijke overbruggingsregeling zelfstandig ondernemers (Tozo))*.
16. Clarifying the status of platform workers (employee or self-employed) is an important issue. As of 2020, the very few cases brought before the court do not yet permit to define a clear policy.

security protection. On the other hand, there are those who have a precarious work situation, without a permanent employer or client, which may affect adversely their income security and limit their access to social security protection.

Notably, the European Commission (EC) has referred specifically to this dichotomy and its adverse effects on the working conditions and social protection of non-standard workers (such as "flex workers", "freelancers" and "platform workers"). On more than one occasion, the EC has remarked that the Netherlands is making too little progress in the process of improving the labour market (EC, 2018, pp. 2–3; EC, 2019, p. 5; EC, 2020b, p. 5).

This dichotomy in the Netherlands, between the standard employed and the non-standard employed, is elaborated in the next section.

Workers: The flexibilization of salaried work in the Netherlands

In the Netherlands, both full-time and part-time workers are considered standard workers as long as they have a permanent employment contract. Conventionally, this group of standard workers made up the permanent core of a company's employees and was supplemented, if necessary, by the flexible hiring of temporary workers. Increasingly over the recent period, a growing number of other non-standard workers have come to complement this group of temporary flexible workers. How do we define standard and non-standard workers and how are they differentiated in terms of social protection?

Standard workers. Despite the flexibilization of the labour market and the growing number of self-employed people in the Netherlands, the largest proportion of workers are still those who are employed with a permanent job.[17] We consider these workers to be "standard employees".

The denominator "standard employee" is generally understood to mean an employee who is bound to one employer by an employment contract for an indefinite period of time (Schoukens and Barrio, 2017). In the Netherlands, this term is also used to mark a dividing line between, on the one hand, employees who work for an employer for an indefinite period of time – full-time or part-time – and, on the other hand, all other employees on the labour market. The latter group (the "non-standard workers") is a varied group that includes the following: employees with short-term contracts, on-call contractors, flex workers but also the self-employed.

As stated, the standard working relationship is still the most common working relationship in the Netherlands. Of the country's 7.5 million employees, 5.5 million

17. See CBS StatLine opendata. In Dutch.

have a permanent employment relationship, according to Statistics Netherlands (*Centraal Bureau voor de Statistiek* – CBS).[18] In other countries, only full-time workers are usually taken into acount for determining the number of "standard employees". In the Netherlands, however, part-time workers who have a permanent job are often included as standard employees. The Netherlands has the largest share of part-time workers in Europe; defined as people who voluntarily or involuntarily work less than 35 hours per week.[19] Of the approximately 9 million in work (i.e. employees and self-employed), about half work part-time and the other half are in full-time jobs.

In short, standard workers are still in the majority on the Dutch labour market, but the share of non-standard workers is increasing.

Non-standard workers. Non-standard workers in the Netherlands differentiate themselves from the standard workers on the grounds of not being in a permanent employment relationship with one employer. An increasing number of people are working based on temporary employment contracts, on-call contracts or as self-employed, and in some cases also, alternately, as entrepreneur and employee (the so-called hybrid employee).

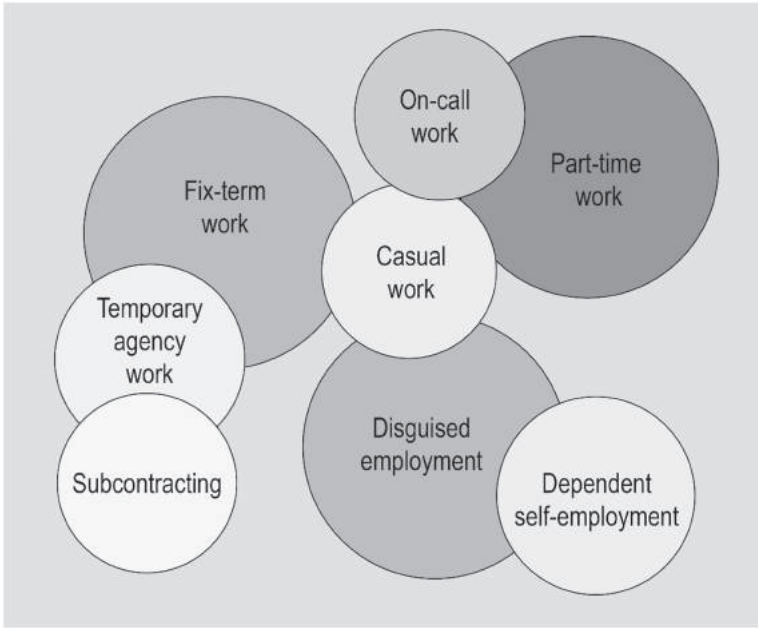
The International Labour Organization (ILO) distinguishes four forms of non-standard employment (ILO, 2016, p. 21 and pp. 47–116). These are 1) fixed-term work, 2) part-time and on-call work, 3) temporary work or other forms of work where several parties are involved, and 4) disguised employment and the dependent self-employed (Figure 2).

All these forms of non-standard employment, as typified by the ILO, also occur in the Netherlands, and increasingly so (Figure 3). In addition to these depicted forms of non-standard work, platform workers now also occupy a part of the Dutch labour market. In absolute terms, platform workers make up only a small part of the labour market, but their importance is growing because platform work can be performed by all groups of working persons, irrespective of age and formal labour market status, either as a main job or as a source of additional income.[20]

The paradigm that divided workers in the Dutch labour market into roughly two groups – the employees (with comprehensive social security coverage) and

18. See CBS data on Employed labour force; position in the job. In Dutch.
19. See CBS data on Part-time. In Dutch.
20. The estimation is that about 1 per cent of the Dutch population works or has worked in the platform economy. See ter Weel, van Kesteren and van der Werff (2020, p. 4). An estimation from the General Association of Temporary Employment Agencies (ABU) suggests that around 10 per cent of the population would be willing to work (once or more often) for a platform.

Figure 2. *The legal forms of non-standard employment*



Source: ILO (2016, p. 21).

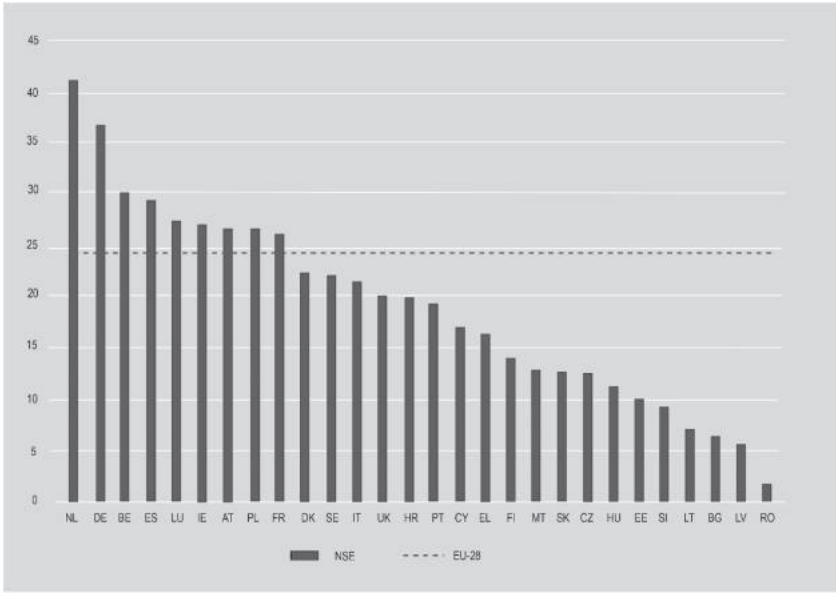
the self-employed (with limited social security covergae) – is therefore no longer tenable.

Self-employed workers: Contemporary transformations of self-employment in the Netherlands

The self-employed in the Netherlands have become a highly diverse group of workers. Whereas previously the classic forms of self-employment (shopkeeper, craft worker, lawyer, hairdresser, etc.) were dominant, over time a number of other types of self-employed worker have joined the group of self-employed. They are self-employed workers with small enterprises without personnel (solo), as well as the economically dependent self-employed.

The classic and new solo self-employed. In the Netherlands, the self-employed have always been a feature of the economy. When talking about the "classic" self-employed without personnel, reference is often made to professions such as

Figure 3. *Share of non-standard employment (NSE) in EU countries in 2015*



Source: EC and De Micheli et al. (2018, p. 11).

the greengrocer or baker. These workers mainly sell products (IBO zzp, 2015, pp. 11–12).

In addition to the classic self-employed, the Netherlands has an enormous number of "new" self-employed without personnel (also referred to as "solo self-employed" or freelancers). These self-employed workers mainly offer labour or services, such as in construction, business services, agricultural professions, retail, cultural sector and events and recreation sector, journalism, IT, consultancy, and so on. Even in the health sector, an increasing number of medical specialists work as freelancers.[21] Some self-employed people find themselves in a vulnerable financial situation, as they are economically dependent on as few as one or two clients. This specific group of self-employed presents a challenge for policy-makers. New research argues the case for limiting the group of self-employed to those who can work at their own risk and expense, thus excluding the economically dependent self-employed (Commissie Regulering van Werk, 2020, p. 10; WRR, 2020, pp. 26, 97).

21. IBO zzp (2015, pp. 11–13). Since 2015, several mores studie (see below in this article) have been published that sharpen this analysis. This was often done in order to situate the platform worker in the Dutch economy.

Figures from 2019 point to 1.1 million self-employed, 900,000 of whom are regarded as "new" solo self-employed (freelancers) and 200,000 as "classic" solo self-employed.[22] Out of a total working population of about 9 million people, this is a considerable number. There is an awareness of these workers' low levels of social protection. Concerns about this are expressed at various levels: at the national level in the form of various national reports and recommendations, at the EU level in annual country-specific recommendations (EC, 2019), and at the international level, such as the views expressed by the OECD (OECD, 2018). The World Bank has also raised concerns about the lack of social protection for the self-employed (solo, freelancers) and flex workers in the Netherlands (*NU.nl*, 2018).

The platform worker. Although the phenomenon of platform work attracts considerable attention, it continues to lack a clear status. From the perspective of social security protection, platform workers continue to lack adequate protection.

Nevertheless, a first concrete proposal towards new legislation for platform workers has been made. In July 2019, a legislative proposal, "*De hervorming van de platformeconomie* (Reform of the platform economy)", was presented to the Lower House of Parliament.[23] This also puts forward concrete proposals to protect workers in the platform economy. An essential premise in the proposal is to move away from according priority to the worker's contractual labour market status, and to give precedence to the needs of the different groups of workers. Future policy should therefore focus on the degree of self-reliance versus dependency of self-employed and employed workers.[24] Another suggested solution is to introduce a legal presumption in the case of platform work: by definition, a platform worker shall be an employee, unless the platform company can prove that the platform worker is self-employed.[25] These kinds of new principles obviously clash with existing legislation and assumptions, but they do present the perspective of new legislation for platform workers.

The self-employed without personnel (solo) have been the subject of much research and policy concern,[26] with many commissions and reports, including studies commissioned by the government. What all these reports have in common is that they indicate how difficult it is to grasp the phenomenon of self-employment. The variety found within this group of workers is so wide that it is

22. See CBS online data on working population; position in the job. In Dutch.
23. See *Kamerstukken II*, 2018-2019, 35,230, nr. 2, *Initiatiefnota van het lid Gijs van Dijk over "De hervorming van de platformeconomie"*. In Dutch.
24. See *Kamerstukken II*, 2018-2019, 35,230, nr. 2, pp. 5–6. In Dutch.
25. See *Kamerstukken II*, 2018-2019, 35,230, nr. 2, p. 6 en ook *Kamerstukken I*, 2020-2021, 35,074, U, p. 9. In Dutch.
26. See CBS StatLine opendata on labour participation. In Dutch.

very difficult to distil the problems and solutions into one single analysis with one single policy solution. There is no single definition of "the" self-employed person and it is therefore extremely complex to unravel this abstract concept and design new labour market and social security policies that encompass all its possible characteristics.

With regard to the specific question of platform workers in the Netherlands, this is also a topic of growing research interest. In 2020, several reports that aimed to gain more insight into the group of platform workers were presented.[27] Platform work – as a specific form of self-employment – exposes even more clearly a number of important bottlenecks in the current Dutch "social system".[28] Three common threads between these challenges and risks can be outlined as follows.

First, there is no separate social security legislation for platform workers in the Netherlands. Consequently, these workers rely on the existing system: either falling under the status of employee (with extensive labour law and comprehensive social security protection) or self-employed (with less extensive labour law and limited social security protection).

Second, most platforms in the Netherlands select the self-employed status for their workers (SER, 2020, p. 99). As one result of this, in addition to their limited social security protection, these workers have a high risk of poverty. Moreover, the accorded self-employed status may run counter to the wishes of the worker, which contributes to a sense of legal insecurity and income insecurity.

A third bottleneck lies in the pseudo independence of a large number of platform workers. Although they may sometimes work for as few as one or two clients, to whom they are heavily economically and financially dependent, many platform workers appear to work as self-employed. In the execution of their work, these "bogus self-employed" are hardly distinguishable from employees, nonetheless they bear the risks associated with self-employment, including limited social security protection.

These bottlenecks are further discussed below.

Challenging the inadequate social protection of non-standard workers

As regards the previously discussed dichotomy in the Dutch labour market, the EU has repeatedy voiced concerns about the inadequate social protection of non-standard workers.[29]

27. See further in this contribution.
28. The concept "social system" is choosen deliberately and refers to the labour market and the connected (or missing) links from and protection provided by labour law, social security law and, sometimes, tax law.
29. Non-standard workers include the solo-self-employed, workers with flexible contracts as well as the platform workers.

In the annual country reports on the Netherlands, the EU has opined that labour market segmentation and the integration of some people remain challenges. Furthermore, it has observed that the share of flexible employment and self-employment remains high, while the social protection of working people includes (too) large differences (EC, 2018, p. 3; EC, 2019, pp. 6–7).

The EC annual report for the Netherlands for 2020 once more restates these concerns (EC, 2020b, p. 6):

> The labour market performed well across the board, but challenges involving labour market segmentation as well as integration of people with a non-EU background remain, in particular women. Employment reached a record high and unemployment remains close to historic lows. An increasingly tight labour market has recently provided incentives for employers to offer more open-ended contracts. However, the share of flexible employment and the number of self-employed without employees remains high, and there are large differences in the working conditions and social protection under different employment contracts and work arrangements. … Furthermore, the employment situation of those at the margins of the labour market remains challenging.

The impact of the COVID-19 crisis on economic activity throughout 2020 acted to highlight the major challenges of access to adequate social security for the self-employed (including freelancers and platform workers). Typically, the self-employed are often underinsured or uninsured for the risk contingencies of illness, disability, unemployment and old age. In addition to the concerns voiced regarding the situation of non-standard workers, the EU's 2020 country-specific recommendations also urged the Netherlands to promote adequate social protection for the self-employed (EC, 2020a, p. 5, p. 8; IBO zzp, 2015; Buitenhuis, 2019).

Challenging the poverty risk

Of all workers in the Netherlands, solo self-employed (freelancers) are most at risk of poverty, according to various studies (CBS, 2019; CBS, 2020b; SCP and CBS, 2014; IBO zzp, 2015, p. 17; De Nederlandse Bank, 2018). Moreover, part-time self-employed workers face a greater risk than full-time workers. More often than those with a permanent employment contract, many self-employed people have a relatively low income and remain at the "low-income limit" for extended periods. In concrete terms, the low-income limit is a net income of approximately 1,000 euros (EUR) per month for singles, and approximately EUR 2,000 per month for a couple with two children (CBS, 2020b). The risk of

poverty for solo self-employed (freelancers) also stems from these workers typically having low levels of insurance for long-term disability and old-age pensions (Buitenhuis, 2019; see also Stichting van de Arbeid, 2020, pp. 9–10).

The official statistics provided by Statistics Netherlands (*Centraal Bureau voor de Statistiek* – CBS) do not (yet) mention separate figures of platform workers with regard to the poverty risk. The recent studies of late 2020 do contain data on the income of platform workers, but for two main reasons it is too early to draw general conclusions about their income position (TNO, 2020, p. 10; ter Weel, van Kesteren and van der Werff, 2020, pp. 14-28).

First, these initial studies on platform workers are very recent and, second, the variation within the group of platform workers and platforms is so significant that it is not (yet) possible to deduce general viewpoints from the empirical data (TNO, 2020; ter Weel, van Kesteren and van der Werff, 2020). For example, some platform workers, such as students, only work a few hours a week for the platform, while other platform workers work a full-time week and have to support their families from this income. Income dependency on the income earned through the platform varies substantially.

Stating that platform work always carries a risk of poverty, or would increase that risk, is therefore not a defensible hypothesis. The variation in the types of platform work and the varying degrees of financial dependence experienced by platform workers are too large to take a clear-cut position on the relationship between platform work and poverty. Nevertheless, it is useful to continue to monitor the income situation of platform workers and their economic dependence on platform work, given its importance on the (Dutch) labour market. As will be discussed below, studies from 2020 similarly indicate that multiple measurements will continue to be necessary and of value.

Challenging solidarity

The redistributive function of the social security system needs to be reconsidered. In short, the main reason for this is the increasing dichotomy found in the Dutch labour market. As a result, the gap between employed people with a permanent employment contract and all other employed people with less secure employment relationships is widening. The fact that the self-employed, flex workers as well as platform workers do not always (or cannot always) properly insure themselves excludes them from certain insurances for occupational risks and therefore limits the pool of insured persons in the existing Dutch social security system. This has negative effects on the accessibility of, and thus the solidarity provided by, social insurance (ter Weel, Bussink and van Kesteren, 2019, p. 32). The objective of the social system can no longer be based

on covering standard employees – as the cornerstone – but must be more inclusive as regards flexible forms of work (Schoukens and Montebovi, 2019, pp. 356–357).

On this issue, too, the EU has once again drawn the Netherlands' attention to the need to invest more in improving the employability of certain groups of workers, and thus their likelihood to have better social security coverage (EC, 2020a, p. 6 (20)):

> Investment in basic and/or digital skills, education and training, including upskilling and reskilling opportunities for all, also remains crucial to improving access to the labour market in particular to strengthen the employability of those at the margins of the labour market (including people with a migrant background and people with disabilities), while fostering equal opportunities and active inclusion.

Challenging the financial sustainability of the social security system

The financial sustainability of the Dutch social security system has been under pressure for a considerable period. There are various reasons for this, such as the increasing use and costs of health care, population ageing and a worsening old-age dependency ratio, but also the decline in employee contributions. As far as statutory social security coverage is concerned, self-employed people do not pay contributions for "employee" insurances, as they are covered only by the universal schemes. This reality is neither new nor worrying. What is new and worrying, however, is the fact that more and more self-employed people are working in a hybrid status (i.e. switching between or combining the self-employed and employee status) and platform workers are not, or not properly, declaring their income. For these workers, in the event of a contingency occuring (e.g. illness, disability, loss of income or old age) many may expect to receive financial support from the State, to rely on social assistance.

Concerning the hybrid self-employed, their ability to switch between self-employed status and employee status, or to combine both working forms, is not always transparent for the purposes of determining eligibilty for social security protection.

As far as the platform workers are concerned, the situation is slightly different. The question is whether every sub-task (every gig) should count for social security purposes? If a platform worker remains below the minimum income threshold with every subtask completed, there is no requirement to pay social security contributions for any one task – at least according to many existing systems. In the short term, this worker may earn a decent income through the combination of multiple partial incomes, and may also have an incentive to continue to have

earnings below the income threshold. In the longer term, however, the platform worker will not accrue full social security rights and the social security system will not have collected all the contributions due based on earnings from work (Schoukens, Barrio and Montebovi, 2019, p. 234; Schoukens and Montebovi, 2019, p. 358).

This could have an important bearing on the Dutch social security system's financial sustainability. As the EU reports (EC, 2018, p. 3):

> The self-employed are not obliged to be insured against labour-related risks such as accidents at work, unemployment and old age (second pillar); which could affect the sustainability of the social security system in the long run.

To manage this challenge to the financial sustainability of the social system, new ideas are needed to rethink the financing of social security. It is necessary in this respect to involve the platform providers and to demand transparency from them as regards the income data of platform workers. As we discuss below, proposals were made in the Netherlands mid-2020 for a revision of the Dutch tax system to include platform work in the system for the first time.

Transformations completed or in progress

Across 2019 and 2020, an important number of steps were taken in the form of new research, policy and regulation to address the challenges presented by segmentation in the Dutch labour market. The Dutch Ministry of Social Affairs and Employment was seeking options for a fundamental reform of the labour market and several reports published in 2020 offered the Minister of Social Affairs different possible paths and viewpoints. However, at least in the short term, addressing the dichotomy on the Dutch labour market has been sidelined by the need to prioritize responses to the COVID-19 pandemic. There was also a general election in March 2021. At the time of writing, it is not clear which priorities the new coalition government will and can execute

2019 and early 2020

Several reports from advisory bodies of the government have been published in the recent period (see below), all of which had a shared concern about the Dutch labour market and segmentation between workers. The reports argued for an in-depth reform of the existing social security and labour law frameworks. Some also pointed to the need to revise the fiscal regime, to include platform workers and to simplify existing tax arrangements for the solo self-employed.

The report "*The better work*" (WRR, 2020) by the Scientific Council for Government Policy (WRR), which focuses on the quality of work, underlines three essential conditions: i) decent wages and social security ii) labour market autonomy as well as connectedness and iii) a good work-life balance. As the report pithily argues, good work requires getting a "grip" on money, a "grip" on work and a "grip" on life (WRR, 2020, p. 81, p. 103, p. 129). The report asserts that meeting these three conditions will benefit workers, labour organizations, society and the economy (WRR, 2020, pp. 12–13, p. 222, p. 246). More specifically, the report's nine recommendations include the need i) to prevent unfair competition between workers with different contract forms, ii) to develop contract-neutral basic insurances compatible with the new world of work, iii) for active labour market policy, and iv) to provide a basic job for people on benefits who are in a difficult position on the labour market.

The report *What kind of country do we want to work in?*, by the Committee on the Regulation of Work *(Commissie Regulering van Werk)*, addresses the bottlenecks in the current labour market and also proposes reforms (Commissie Regulering van Werk, 2020). The Committee notes, for example, that due to a proliferation of contract forms, the current labour market regulations are no longer comprehensible, and not equitable. Therefore, the Committee proposes a fundamental reform to achieve, amongst other things, a clear system of contract forms, the tax equal treatment of all workers, basic income security for all workers, and a basic insurance for incapacity for work for the self-employed. The Committee cited an OECD report, which warned that the "segmentation of the Dutch labour market is likely to worsen and may reach a point of no return" (OECD, 2019, p. 4, cited in Commissie Regulering van Werk, 2020, p. 61).

The Labour Foundation *(Stichting van de Arbeid)*, a national consultative body whose institutional role concentrates on labour and industrial relations, has reported on the need for occupational disability insurance for self-employed persons (Stichting van de Arbeid, 2020). In its proposal, the Foundation introduces the possibility of a new, separate disability insurance for self-employed persons in addition to the existing insurance for employees. The advantage of this proposal is that this change is deamed feasible in the short term. The disadvantage is that two separate occupational disability schemes will continue to exist: one for employees and one for the self-employed. The proposed new disability insurance would also have to ensure the reintegration of self-employed persons following an incapacity and to guarantee the affordability of the insurance.

The report of an independent think tank, SEO Economisch Onderzoek (ter Weel, Bussink and van Kesteren, 2019, pp. 1–3), investigated four scenarios for (more neutral) social insurance for disability, unemployment and longevity in the Netherlands. The four scenarios were developed based on the variables of the

neutrality of the form of employment and the freedom of choice. Some scenarios imply major reform, while others less so. It is clear, however, that a more inclusive system wherein all workers are insured against the risks of illness, incapacity for work, unemployment and longevity (supplementary pension) is desirable.

Mid 2020

The Minister of Social Affairs and Employment (*Ministerie van Sociale Zaken en Werkgelegenheid* – SZW) welcomed the reports and promised to take them into account when developing reform proposals for social security, labour law and taxation.

In May 2020, the Minister informed the Lower House that the issues raised in the reports of the WRR and the Committee on the Regulation of Work are particularly complex and urgent. Due to the COVID-19 crisis, however, a formal response was postponed. The reports were also taken into account in the development of emergency policy responses to the COVID-19 crisis.[30]

Investigations have also been carried out into tax reforms. In May 2020, eleven studies and 169 ideas (building blocks) were presented to the Lower House of Parliament, to help guide future policy choices. The studies are based on specific bottlenecks, including the flex and platform economy.[31]

Prior to the COVID-19 crisis, discussions concerning a statutory social security scheme for unemployment or financial support in times of crisis for the self-employed were considered impossible. The crisis suddenly made these possible. The Dutch government quickly drew up the Temporary Bridging Scheme for Independent Entrepreneurs (TOZO scheme), a measure that has been widely used.[32] In this sense, the COVID-19 crisis seems to have permitted a radical shift in the social debate, permitting actors to think "out-of-the-box". As such, the crisis has given an extra impulse and there is a new mindset and willingness to reconsider the protection of all workers on the Dutch labour market, including freelancers and platform workers.

30. See Minister Koolmees, *Kamerbrief over uitstel kabinetsreactie "Commissie Regulering van Werk"*, 22 May 2020. In Dutch.
31. See Brief Ministerie van Financiën aan TK: *Rapporten Bouwstenen voor een beter belastingstelsel*, 18 May 2020. In Dutch.
32. See Information about the Temporary bridging scheme for self-employed persons (Tozo). In Dutch.

Late 2020

Three further reports were published in October 2020 (TNO, 2020; SER, 2020; ter Weel, van Kesteren and van der Werff, 2020), but these were specifically focused on the platform economy; in contrast to the broader focus of the earlier reports.

What is striking is the economic, statistical as well as descriptive approaches of the three studies, the intention of which is to help steer policy measures in the future. However, an important number of questions about platform workers' social security are left unanwered. Only the SER study pays limited attention to the concrete social position of the platform worker, doing so via the ILO concept of "decent work" (SER, 2020, p. 100).

The three studies define the limitations of their findings in relation to the representativeness of their analyses. Despite these limitations, the studies are interesting because they contain specialist information on platform work and are a first, important step towards further research. The key take-home point of the studies is to emphasize that "the" platform worker does not exist, owing to the fact that platform work is very diverse in its nature and the motivation of platform workers also differs greatly.

In addition to these three studies on the platform economy, late 2020 also brought another important new element to the Dutch social debate on platform work and freelancers: the Supreme Court's ruling of 6 November 2020.[33] In this ruling, the Supreme Court judged, among other things, the role of the intention of the parties when entering into an agreement. This offers new perspectives for the qualification of the agreements between freelancers and clients and between platform workers and clients.

Despite the promise of the Minister of Social Affairs and Employment to examine immediately and thoroughly the reports, official attention found itself redirected to the immediate challenges posed by the COVID-19 crisis. Consequently, a formal reaction to the reports of the Committee on the Regulation of Work and the WRR came only on 11 November 2020.[34] The minister indicated that the reports' findings had been taken into account in 2020's short-term emergency reforms, necessitated by the COVID-19 crisis, and that the reports' recommendations will be taken into account in the long term when developing new legislation and new policies. Furthermore, the minister has informed that the cabinet is seeking to elaborate a legal presumption concerning platform work, as proposed in July 2019 in the law proposal "The reform of the

33. See HR, 6 November 2020, ECLI:NL:HR:2020:1746. In Dutch.

34. See *Brief van de minister en staatsecretaris van Sociale Zaken en Werkgelegenheid aan de Tweede Kamer, 29,544 Arbeidsmarktbeleid*, nr. 29544, 11 November 2020; *Kamerstukken I*, 2020-2021, 29,544-B. In Dutch.

platform economy".[35] It remains to be seen how the general election result of March 2021 will influence any next major step in labour market reform.[36]

Conclusion

At the beginning of this article, it was stated that the social security position of platform workers in the Netherlands is precarious and most platform workers are still classified under the staus of self-employed. As such, they are responsible for their own financial and social situation with only limited coverage for health care, the basic pension and child benefits from the statutory social system, and have no income replacement coverage in case of illness, disability and unemployment as well as for supplementary pension coverage.

Nevertheless, there is a significant amount of policy attention being direct at the platform economy and platform workers in the Netherlands. As regards the latter, it is obvious that current social security law, labour law as well as tax law are ill adapted to the labour market characteristics of non-standard workers. The answer to the question of how to integrate these workers into an inclusive social security system requires further clarification. The Dutch legislator is aware of the need for policy changes through new legislation. At the beginning of 2020, a number of reports were published that identified short- and long-term bottlenecks but also proposed recommendations for a major labour market reform. The policy context for government action appeared to be favourable. This was before the COVID-19 pandemic, and the ensuing economic crisis, which continues and which has reordered the priorities of politicians and legislators.

While the three recent studies from late 2020 are focused specifically on the platform economy, and provide mainly economic and statistical information, it is of note that only one of these mentions, and briefly so, that platform workers are also entitled to what the ILO refers to as "decent work".

As a result of the March 2021 general election, realizing concrete actions with regard to addressing the challenges of platform work and tackling the country's labour market dichotomy will take longer. Nevertheless, for the incoming coalition government, there are already a number issues on the agenda. These include the reform of the tax system, reform of the labour market, regulation of platform work and developing an adequate social security system for all workers in the Dutch labour market.

35. See *Kamerstukken I*, 2020-2021, 35,074, U, p. 9. In Dutch.

36. See *Brief van de minister en staatsecretaris van Sociale Zaken en Werkgelegenheid aan de Tweede Kamer, 29,544 Arbeidsmarktbeleid*, nr. 29544, 11 November 2020, p. 28; *Kamerstukken I*, 2020–2021, 35,074, U, p. 9. In Dutch.

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Social protection and the platform economy: The anomalous approach of the French legislator

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Abstract Addressing the social protection of platform workers, the French legislator in 2016 and then in 2019 made moves to incorporate these workers into the general social security regime with regard to certain covered risks (work injury and occupational diseases), and to improve adequacy (enabling possible access to complementary coverage). However, these moves rest on radically opposed perspectives. Rather than reasserting the legal responsibility of the employer vis-à-vis workers' health and safety, we see responsibility placed with the platform, but only on a voluntary basis under the aegis of corporate social responsibility. This risks fragmenting social benefits, to be determined by each platform, thus weakening the practices of mutual protection and risk pooling among enterprises and workers that lie at the heart of social security. In doing so, the legislator has broken the link that had as its historic objective the goal of social inclusion and has encouraged in different ways the privatization, or a re-commodification, of social security in the commercial interest of private insurance companies. Moreover, this has been done using the Trojan Horse of the French labour code. This approach is in contrast to the converging position of international organizations, such as the European Union, International Labour Organization or the Organisation for

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Economic Co-operation and Development, recommending that States establish a right to social protection for all atypical workers and non-salaried workers. Instead of identifying the common challenges that face workers who work for platforms, and offering responses specific to their situation, rather, it considers platform work as one of the new forms of atypical work undertaken by those who may have the status of employee or self-employed.

Keywords social security legislation, social protection, atypical work, platform workers, France

Introduction

In the context of the platform economy, the social protection of workers is not a peripheral matter, although legal studies on the subject are quite limited in France.[1] By their own admission, the issue lies at the heart of platforms' preferred business model.[2] Challenges arise in direct connection with the legal status of platform workers who are treated as self-employed and who, in France, register for the tax and social security scheme for micro-entrepreneurs.[3] The first step is to determine who bears the cost of covering social security provision for platform workers. This was considered in the ruling of 28 November 2018 from the French Court of Cassation, in a case following a road accident involving a Take Eat Easy[4] rider who was making a delivery, which caused a temporary incapacity for work. Second, there is the issue of competition between those businesses that fulfil their social protection obligations to workers, and those that evade them by

1. Cf. the special issue of the Montel et al. (2018). See also ISSR (2019) and Desbarats (2020).
2. Thus, for example, in 2019, shortly before it launched on the stock market, Uber stated: "If, as a result of legislation or judicial decisions [we] incur significant additional expenses … potentially including expenses linked with the application of wage and hour laws … social security contributions, taxes … any such reclassification would … have an adverse effect on our business and financial condition". See Uber Registration Statement with the United State Securities and Exchange Commission, of 26 April 2019, p. 35. Cited also by Degryse (2019) in Daugareilh, Degryse and Pochet (2019).
3. This option is available to service providers up to a specific annual turnover (72,600 euros (EUR) in 2020). The simplified regime means that a fixed rate can be used to discharge tax (2.2 per cent on services) and social security obligations (22 per cent on services). The micro-entrepreneur is also exempt from value added tax. The main legal statuses to which the simplified regime is relevant are sole trader, sole trader with limited liability, and limited company with a sole director.
4. Among the many commentaries, see Gomes and Lokiec (2018).

(fraudulent)[5] use of self-employed status (Chauchard, 2016, p. 947; Chauchard, 2017, p. 73). Undoubtedly, this problem would be considerably reduced if a principle existed in French law that all workers were entitled to the same social protection, regardless of employment status.[6] Third, this business model raises broader questions about how social protection should be financed. In addition to concerns about platforms specifically, the question arises as to the rationale for the separate treatment of self-employed workers in the social security system. This is especially so given the growing number of the so-called "new-style self-employed" opting into the micro-enterprise scheme, as is the case with most platform workers,[7] despite their income and employment profile bearing more resemblance to that of a non-standard salaried employee than a traditional self-employed worker.

In its 2016 report, the French Inspectorate General of Social Affairs (*Inspection Générale des Affaires Sociales* – IGAS) found that few platform workers were entirely without social protection, if only because they often do platform work alongside another professional activity or as a secondary activity (in the case of students). Furthermore, if they are not employees, platform workers must register with the social insurance scheme for the self-employed. Here the issue in legal terms is not so much registration with a scheme, but rather the contributions and the quality of coverage provided. The coverage provided for self-employed workers is lower or non-existent in some areas (supplementary health insurance, occupational accidents, total or partial loss of employment) (Haut Conseil pour le financement de la protection sociale, 2019). Platform workers in particular face the additional challenges of incomes that are low,[8] insecure, irregular and derived from multiple sources,

5. As determined by the Conseil des Prud'hommes de Paris (employment tribunal) on 29 February 2020 with reference to a Deliveroo rider, R.G. No. 19/07738.

6. A principle mentioned in the Frouin report (Frouin and Barfety, 2020). See below.

7. The 4 August 2008 Act on the modernization of the economy was adopted during the 2008 financial crisis. It introduced the status of *auto-entrepreneur*, the aim being to "make France a country of entrepreneurs". Since 2016, it has been known as a "micro-enterprise". It means that activities can be combined, since this status can be held alongside other employment statuses, including that of being inactive. "At the end of 2018, 1.3 million French workers were micro-entrepreneurs, accounting for 42 per cent of self-employed workers, compared with 26 per cent in 2011". This is the regime used by platform workers (Conseil national du numérique, 2020, p. 29).

8. According to figures from France's National Institute of Statistics and Economic Studies (*Institut national de la statistique et des études économiques* – INSEE) (2019), 75 per cent of micro-entrepreneurs (formerly known as *auto-entrepreneurs*) reported an annual turnover below EUR 15,000 in 2016, compared with 23 per cent of workers in more traditional self-employment. The average annual turnover was EUR 10,300 in 2016 (Richet, 2019). Private hire drivers in France work 50 to 60 hours, sometimes 70 hours a week and earn EUR 3.75 per hour after deductions for the cost of car lease, petrol, fines, contributions and taxes (Champeaux, Abdelnour and Degryse, 2019). Only 20 per cent of platform workers have an ideal level of social protection (Conseil national du numérique, 2020a, p. 28).

leaving them with little choice but to disregard the risks. This means that a neglect of social protection on the part of platform workers has less to do with cultural issues than with a lack of financial resources,[9] information and training. At the same time, empirical research demonstrates that the working conditions and pay of these workers do give rise to specific workplace health and safety risks,[10] including the (as yet largely unknown) risks associated with algorithmic management,[11] bearing in mind that "if the employer is an algorithm, the level of subordination is extreme".[12]

The platform economy therefore raises the issue of bogus self-employment – not new in itself – in a particularly acute form. It also reopens the debate on the creation of a third employment status.[13] Some reports have concluded against this idea,[14] on the basis that French social security law makes sufficient provision to address these scenarios. The creation of a third employment status would be out of line both with the trend to offer increasingly similar social protection to employees and the self-employed, and also with the linking of entitlements to the person rather than to a job or employment status.[15] It runs counter to

9. According to the 2016 Terrasse report on the sharing economy, while so-called "established" professionals have "high levels of qualifications and/or assets that can be liquidated upon retirement, the more recent forms of self-employment can involve low value-added activities. Moreover, on average these workers earn incomes that are nearly ten times lower than other self-employed workers (EUR 460 versus EUR 3,100 per month)". These figures are from *INSEE Références*, 2015 edition – Data on 2010 (Terrasse, 2016, esp. p. 43).

10. This applies where pay is linked to orders or speed. Following the death of the bike courier Franck Page near Bordeaux on 17 January 2019, a rider commented, "Of course it's a dangerous job. When you're riding for hours on end, among many cars and pedestrians, on roads that are not always suitable, you do face risks. But you have no choice, you're paid by the job, there are no guarantees, so you have to ride fast, to rush, that's all you can do to earn what bit you can". To earn a reasonable income, platform workers have to work unreasonable hours. Their physical and mental health is put at risk by the structure and level of pay, but also by a "series of gamification mechanisms, by the way the application is designed with in-built bonuses encouraging riders to go faster, even in poor weather conditions, or to take ill-advised risks" (Conseil national du numérique, 2020a, p. 28).

11. See the Conseil national du numérique (2020, p. 47 et seq.). On algorithmic management see the contributions by Amar et al. (2018). This understanding is based on the following definition of algorithmic management: "We define algorithmic management as oversight, governance and control practices conducted by software algorithms over many remote workers. These workers conduct tasks on online platforms but might be freelancers and not be officially employed by the company. We argue that algorithmic management is characterized by continuously tracking and evaluating worker behaviour and performance, as well as automatic implementation of algorithmic decisions. In algorithmic management practices, workers interact with a "system" rather than with humans. In many cases, the system has less transparency, and workers have no knowledge of the set of rules governing the algorithms" (Möhlmann and Zalmanson, 2017, p. 4).

12. *Semaine sociale Lamy* (2017). See Dockès (2019).

13. On France, see Antonmattei and Sciberras (2009, p. 221). For a comparative approach, see Gomes (2017).

14. See Frouin and Barfety (2020); Conseil national du numérique (2020a); Institut Montaigne (2019); Conseil d'État (2017); Terrasse (2016); Amar and Viossat (2016).

15. As would be the case with the personal activity account, see Laborde (2017, p. 137).

the long-standing tradition in employment law of extending protection to self-employed workers, as set out in part VII of the Labour Code. Furthermore, the creation of a third status would not remove all the grey areas, as can be seen from the examples of Spain (Guerrero Vizuete, 2019) and Italy (Bavaro and Marino, 2019, p. 14).

The status of platform workers is also related to the issue of how social protection is financed. If platform workers are self-employed, they would in theory be expected to pay for their own social protection.[16] However, to the extent that their activity depends to varying degrees on the platform used to contact clients, there is some debate about the platforms' role in financing social protection.

Bruno Palier, in his analysis of the effects of the sharing economy on financing social protection, attaches particular importance to the economic challenges (Palier, 2016; Palier, 2019, p. 113). This business model threatens to starve the welfare state of resources because of the way platforms can avoid tax and social insurance contributions, taking advantage of being multinational, whereas social welfare legislation is national in scope. They also try to avoid the costs of social protection by not taking on workers as salaried employees. Until a judge reclassifies the relationship, Uber drivers, Deliveroo riders and platform workers in general are bogus self-employed workers and, as such, are expected to assume all the fixed and social insurance costs associated with their professional activity.

The International Labour Organization (ILO) has identified the following gaps in the provision of decent work for workers in non-standard employment, which also apply to platform workers: job and income insecurity, hourly-paid work, poor occupational health, as well as a lack of social protection, training and trade union representation (ILO, 2016). European Parliament research conducted in 2017 (Forde et al., 2017) found that these workers are on very low pay, below the hourly minimum wage or median monthly salary. Only 15 per cent of these workers' income was derived from platforms; 68 per cent of respondents had other sources of work, with all the risks that multiple employment entails; 25 per cent said that they relied on platform work for 50 per cent of their income. One of the most significant problems is the lack of any guaranteed work for platform workers, which limits access to social protection, in particular, and is one of the most significant factors contributing to insecurity. This problem suggests that to address social security concerns, it may not be enough to settle the legal question of platform workers' contractual status. A broader approach looking at non-standard forms of employment is required.

16. A micro-entrepreneur must pay 23 per cent of income to the social security agency, URSSAF, for sickness and old-age insurance.

Indeed, several options to improve the social protection of platform workers have been discussed. Should there be an intermediate status between employee and self-employed? Do we need to move towards a "worker" status? Should platforms contribute to paying for social protection, at least for benefits that have little or no coverage in the self-employed insurance scheme (occupational accidents, supplementary health cover)? In 2016 and again in 2019, the French legislator took this third course of action – a choice that was i) anomalous, in view of the recent history of employment and social protection law, and ii) inappropriate, given the specific nature of work on digital platforms, which, as international institutions have found, constitutes a non-standard form of employment.

The anomalous approach of the French legislator to the social protection of platform workers

In fact, starting with the 2016 Employment Law, the French legislator has identified problems in connection with the social insurance coverage of platform workers. There has been a partial response, based on promoting an individual and privatized approach to closing the coverage gaps in the social security scheme. This policy choice and the resulting legislation break with the historic purpose of social rights and the foundations of social security.

Towards the privatization of social insurance cover for platform workers

The previous practice of the French legislator as regards employment law was to apply a legal presumption of an employment contract or employed status for certain professions, with a right to be affiliated *ipso jure* to the general social security regime. Another trend has been the case-by-case extension of employment and social security law to cover entitlements initially created with employees in mind. In 2016 the legislator assumed that in the absence of an explicit choice, platform workers, being self-employed, would fall within the self-employed social security regime, and they then tried to address some of its weaknesses. There are some risks not covered by the self-employed regime, including loss of employment, and occupational accidents and diseases. Nor does the self-employed regime include mandatory health or old-age insurance. Where coverage is provided, it is at a lower level than for the same benefits in the

general regime.[17] The legislator decided to act on the issue of insurance liability for platform workers' occupational risks in 2016 in the wake of extensive media coverage of road accidents involving platform workers delivering goods or providing transport services. This soon came to be regarded as a major concern surrounding these activities, which take place in full public view,[18] and thus had an impact on public opinion.

Articles L.7342-1 to 7,342-6 of the Labour Code do now set out entitlements, including in cases of occupational accident, for self-employed workers using digital intermediary platforms, where their turnover is at least 13 per cent of the annual social security ceiling[19] – a provision that has not really been effective to date.[20] It means that the risk coverage and the liability for costs are assessed on the basis of income – and yet the assumption of costs is supposed to be a matter of social responsibility. This idea had been put forward in a prescient article, but in an entirely different context, by Thérèse Aubert-Montpeyssen (1997, p. 616). It was taken up in the Terrasse report, submitted to the French Government in February 2016. Several months later, it was adopted as part of the Employment Law of 8 August 2016. The French legislator took up the same idea, but with a very different application and effect, in the draft law on mobility that was struck down by the Constitutional Council in its decision of 4 September 2018.[21] It was finally included in the Mobility Orientation Law of 24 December 2019.[22]

The provisions added by the Law of 2019 to those introduced by the 2016 Employment Law have a more restricted scope, leading to the introduction of a

17. For example, if unable to work due to illness, a self-employed worker only starts to receive daily sick pay after the expiry of a seven-day period (compared to three days for employees), and must have contributed to the self-employed regime for at least one year. Micro-entrepreneurs who earned less than EUR 3,919.20 a year in 2019 had no entitlement to payments. The duration and the level of payments is lower than for employed workers. Another example is pension contributions. Here, the sum contributed by micro-entrepreneurs depends on their annual turnover. According to the *Haut Conseil du financement de la protection sociale*, "The annual turnover of many micro-entrepreneurs means they do not qualify for pension entitlements: 67 per cent did not qualify in any quarter of 2018, whereas 17 per cent qualified in all four quarters. If all social security regimes are included, i.e. accounting for any other activity or employment, 37 per cent did not qualify in any quarter" (Conseil national du numérique, 2020a, pp.81–82).

18. Unlike those who do micro-jobs or crowdworkers.

19. EUR 5,347.68 in 2020.

20. Policies taken out by platforms with Axa (for riders' civil liability) and Cover (for occupational accidents) often fail to provide compensation commensurate with the damage caused. Indeed, this is what sometimes leads workers to request reclassification of their work as an employment contract, something the platforms try to pre-empt by concluding agreements in which workers or their legal beneficiaries waive their right to pursue legal proceedings (Conseil national du numérique, 2020a, p. 83).

21. Decision of the Constitutional Council, 4 September 2018, No. 2018–769.

22. Article 44 of the Law of 24 December and article L.7342–8 and 9 of the Labour Code. See Loiseau (2020).

new section (Specific Provisions)[23] that applies only to workers who are driving a private hire vehicle or delivering goods using a two- or three-wheeled vehicle, with or without an engine.

In line with the principle that platforms have a social responsibility, they are given the option of drawing up a charter. These contain measures to "address the occupational risks to which workers may be exposed in the course of their work as well as the risk of injury to third parties" and, "where relevant, to put in place supplementary social protection guarantees arranged by the platform for the benefit of workers".[24] The result is that there are two sets of rules in the Labour Code. One set is specific to platforms for the transport of persons or goods, and the other applicable to any workers on platforms that specify the characteristics of the services provided or goods sold and determine the price (article L. 7,342-1 of the Labour Code), regardless of the nature of the job, as long as the workers are self-employed. There is a third scenario, not described here because it is covered by the general law, which applies to platform workers who are employees.

The 2019 Law goes beyond the 2016 Law in that it enables platforms to adopt the normative framework of corporate social responsibility: charters and codes of conduct. Within the Labour Code itself, the legislator acquiesces to the platforms' strategy of deregulatory capture,[25] enabling them to escape the liabilities that would normally apply to a business acting as an employer.

As regards the two aspects that have to do with the social protection of platform workers, the commitments in this area relate to accident prevention, but neither the nature nor the scope are specified by the legislator. Part IV of the Labour Code already includes provisions on the prevention of occupational accidents, which apply regardless of the employment status. The 2019 Law also makes it possible to include in the charter supplementary entitlements to social protection, which are currently unavailable to platform workers.

In this way, the French legislator has acted outside the existing legal framework, establishing a specific social security regime for self-employed platform workers (Lazaret, 2019, p. 167) in a way inconsistent with the principles of equality and

23. This follows a first section – General Provisions – that applies to all self-employed workers on digital platforms.

24. The Taché amendment proposed that supplementary social protection should cover the following risks: death, maternity, physical integrity, incapacity for work, disability, unfitness for work, old age and payments on retirement.

25. In contrast with the opposite process, in which CSR was used to promote the regulation of transnational business (see Daugareilh, 2019; Mecki, 2020, p. 112) and even to create a binding duty of care for parent companies and subcontractors, in the Mobility Orientation Law, CSR is associated with deregulation, revealing the ambivalence of the concept. Indeed, in its origins, CSR was a voluntary commitment by businesses to take into account stakeholders' concerns regarding the social, environmental and human rights impacts of their activities, going beyond strictly legal requirements.

generality that apply to employment and social security law. In 2016 and again in 2019, the legislator has gradually brought platform workers' entitlements more into line with the general social security regime as regards the areas covered (occupational accidents and diseases) and the level of coverage (the option of supplementary insurance). However, the foundation of the approach is quite different: the principle of an employer's liability for health and safety at work is replaced by the platform's corporate social responsibility, which is optional, not binding. Thus, the legislator does not establish any entitlement that the platform worker could enforce through legal proceedings. Paradoxically, although this mechanism is supposed to fall outside employment law, it relies on self-employed status as the criterion for determining which persons are concerned by the new rules without introducing any clear legal presumption of self-employment, thus implicitly referring back to the self-employed social security regime. The result is that the platform does not contribute to insurance for sickness, unemployment, old age, or occupational accidents and diseases for the workers affected, regardless of whether they fall within the general social insurance regime or the self-employed regime. In allowing platforms to take out private insurance to provide coverage for their workers, the legislator removes a group of insecure, vulnerable and often poor workers from the scope of national solidarity and risk-sharing, leaving them to rely on insurance law. The legislation therefore raises a number of problems.

- The platform's obligations are based on social responsibility instead of legal liability.
- Contributions are dependent on the worker's turnover, contrary to the principles of equal treatment, solidarity and social inclusion. Self-employed workers whose turnover falls below the threshold established by law are not entitled to coverage by the platform and are excluded from this type of protection.
- Even if the worker in question does meet the criteria, the platform does not automatically step in, which considerably limits the efficiency of the system. In fact, the platform can only provide coverage when it has information about the worker's annual turnover. This means that the worker is expected to make voluntary contributions up-front, which can then be claimed back at the end of the year, as long as the entitlement in question is linked to the work done via the platform and the worker has reached the threshold of 13 per cent of the annual social security ceiling. It is worth recalling that under article R.743-9 of the Social Security Code, contributions are payable quarterly in advance during the first fortnight of the month preceding the calendar quarter of the insurance period. If the worker works for a number of platforms, as long as the minimum turnover is reached in each case, each platform reimburses contributions on a pro rata basis reflecting the turnover earned on that platform. In this situation, the platform may ask the worker to attach to the application evidence of

the turnover earned on each platform. The legislation therefore requires workers to have the financial capacity to pay in advance, despite the fact that they are on low, unpredictable and variable incomes. It also assumes that workers have the skills to deal with the complexities involved in signing up for voluntary insurance under the general regime for occupational accidents and diseases (article L.743-1 of the Social Security Code). Given all of these factors, it is hardly surprising that the vast majority of platform workers do not take out voluntary insurance under the general regime. Most opt instead for private insurance (as the law allows), or more often, the collective insurance contract taken out by the platform which, in accordance with the Circular of 8 June 2017, must include "guarantees at least equivalent to those provided by voluntary accident insurance, set out in article L.743-1 of the Social Security Code".[26]

- The legal provision as drafted entails a significant risk of fragmenting social coverage between platforms, moving away from the principle of risk sharing and solidarity between employers and employees that lies at the heart of social security. Private insurance contracts have already been concluded between Axa and Uber, and subsequently with Deliveroo. In pursuing this line, the legislator is breaking with a historic tradition in which the main purpose was social inclusion and taking steps that in a number of ways encourage the privatization or even re-commodification of social security,[27] profiting insurance companies and using the Labour Code as a Trojan horse.

Social protection of platform workers: Swimming against the tide

Agencies responsible for collecting social security contributions have taken out a number of claims against intermediary platforms. A first case dates from 7 December 2016, and was lodged by the collection agency, URSSAF, against Take Eat Easy. A lack of coverage for occupational accidents also led to a ruling – the first in this sector – from the Court of Cassation. This received extensive media coverage on 28 November 2018 because the judges decided to reclassify the relationship as one of subordination. In this case, the employee had additional employment as a stage manager and was a victim of two road traffic accidents,

26. Circular No. DGT/RT1/DGEFP/SDPFC/DSS/2C/2017/256 of 8 June 2017 on the social responsibility of digital intermediary platforms, NOR: MTRT1724167C. The choice is straightforward given that private insurance pays EUR 40 per day for a period of one month, whereas the voluntary insurance linked to the general regime for occupational accidents and diseases pays EUR 300 per month and for a month at most. Since October 2019, Deliveroo has been offering insurance through La Parisienne, which provides that in cases of incapacity for a minimum of one week, the policy holder receives EUR 30 per day for a maximum of 15 days.

27. Or, to use J. Dirringer's striking term (2018, p. 33 sq. p. 37), are we seeing the "uberization" of social security?

leading to incapacity for a month. The question is whether it is necessary to establish a separate social security regime despite the fact that, in social security law, some categories of self-employed workers have already been included in the general scheme by assimilation, and in spite of the general trend towards the universal extension of social insurance to bridge the remaining gaps between the general regime and the self-employed regime.

In French law, the test of legal subordination is applied to distinguish between employees and the self-employed. This has a direct impact on entitlement to social protection because it determines whether the worker is covered by the general social security regime. This means that in French law, there is a link in principle between the classification of work, i.e. legal subordination, and affiliation to the general social security regime. Departures from this principle are nothing new. For example, artists and writers have social insurance funded in part by contributions from the beneficiaries themselves and in part by the disseminator of an original work, even if there is no relationship of legal subordination. The contribution is justified by the fact that a profit is derived from the activities of the other party.[28] The same solution applies to the authors of graphic and sculpted art works, for whom contributions are based on the turnover earned from the commercial exploitation of the work, rather than the artist's income.[29] Several reports recommend that platform workers should be included in the general regime (Frouin and Barfety, 2020, p. 57; Conseil national du numérique, 2020; Haut Conseil pour le financement de la protection sociale, 2019; Amar and Viossat, 2016). By analogy, other work relationships that do not entail subordination could be brought within the general regime. Taking this a step further, there is no theoretical or organizational reason why workers, regardless of their employment status, should not be included in the general regime; business contributions would be based on the profit derived from the work of the other party, regardless of whether the worker is employed or self-employed.

The coexistence of a self-employed regime alongside the general regime is reflected in differences in financing, contributions and benefits.

In terms of financing, the French system is based on both professional income and an employer contribution, the principle being that social security should be redistributive, i.e. the economic entity that profits from the worker's activity should also make a contribution. Therefore, the aim is to tackle social inequality at a national level through solidarity between all employers and all employees. However, in the case of self-employed workers, those costs are borne by one and the same person – as both contributor and beneficiary.

28. Article L.382-4 of the Social Security Code; Daugareilh (2008, p. 89).
29. Article L.382-4 of the Social Security Code; Daugareilh (2008, p. 89).

The distinction between employment and self-employment also presents challenges when it comes to the benefits paid. For occupational accidents and diseases, the prevailing model has been the payment of a daily allowance, reserved for employees. The first extension of this right to self-employed workers was adopted by the legislator to cover self-employed agricultural workers in 2001 (Zacharie, 2016, p. 223). There is no reason why insurance for occupational accidents and diseases should not be extended, as regards benefits in cash and in kind, to unregulated liberal professionals, registered before 1 January 2018, which would include a large number of platform workers using the micro-enterprise scheme.

As for the Labour Code, in Part IV there are examples of workplace risks giving rise to entitlements that do not depend on the legal classification of the employment relationship or on establishing a link sufficient to entail obligations on health and safety at work. These provisions focus in particular on sectors that externalize labour or use serial subcontracting (Aubert-Montpeyssen, 1997). For example, articles L.4522-1, L.4522-2 and L.4532-2 of the Labour Code require the coordination and training of all workers based at the same workplace, regardless of the legal link between them and the contractor (in low-level nuclear facilities and installations which may give rise to public utility services, and building and civil engineering). These obligations carry criminal liability, even if there is no legal link between the businesses concerned, in cases where there is simultaneous or consecutive intervention "by several self-employed workers, including contractors or subcontractors". These obligations apply to the party with decision-making powers and, beyond that, to the party with financial control. They could form part of a duty of care extended to cover platforms.[30]

Thus, the trend has not been to reduce the scope of employment law,[31] but rather to extend it regardless of the legal relationship with the contractor wherever necessary to protect workers' physical and mental health, in particular in sectors where employed and self-employed workers work alongside each other. Indeed, perhaps the legislator of 2019 pre-empts this point when recommending that prevention and training in health and safety could be included in the charter? The difference – and it is a significant difference – is that the charter is not binding. It does not create obligations of an equivalent nature and scope to a legal duty imposed on the platform.

As regards unemployment, self-employed workers typically have been excluded from coverage for loss of employment, which only applies to cases of involuntary

30. As proposed in the Jacquin draft law on the protection of self-employed workers by the creation of a duty of care, the defence of salaried worker status and the fight against bogus self-employment, 1 December 2020, Senate, No. 187.

31. See also Larrazet (2019).

job loss; whereas self-employed workers have control over their own employment. A law of 5 September 2018 sketched out some initial elements of unemployment insurance for self-employed workers (Joly, 2018, p. 58). It creates a right to a flat-rate payment in some very limited cases, essentially excluding micro-entrepreneurs, in particular because one of the conditions for entitlement is to open a procedure for liquidation of assets – a procedure rarely used by micro-entrepreneurs.

The progressive extension of sickness, maternity and family benefit coverage, as well as the trend to extend the general regime to cover workers who are not employees, suggest that platform workers could be offered social protection regardless of the classification of their employment status.[32] Certainly, this could be done without the need to resort to a special regime that places them outside the scope of social security and departs from the underlying principles of solidarity and risk sharing. In fact, it is to some extent both the legal employment status and the insecurity of incomes – usually low and inconsistent – that prevent these workers, in the short term, from taking out social insurance, and in the long term, from building up full entitlements. This is not unique to platform workers. It is widespread among all those involved in atypical and non-standard forms of employment (to borrow a term from the ILO).

This is why the solution in terms of social protection is perhaps not to identify an occupational category or even a sub-category, as the French legislator did in 2016 and 2019, but to consider the whole range of new and non-standard forms of employment that are emerging and spreading globally. Taking on board these developments, international organizations have started to explore ways forward that would encompass all non-standard workers, in a way compatible with the founding principles of social security (Daugareilh and Badel, 2019).

The French legislator's inappropriate approach to the social protection of platform workers

Bogus self-employment, instability, job insecurity and a lack of social protection are all characteristic of the new jobs created by the uberization of the economy. These characteristics of work in the digital age are shared to some extent by increasing numbers of workers, regardless of their sector or form of employment. While these workers face the same social protection risks (illness, maternity, disability, old age, etc.), platform workers also face a specific risk not covered by the social protection system: the risk of increasingly frequent changes

32. This was the purpose of the draft law tabled by Communist members of the Senate, which was considered at first reading on 11 September 2019, Text No. 717, draft law on the employment status of platform workers.

of job and employment status, with periods out of work between jobs. As such, perhaps the aim should be not so much to respond to the needs of a specific category of workers, but rather to consider social protection for all those in non-standard employment (contractors, those with multiple jobs, freelancers, entrepreneurs, on-call workers, etc.). This would include platform workers, in line with the approach that has been taken for workers in the creative industries for some decades now.[33] To respond to these challenges, international organizations such as the European Union, the Organisation for Economic Co-operation and Development (OECD) and the ILO recommend that member States establish a right to social protection for all non-standard workers and for all workers who are not employees. Their approach is not to treat platform workers in isolation as a separate category, but to regard them as one of the new, non-standard forms of work that may entail employed or self-employed status.

Social protection for all non-standard workers

Since 2016, the ILO has carried out a number of studies on non-standard employment and has systematically and explicitly examined the situation of platform workers from a number of perspectives. In its 2016 report on non-standard employment around the world (Cosme, 2016, p. 91), the ILO made two recommendations of interest:

Bridging regulatory gaps by ensuring equality of treatment for workers engaged in non-standard forms of employment. The ILO believes that legislation is necessary to remedy the problem of unclassified, bogus or misclassified work relationships. It calls on Member States to take action to prevent classifications that fail to reflect the reality of the conditions in which platform workers are engaged. On this issue, the French Court of Cassation has ruled in two cases involving workers on two different platforms – Take Eat Easy and Deliveroo – that on the facts, the work relationship was based on legal subordination and arose in the context of an organized service.[34] In these cases, the evidence on working arrangements submitted to the Court in support of the reclassification request demonstrated both legal and financial dependence, incompatible with self-employment. Instead of providing legal certainty to these workers, who are demonstrably placed in a vulnerable, insecure and unequal position vis-à-vis the platform and therefore need legal protection equivalent to that of employed workers, in 2016 and 2019 the French legislator introduced more uncertainty

33. On this subject, see the contributions from Menger (2011), Gazier (2009), Gazier (2012), Daugareilh (2008, p. 87), and Kerbourc'h (2008, p. 55).

34. Soc. 28 November 2018, Take Eat Easy, No. 1737; Soc. 4 March 2020, Deliveroo, ruling No. 374. Commentaries, inter alia, by Gomes (2019), Lokiec (2018), Lhernoud (2019), Van den Bergh (2018), and Escande-Varniol (2019, p. 177).

and undermined these supposedly self-employed workers by placing a burden of proof on them to establish legal subordination. And yet it seems that these workers are subject to much closer surveillance than most employees (Supiot, 2000, p. 131) and that they do not have any real autonomy. For example, for delivery riders, the detailed delivery route is specified by the app and is very closely monitored. Deviation can give rise to a warning or even a penalty. So these workers are not just bogus self-employed, but financially dependent bogus self-employed. The rulings of the Court of Cassation on Take Eat Easy (28 November 2018) and Deliveroo (4 March 2020) are very revealing in this context. Moreover, some of the evidence summarized in the ruling of the Conseil des prud'hommes de Paris (employment tribunal) of 4 February 2020 goes so far as to demonstrate evasion of the law by the platforms.[35]

At a national level, social protection systems should be strengthened, if necessary by guaranteeing insurance cover for all workers regardless of employment status. This means, for example, eliminating or lowering thresholds regarding working hours, earnings or the minimum duration of employment required to qualify for entitlements, so that workers in non-standard forms of employment are not excluded. It could also mean introducing more flexibility with regard to the contributions required to qualify for benefits, by allowing interruptions in contribution periods and ensuring the portability of entitlements between different social security schemes and employment statuses.

In other words, in line with ILO Social Protection Floors Recommendation, 2012 (No. 202), all workers, regardless of status, should benefit from a universal social protection floor, with the level and extent of benefits not dependent on employment status. The French legislator falls short on two counts: first, by discriminating against platform workers, making entitlement to compensation from the platform dependent on a minimum turnover; second, by creating a subcategory eligible for preventive measures and supplementary health cover. Moreover, the notion of a social protection floor, which implies a universally applicable binding legal framework, seems incompatible with the idea of social responsibility, which makes social protection contingent on the goodwill of the platform. This was the approach taken in the Frouin report: "As a matter of principle, social protection should be neutral with regard to the employment status of the worker, and in practice, platform workers should be placed on an equal footing with employees; indeed, this equal treatment could properly be extended to all self-employed workers. But this principle of neutrality and the underlying objective can only be implemented through government intervention and ultimately through legislation" (Frouin and Barfety, 2020 p. 85; Conseil national du numérique, 2020, p. 165).

35. Conseil des prud'hommes, Paris, 4 February 2020, Commerce Section, R.G. No. 19/07738.

As part of its work marking the ILO centenary, the Global Commission on the Future of Work submitted a report to the ILO in 2019 (ILO, 2019, pp. 35–36).[36] The report makes a clear recommendation in favour of universal social protection based on principles of solidarity and risk sharing to provide workers "with freedom from fear and insecurity and [help] them to participate in labour markets". The authors of the report suggest that in principle socal security coverage should be extended to all workers, regardless of their form of engagement, "including self-employment". They advocate "protection for workers who move between wage employment and self-employment … ensuring that rights and benefits are accessible and portable, including for those working on digital platforms".

Furthermore, the work done by the Commission of Experts on Social Protection[37] suggests that social security systems are particularly ill-adapted for workers in non-standard employment,[38] which includes workers involved in the digital or platform economy who tend to be under-employed, if there is any formal relationship at all. The report indicates that they and their families "are among those sections of the population most likely to have no access to social protection and no entitlement to welfare cover" (ILO, 2019).

The ILO has also produced a study on digital platform workers (Berg et al., 2018), which reports the outcome of a survey of 3,500 workers conducted in 75 different countries, from 2015 to 2017. The report describes the situation of these workers in terms of social protection: "Only six out of ten respondents in 2017 were covered by health insurance, and only 35 per cent had a pension or retirement plan. In most cases this coverage came from the respondents' main job in the offline economy, the job-related benefits of their family members, or state-sponsored universal benefits". Their social protection is therefore weak, it "is inversely related to the individual's dependence on crowdwork – workers who are mainly dependent on crowdwork are more likely to be unprotected. About 16 per cent of the workers for whom crowdwork was their main source of income were covered by a retirement plan, compared with 44 per cent of those for whom crowdwork is not the main source of income" (Berg et al., 2018, p. xviii).

This report sets out three ways to adapt social protection system so that workers have access to social protection:

• adapting social insurance mechanisms to cover **all forms of employment, independently of the type of contract**[39] – the ILO notes that lowering or

36. See Behrendt, Nguyen and Rani (2019, p. 17) and the commentary by Keim-Bagot (2020, p. 22).
37. See Markov, Stern Plaza and Behrendt (2019, p. 547); see also ILO (2019b).
38. The ILO defines non-standard employment to include multi-party employment, disguised employment and "dependent self-employment", all definitions that could equally apply to the relationship between a worker and a platform. See ILO (2015) and OECD (2018).
39. Emphasis added.

removing minimum thresholds with regard to the size of the enterprise, working time **or earnings, can help to broaden the coverage**;[40]

- using technology to simplify contribution and benefit payments;
- instituting and strengthening universal, tax-financed mechanisms of social protection, perhaps going so far as to introduce a universal basic income. This would mean strengthening the tax mechanisms which platforms, in any case, are currently able to avoid.

For its part, in 2018, the OECD produced a report on the future of social protection in which it devoted a significant amount of space to digital workers (OECD, 2018). The OECD notes that 16 per cent of all workers are self-employed and a further 13 per cent of employees are on temporary employment contracts. Most of the time they only have access to basic benefits. Only six out of 35 member States offer the same benefits to the self-employed. The OECD, like the ILO, takes a broad approach, grouping together all new forms of – non-standard – work, into one category. The OECD states clearly that providing social protection to non-standard workers is an ethical, but also an economic imperative, since it is the only way to guarantee the financing of social protection schemes and to avoid businesses opting for employment arrangements that do not require them to make any contributions.

In its 2018 Policy Brief, the OECD recommends three avenues to reform social protection so that it properly reflects current practice in the world of work. The first option would be to include non-standard workers in the existing schemes and to adapt the rules to better meet the needs of these workers. The second would be to individualize social protection by linking social protection entitlements to the person rather than to the job. This option has already been taken up in some legislation; for example in France, with the introduction of the personal activity account (Laborde, 2017). Individuals themselves contribute to their account, which has some advantages in terms of portability during a change of employment status and flexibility in accessing benefits. It does raise a series of questions, for example, regarding eligibility for benefits, the role of the State or business in financing the system, and the level of the contribution that should be set aside for a pension. The third possibility is to make social protection universal by cutting the link with employment altogether. This would help to bridge the coverage gap between employed and self-employed workers, mentioned several times above, and would reduce the need to track changes of job or employment status. However, this would mean a complete rethink of social protection financing, which would entail an increase in cost. This possibility has been picked up on by a number of countries, including France, where entitlement to family benefits and health care has been decoupled from employment, and the same is

40. Emphasis added.

now being done for loss-of-work benefits. That said, non-standard workers who are also non-salaried have lower levels of protection for the risks covered, as well as a limited ability to shoulder the costs of social security contributions.

Social protection for workers who are not employees

Most initiatives on the social protection of the self-employed have been at the European level. The Council of the European Union recommends that Member States should "promote, in the context of their policies on preventing occupational accidents and diseases, the safety and health of self-employed workers, while taking account of the special risks existing in specific sectors and the specific nature of the relationship between contracting undertakings and self-employed workers".[41]

In 2017 and 2018 the Commission held a series of consultations with the social partners on ways to enhance and extend social protection to as many individuals as possible, including self-employed and insecure workers. On 13 March 2018, it published a Draft Recommendation of the Council on access to social protection for workers and the self-employed, which was adopted on 8 November 2019.[42] The principle behind the text is that employees and, under comparable conditions, the self-employed, have a right to adequate social protection. This Recommendation is based on a number of observations.

- "Employment will increasingly be more diverse, and careers will be less and less linear"; there is also a greater "variety of forms of work (on-demand work, voucher-based work and platform work)".
- "One out of five self-employed persons is self-employed because he or she cannot find a job as an employee; some non-standard workers and some self-employed persons have insufficient access to the branches of social protection".
- "In the long run, the gaps in access to social protection could put at risk the welfare and health of individuals and contribute to increasing economic uncertainty, the risk of poverty and inequalities … Such gaps could also reduce the revenues of social protection if a growing number of people do not contribute to the schemes".

The Recommendation (point 8) is that Member States should "ensure access to adequate social protection for all workers and self-employed persons in respect of all branches mentioned in point 3.2" (unemployment benefits, sickness, maternity, invalidity and old-age benefits, accidents at work and occupational diseases) "… by

41. Rec. No. 2003/134/EC of 18 February 2003, OJEC No. L53, 28 February.

42. See EU (2019). To assist the monitoring of the Recommendation's implementation, States must submit a plan by 15 May 2021 at the latest setting out the corresponding measures to be taken at national level.

extending it to … the self-employed, at least on a voluntary basis and where appropriate on a mandatory basis". However, empirical research shows that voluntary insurance does not work for these new self-employed workers, mainly for financial reasons, and to a lesser extend due to psycho-social factors. The recommendation suggests that States ensure contributions are in line with the contributory capacity of the self-employed. One of the recommendations made by the *Conseil national du numérique* in France is that self-employed workers' contributions should be inversely proportional to their income (Conseil national du numérique, 2020, p. 181).

The Recommendation also suggests that, with the exception of voluntary provisions for unemployment insurance, there should be a general principle of universality, with adaptations to reflect the situation of specific groups of workers. Yet, the Recommendation also says that, "The implementation … should not significantly affect the financial equilibrium of Member States' social protection systems". While social protection can be provided by a combination of schemes, the Recommendation expressly states, "Private insurance products are not within the scope of this Recommendation (point 1.2)". The French legislator did introduce optional private insurance to cover occupational accidents and diseases, while the platforms' response to criticism has been to offer a "social insurance package" to cover risks such as sickness, maternity or lack of employment. The approach adopted in French legislation, in attempting to patch up the gaps and weaknesses of the self-employed scheme, raises questions on compliance with the European Recommendation described above, and is perhaps an application of Gresham's law, according to which bad money drives out good.

Conclusion

Given the degree of international consensus in the reports and recommendations, should the link between social security and employment be severed, or should we readjust the relationship between the two partners in this "old married couple"?[43] Economists and legal scholars who took an interest in this matter long before the emergence of the uberization of the economy have considered various scenarios.

According to Bruno Palier, our social systems were designed to provide financial security for workers in automobile assembly plants, not for service providers working "on-demand" in the digital economy (Palier, 2018, p. 16). Palier examines a number of possible issues. He thinks that the Bismarckian system, which makes social protection dependent on a particular type of employment (an indefinite contract), is the worst adapted to the new platform economy. The

43. To use Supiot's term (1995, p. 823). See also Badel (2018, p. 167).

liberal system of social protection, with public assistance restricted to the very poorest, could increase levels of poverty without making available the necessary financing to address the situation. The Nordic-style social protection system, which grants a wide range of entitlements (health, education, training, and a minimum income in cases of disability, unemployment or old-age) to all citizens, regardless of their employment situation, seems to be better adapted to meet the needs of workers in a changing economy. Providing more universal benefits and social services to all citizens by decoupling social insurance from the work contract, business or employment relationship is the preferred option of several economists with an interest in social protection.[44]

Legal scholars analysing the relationship between work and social protection (Borgetto et al., 2017) have noticed some contradictory trends, in that while there has been some loosening of the historic ties between the two, the separation is not complete. In France, this is true of family benefits, which are available to all residents, but are still funded by employer contributions. Another example is health care, which has become a universal benefit since the introduction of the PUMA universal health scheme (*Protection universelle maladie*), but may be topped up with supplementary health insurance – mandatory for employees, but optional for the self-employed. There is also a tendency to redefine the work/social protection relationship, in particular through the introduction of benefits such as the *Revenu de solidarité active*, (RSA) part of a welfare-to-work scheme, or the personal activity account. Indeed, we see the emergence of new terminology, with the word "work" being replaced by "professional activity". Far from spelling the end of the work/social protection relationship, the social security reforms reflect the enduring nature of this long-standing link. Indeed, the relationship has shown a capacity for renewal, which may then give rise to greater complexity, in a positive sense, as some authors have shown (Borgetto et al., 2017, p. 7 ff.).

The uberization of the economy is widely regarded as a fresh opportunity to rethink the work/social protection relationship. However, if we fail to renew the terms of the debate, it could in fact be dangerously distorted by this phenomenon, were we to lose sight of the facts. In addition to the low volume of workers affected,[45] this includes information on working conditions, as evidenced by court rulings from various countries around the world (Van den Bergh, 2019, p. 101; Daugareilh and Fiorentino, 2019), as well as the rulings of the Court of Justice of the European Union (CJEU)[46] that these platforms are

44. Palier (2018); see also the classification proposed by Gazier, Palier and Périvier (2014).

45. According to Degryse (Champeaux, Abdelnour and Degryse, 2019), only about 2 per cent of the labour force derive their main income from the platform economy.

46. CJEU 20 December 2017, Elite Taxi, no. C 434/15, CJEU 10 April 2018, Uber France, No. C-320/16; Escande-Varniol (2018).

indeed (transport) businesses and that the conditions of work amount to employment (Dockès, 2019). The model of an entitlement based on professional activity, providing a basic level of protection regardless of employment status (Boissonnat, 1995; Supiot, 2016), might come up again in the debates arising from the uberization of the economy, as has been suggested by some scholars (Dirringer, 2018, p. 33) and in the very recent Frouin report (Frouin and Barfety, 2020). This would make it possible to maintain the link between work and social protection by attaching the right to the person, rather than to the employment status of a specific activity – and certainly not to the type of business concerned, which is the least desirable option.

The aim is to establish a common system of entitlements, within which work, with all its diversity and transformations, would continue to play a central role. This central role must be preserved, both in employment law and social protection law; a system with accessible, enforceable and portable entitlements based on principles of universality (Isidro, 2018), solidarity (Laborde, 2015) and risk sharing. It would mean severing the link between social protection and legal subordination (Linhardt, 2017),[47] but at the same time preserving the link between work and social protection, which explains why all businesses, including platforms, are expected to make contributions towards financing social protection. This approach would continue the trend of assimilating the social protection regimes for employees and the self-employed, helping to make further progress in that regard.

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47. As is the case for some of the professions dealt with in Part VII of the Labour Code (domestic concierges, domestic workers) or more recently wage portage (art. M. 1,254-1 of the Labour Code) or salaried entrepreneurs who are members of employment cooperatives (art. L. 7,331-2 of the Labour Code).

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Platform work and social security in German law: An international law perspective

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Abstract Platform work confronts traditional social security law in two dimensions. First, it makes the distinction between dependent and independent work uncertain and unclear, as the borderline between these blur. This is a profound challenge for social security law, because the criteria of dependent and independent work have to be precise. In the determination of work as dependent or independent, German law illustrates that a shift has taken place in determining employment status, moving from external and objective criteria to the contracting parties' decision, which is to be executed under private law, but also respected under social security law. Second, platform work is heavily intertwined with digital communication, which has established a global environment for communication. Thereby, platform work can also facilitate international trade by making transnational work more accessible and efficient. Therefore, it seems necessary to examine the implications of platform work in international law. International law makes possible the choice of law, executed by the contracting parties. As a consequence, the protection of employees by social security law is related to the private law arrangements between the service provider and the service recipient. Gaps in social security protection of service providers are widespread. In many countries, awareness of the social protection deficits of platform workers has grown and responses to improve the social status of platform workers have come under scrutiny. Analysis reveals that there is a

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joint responsibility of the service provider and the service recipient to be bound to social security coverage under the same national legislation. Nevertheless, from an international law perspective, it is shown that reforms are confronted with restrictions under international law.

Keywords atypical work, platform workers, social security legislation, social security financing, labour market, regulation, legal aspect, Germany

Introduction

Social security legislation makes social security protection mandatory and is a part of public policy. In Germany, access to social security is dependent on labour market status, which has implications for the content, financing and personal scope of social security coverage. Typically, the aim of social security, when financed by worker and employer contributions (social insurance) that are levied on salaries, is to provide for protection against work-related and social risks.

In German law, social security coverage is predominantly directed towards dependent workers, for whom access to the full benefits of the system is possible. The self-employed are often also covered by social security, but mostly under divergent and specific conditions. In the German context, social security is a work-based system – it is thus not about protecting all those resident in the country.

Given that social security emphasizes the protection of dependent workers, the most elementary distinction is to be drawn between dependent and independent work. The former is covered for all important workplace and social risks: health and long-term care, disability, old age and protection for surviving spouses and children, work accidents, occupational diseases, and unemployment. The latter does not receive or strive for a likewise level of support – the risks covered and the benefits provided are far more restricted.

Public functionaries – senior public administrators, judges, the clergy, schoolteachers and lecturers at public universities – are integrated by means of separate and regionally based systems of social protection, organized directly by the States *(Land)*, which are autonomous public protection schemes *(Beamtenversorgung)* independent from national insurance programmes. Additionally, and separate from other groups, federal public functionaries are protected by federal legislation.

The self-employed may be protected as members of categorical schemes that are dependent on professional status, which determines whether and how self-employed persons are covered. The provisions distinguish between farmers, artisans, artists and the liberal professions.

The farmers' old-age pension and health care system is separate from the scheme for workers and is highly subsidized by the State. This is due to European Union (EU) competition law, which does not permit direct state subsidies for farmers.

Artisans and artists are integrated into the general pension insurance (*Rentenversicherung*) scheme; for the two groups, special rules apply as to the financing and duration of protection. The mandatory period of coverage for artisans is limited to 18 years of professional life. For artists, a special contribution is levied from companies that make use of artistic services and from other distributors of cultural services; this special contribution finances the shortfall in total contributions owing to there being no employer contributing on behalf of self-employed artists. In this manner, self-employed artists' contributions to social security, as a percentage of earnings, are the same as those of dependent workers – regardless of their economic independence.

Within the liberal professions, barristers, medical doctors, dentists, pharmacists, barristers, notaries, architects and engineers are organized in different professional chambers; these bodies have the right to enact and administer the protection for old age, survivors and disability. For the latter, this may be administered autonomously and on a regional (Land) basis. These liberal professions are endowed with the right to provide for their old-age protection autonomously. As these groups are organized in professional chambers at the regional (Land) level, these institutions are responsible for regional systems of statutory social protection for their members. This protection is elitist and fragmented, as the insurance risk pool and solidarity is regionally determined as well as restricted to one professional group.

Independent workers who do not fall into one of these professional categories are protected in a mandatory manner, but only if they are solo self-employed and depend economically on a single or a main client (Kreikebohm, 2013, § 2 Rn. 39).

Those self-employed who are without a status permitting them to qualify for mandatory social security protection can opt for voluntary social insurance.

Platform work is facilitated and driven by the emergence and development of digital communication. To identify platform workers' social security protection needs, it is first necessary to specify the legal character of this work. This is difficult, as digital communication overcomes the traditional limits to human action of space and time. Platform work alters economic relations and forces a reconsideration of the legal categories of work. This task is a pertinent and

urgent one, because the process of the digitalization of everyday life continues apace.

On the German labour market, a substantial increase in economic activity in the form of platform work is underway. A government review and analytical report has examined the various changes to work patterns that are driven by the increase in digital work, including work organized transnationally (Federal Ministry of Labour and Social Affairs, 2016). Although political awareness of this topic has risen, clear figures on these developments are not readily available, because of the lack of comprehensive social protection for the self-employed. This deficit is widely deplored by the political parties, but substantial steps to improve this situation have not yet been undertaken.

The protection afforded by social security systems is a fundamental feature of modern nation states. Platform work, however, may be conducted as an international activity. Due to this reality, platform work raises fundamental questions concerning international labour and social security law. These international dimensions must be borne in mind when addressing the legal status and social protection of platform workers. This is not an abstract question, because each system of social security protection is organized by a specific nation state. Given that the degree and forms of social security protection for the working population vary from country to country, each State has to reflect on the limits of its own system set by international law. This reflection will be explained more fully when analysing the impacts of international platform work on social security. In the light of international law, possible responses shall be identified that intend to improve the position of platform workers, especially those who are active as self-employed. International law demonstrates that the options for responses to improve the status of self-employed platform workers are limited.

The remainder of this article is structured as follows. The next section discusses the legal basis of dependent and independent work status, by means of which the status of platform work can be qualified. This is followed by consideration of national social security systems and the challenges posed by the potential international nature of platform work. In turn, the article present proposals to address the social security needs of platform workers before a concluding section presents final thoughts.

Platform work: Dependent or independent work?

In this section, to identify and distinguish between dependent and independent work, the legal basis of the distinction in statutory as well as case law is illustrated. On this basis, the legal qualification of platform work is presented.

Legal basis and case law

As outlined above, the German social security system emphasizes the protection of dependent workers. Therefore, the most elementary distinction is to be drawn between dependent and independent work; the former are covered by social security systems for all important social risks, while coverage for the latter is far more restrictive as to the risks covered and the benefits provided. The self-employed are protected by categorical schemes, dependent on professional status, which determines whether and how self-employed persons are covered. The provisions distinguish between farmers, artisans, artists and the liberal professions.

Independent workers who do not fall into one of these professional categories are protected in a mandatory manner, but only if they do not provide regular and steady work to at least one employee (i.e. they are solo self-employed) and depend economically on a single or a main client. The economic dependence requirement demands that five-sixths of their overall economic activities stems on returns from this one (main) client (Kreikebohm, 2013, § 2 Rn. 39).

Those self-employed who are without a status permitting them to qualify for mandatory social security protection can opt for voluntary social insurance. However, this voluntary option is rarely taken because the cost of such protection is high.

To have access to a level of protection adequate to replace previously earned income, the self-employed worker has to contribute double the amount in comparison with an employee with the same income – the self-employed have to pay their own contribution and also bear the employer's share.

Accordingly, to delineate dependent from independent work is crucial for defining access to social protection under German law.

The distinction between dependent and independent work, as understood both in economic and social terms, is defined by law (§ 611a BGB, § 7 SGB IV). In the light of the elaborate structure of the German social security system, this distinction is of fundamental importance. The concepts used to describe the distinction are to be interpreted by the administrations as well as by the courts in the case of disputes.

The status of dependent work is conceived as the subordination of the employee to the employer's directives. The employee's work is, therefore, determined by the employer. In Germany, "social protection" is understood as public support for "dependent persons", therefore "social security" focuses on "dependent workers" – in liberal society, dependency justifies an intervention in favour of persons who are conceived as both economically and socially vulnerable and deemed in need of public support.

These distinctions reflect, however, the centralized and hierarchical world of work of the nineteenth century (Walwei, 2016, p. 357, p. 361f). The

contemporary world differs from this view substantially, as the hierarchical work patterns of the industrial past are replaced by more egalitarian forms of cooperation. As a consequence of the digital shift, traditional legal differences between dependent and independent work have blurred (Pietrogiovanni, 2019, pp. 56–58).

As regards case law, the German courts distinguish between dependent and independent work, first, by analysing the content and the circumstances of the work and, then, by determining how the economic risks of work are allocated and distributed between the service demander and service provider. Economic risk means the assumed burden that is necessary to realize an economic profit from merchandizing the work to be undertaken. If the employer determines the content and the circumstances of work and bears the economic risk, the work is dependent; otherwise, it is independent.

A key characteristic of dependent work is that the activity has to be undertaken on the employer's premises, wherein final authority and responsibility lies with the latter.[1] Recent measures taken in response to the COVID-19 pandemic have given rise to employees working professionally from home, outside of the employer's workplace. This has been possible, despite the loss of oversight that it implies for employers as regards employees' work, because it has only been under this condition that the work could be undertaken effectively. This experience has therefore raised the question concerning why, in the future, it should be necessary for an employee to be integrated into the employer's hemisphere (workplace) and why such integration should continue to be conceived as crucial for distinguishing between dependent and independent work.

In the light of these criteria, this also brings into question whether the transportation of objects or persons[2] or the delivery of personal services – such as long-term care[3] – are undertaken as dependent or independent work. The key question relates to which degree these services need any guidance from an employer. When it comes to deciding upon the appropriate legal status for the service, one can actually observe both forms of employment. This suggests that it is not the service, as such, that qualifies the status of the work. Rather, its legal status is to be determined according to further factors and criteria as well as the intentions of the parties.

1. BSG, 29.08.2012 – B 12 KR 25/10 R = SozR 4-2400 § 7 Nr. 17 Rn 24 "Integration into the factory"; Auer-Mayer (2016, pp. 126, 128).
2. BSG, 19.08.2003 = SozR 4–2400 § 7 Nr. 2; BSG, 22.6.2005 = SozR 4-2400 §7 Nr. 5; BSG = SGb 2008, 401; BSG = SGb 2014, 319.
3. BSGE 12099.

Confronted with a series of specific cases in Germany, the Federal Supreme Court on Social Affairs (*Bundessozialgericht* – BSG)[4] held that the qualification of a service as dependent or independent should rely on the contract, which the parties concluded to agree on and to concur on the work to be done. To examine the service provider's status, the contract should be the starting point for any legal inquiry.[5] As the onus lies with the contracting parties to determine their cooperation, they have the right to determine autonomously the legal status of their relation.[6] This qualification – negotiated and formalized in the contract – has to be respected by the courts if the parties make effective the promise given, unless the arrangement is proven fictive.[7] From this perspective, the nature of the social protection results from the consensus of the contracting parties, which as a private law contract also provides for social protection under public law.

Qualification of platform work

The qualification of platform work is, as a first step, carried out by the contracting parties. They define their mutual relations by determining their contractual relationship by contractual law. This law offers to the contracting parties a plethora of forms for collaboration – the above-mentioned contracts of service (dependent work) and contracts for services (independent work). The former creates a dependency relationship between the contracting parties, while the latter establishes links with independent and autonomous partners. In the world of work, the notion of a "free contract" has always been considered dubious given the economic inequalities involved between the contracting parties. Consequently, as the second step, the courts, when qualifying a contractual agreement, always examine to ensure that the contractual obligations are not misrepresentations of the factual relationship established and carried out in practice. Only where the contractual arrangement corresponds with the factual exercise of the treaty does the court uphold the contractual qualification.

The courts have been confronted with the task of qualifying the nature of platform work at a time when the acknowledged indicators used to discern dependent and independent work have become uncertain and difficult to grasp. If platform work is intentionally and voluntarily organized as dependent work – e.g. the delivery of commodities in parcels, courier services,[8] or the

4. BSG SGB 2008, 401 (Pilot); 2011, 677 (family support on demand); 2014, 319 (Telephone service).
5. BSG, 29.08.2012 – B 12 KR 25/10 R = SozR 4-2400 § 7 Nr. 17.
6. BSGE 120, 99 Rn. 17.
7. BSGE 120, 99 Rn. 16.
8. LAG Berlin Brandenburg, 29.3.2017 – 24 Sa 979/16; LAG Baden-Württemberg – 2 Sa 6a 1/15; LAG Berlin-Brandenburg, 13.1.2016 – 23 Sa 1445/15.

transportation of persons[9] – the legal relations are to be qualified as dependent work, even if the instruments for the work – smartphones and means of transportation – are owned by the service provider.

This judgement can be explained and justified, given that the service should be at the disposition of clients and the service provider is exposed to the demands of the service supplier as the ultimate lender of the effectuated service. If platform work is undertaken by a self-employed person, and especially as an artisan, artist, farmer or member of a liberal profession as well as an economically dependent self-employed or voluntarily insured person, the provider's protection is safeguarded by virtue of her or his status as a self-employed person, protected under German social security law.

In cases where the platform work is organized using a digital interface between the offeror[10] and the demander of the service, most often the work to be undertaken is defined by a contract. If this contract does not rely on the cooperation of the partners at a specific workplace, or on the need to be at the recipient's disposition at a specific time, and if no further arrangements apply, the contract of service and the status of independent work are the appropriate legal forms for such an activity. Such platform work is, thus, to be qualified as independent work.

Quite often, such work substitutes for dependent work, which contributes to the atomization of the workforce (Krause, 2016b). Under these conditions, an employer no longer determines the content of the work within the contract for services, and it is not necessary for the worker to be guided by any one-sided directives. Instead, the service rendered is defined entirely by the contract, which also determines the time, the manner and the place of delivery.[11] Under such an arrangement, the service provider becomes an entrepreneur of herself/himself and, hence, an independent worker.[12]

The fact that she or he remains personally responsible to deliver the contracted service does not alter this status, because this responsibility is borne by many self-employed persons, e.g. painters, musicians, authors, medical doctors or barristers.[13] The indicators on the distinction between dependent and independent work give a presumption that platform work is independent work,

9. Bundesgerichtshof (BGH), 13.12.2018 I ZR 3/16 = MDR 2019, 435 declared Uber illegal because the system infringes the monopoly of transportation of persons endowed to taxis.

10. A legal definition of "offeror" is "one that makes an offer to another".

11. Pacha (2018, p. 172). BAG, 30.10.1991 – 7ABR 19/91 – NZA 1992,409; BAG, 13.11.7 AZR 31/91 – NZA 1992,1,025; BAG, 16.6.1997 – 5 AZR 312/96 – NZA 1998,368 ff.

12. Günther and Böglmüller (2015, pp. 1025, 1,030 ff.); Däubler and Klebe (2015, pp. 1032 ff.); Fock et al. (2018, p. 591); Kocher and Hensel (2016, pp. 984, 986); Freudenberg, Schultz-Weidner and Wölfle (2019, p. 365); Kraus (2017, p. 1387); Kreßel (2019, p. 2744).

13. In French legal terms, such a contract constitutes "une obligation de résultat" and not "une obligation de moyen". See Mecke (2016, pp. 481, 484); Walwei (2016, p. 362); Pürling (2016, pp. 411, 419).

unless there is a specific indication that platform work should be carried out as dependent work.[14]

Dimensions of international law

Universal social security protection is an ambition under international law[15] and a specific entitlement in the system of international human rights.[16] Social protection, however, is to be guaranteed by national systems of social security. Yet, platform work, by its very nature, is open to international law. The statutes of both employment and social security are to be determined by international law. Thus, international law applies to transnational platform work, and the legal principles of international law play a pivotal role in the formation of platform workers' rights.

Defining the problem

Given that platform work is made possible by the Internet, it has a certain leaning towards international law. Internet-based cooperation and collaboration can be organized between contracting parties who are located not only at different places, but even at great distance from one another internationally. As the Internet is ubiquitous and omnipresent (Borges, 2007, p. 830), platform work can, in principle, be offered as well as undertaken by anyone, anywhere and at any time. In practice, this potential is indeed widely used by offerors as demanders of services. Therefore, it is neither necessary nor even likely that platform workers and the demanders of their services live in the same country, i.e. the same national jurisdiction.

If a legal relationship has transnational dimensions, international law is involved to deal with problems of law. In the first instance, if the legal seats of the service provider and service recipient are located in different States, the assumption that the service provider and service recipient are submitted to the same national jurisdiction is caught in limbo. It manifests, therefore, a question of international law to determine which law applies to a transnational contract. Platform work, as a type of transnational work, which is embedded in the international means and

14. Däubler and Klebe (2015, pp. 1032,1,034 ff.); Deinert (2017, pp. 65, 68); Heuschmid and Klebe (2016, p. 73); Pacha (2018, p. 141); Becker (2017); Klebe and Neugebauer (2014, p. 4); Günther and Böglmüller (2015, pp. 1025, 2030); Krause (2016a); Meyer-Michaelis, Falter and Schäfer (2016); Mecke (2016, pp. 481, 484); Brose (2017, pp. 7, 11); Ruland (2019, p. 681); Tomandl (2018, p. 174).

15. See full text of International Labour Organization (ILO) Social Security (Minimum Standards) Convention, 1952 (No. 102).

16. See text of United Nations Universal Declaration of Human Rights, 1948, Article 22.

structures of digital communication, is a relatively new form of work. It is relatively new not only from a technological perspective, but also from a legal one. Nonetheless, it has already brought an enormous increase in transborder relations and contracts. A key problem of the platform economy is how it articulates with international law.

As stated, nation states make social security law. In this regard, platform work raises a series of questions regarding international labour and social security law. Hitherto, these questions have been addressed only rarely and remain, apparently, largely unanswered. These questions cannot be neglected, however, because the international character of platform work creates a number of legal complications.

One may assert that there is a consensus in the international community that workers should be protected by social security. Accordingly, this infers an international ambition to also safeguard platform workers, to attribute to them all necessary social protection. Of course, a "worldwide web" jurisdiction to provide workers' social protection does not exist; social security protection remains organized by nation states using national legislation and administration. The legal right as such, as well as the scope and the scale of the right, to receive social security are to be determined by nation states.

Under the auspices of international law – above all, the human right to social security[17] (van Langendonck, 1998, p. 477) – nation states are committed to implement social protection for all. In practice, international law is restricted, in that it may only demand that States protect workers, and States are free to decide how they comply with this demand.

As platform work is often trans-border work, States have to organize social protection for such work in accordance with the provisions of international social security law. This cannot be decided by States alone, but is governed by international law, to which the States have agreed, and with which they should comply. As to the international character of platform work, there is a widespread uneasiness about the applicable law, when it comes to transnational arrangements for platform work. Therefore, the international law implications that arise from platform work have to be examined more extensively and carefully.

What are the criteria to integrate transborder workers in the social security laws of States? This question is not a matter of national policy or even "national interest". Rather, it is governed by the provisions of international law that all States have to observe, respect and fulfil. For the EU Member States, reg. No. 593/2008[18] of the European Parliament and of the Council determines the

17. See also van Langendonck (2006 and 2007); UN Universal Declaration of Human Rights, Articles 22 and 25; UN International Covenant on Economic Social and Cultural Rights, Article 9; European Convention of Human Rights, Articles 34 and 35.
18. Vom 19.6.1980, EVÜ, 80/934/EWG, ABl. 1980, L 266/1.

private law components of transborder work, and reg. Nos. 883/2004,[19] 987/2009[20] provide for the social security law rules, which are to be respected when platform work is done on the basis and in the framework of the Internal Market of the EU.

Statute of employment

The notion of employment represents a collaboration between the employee and the employer carried out in one place of work, regularly and at the place where the enterprise of the employer is located. In other words, the work to be done, is to be done in the workplace. Hence, by virtue of this relationship of dependent work, the employee and the employer are conceived as being exposed to one – and only one – joint legislation, that is determined by the law, and which is applicable at the place of employment. However, this assumption is not always fulfilled with regard to how platform work is undertaken. Specifically, which law applies in the absence of a joint place of work?

For EU Member States, this question is to be answered by consulting Regulation No. 593/2008. This Regulation applies in all situations involving a conflict of laws. The provisions are directed towards contractual obligations, but do not apply on administrative acts (Article 1 reg. No. 589/2008). From this, it follows that the private law questions of platform work are governed by the principles of private internal law; the international dimensions of social security, however, are determined by the principles of international social security law. The international rules on private law matters have a universal effect, i.e. they bind the EU Member States irrespective of whether or not a foreign law is that of a Member State (Article 2 of the reg. No. 589/2008).

A contract shall be governed by the law chosen by the parties (Article 3 of the reg. No. 589/2008). This principle applies also to an individual employment contract (Article 8 of the reg. No. 589/2008). Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to her or him by provisions that cannot be derogated by agreement under the law, which in absence of choice, would have been applicable pursuant to Article 8 para. 2, 3 and 4 (Article 8 para. 2 of the reg. No. 589/2008).

In absence of a choice of law, an individual employment contract is governed by the law of the country, "in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country" (Article 8 para. 2 of reg. No. 598/2008). This rule shall protect the employee and make sure that the

19. O.J. of the EC L 200/1 dated from 7 June 2004.
20. O.J. of the EC L 284/1 dated from 30 October 2009.

contract law of the State of her or his regular employment can be derogated by choice of law only if the chosen law gives to the employee a better position (Martiny and Reithmann, 2010, Rn. 4,846). This rule is inspired by the "better law" approach doctrine[21] wherein, in case of conflicting laws, the law to be applied is that which gives the best protection to the least fortunate party: the law best for her or him. Under this principle, the law of the State of habitual employment safeguards, under all circumstances, the minimum of protection (Martiny and Reithmann, 2010, Rn. 4,846, 4,852–4,854).

The law of habitual work determines the place where the work is habitually carried out.[22] This is the place where the work is normally[23] and predominantly[24] executed, and from where it starts and where it will be terminated.[25] Employees are integrated in the work organization at the regular workplace[26] and this is where they spend the greatest part of their worktime.[27] The workplace is located where the work is habitually done and to be done, and from where it is organized.[28]

The applicable law does not alter if the work is temporarily to be done outside the regular State of employment and the employee is posted to do the work in another country. Temporary employment in another country does not change the applicability of the law of the State in which the employee habitually works (Article 8 para.2,2 of reg. No. 598/2008) (Martiny and Reithmann, 2010, Rn. 4,831).

If a person is employed temporarily abroad, the overriding mandatory provisions of this State are to be respected. These provisions are directly applicable (Article 9 of the reg. No. 598/2008), irrespective of the chosen law or the law of the habitual workplace (Deinert, 2016, § 10-22; Kothe, 2015, 314 ff). As mandatory provisions, they cannot be derogated under internal law; therefore, they are also to be respected in international law. This rule intends to protect the employee, conceived as the weaker part of the contractual relation (Martiny and Reithmann, 2010, Rn. 4,845). Overriding mandatory provisions are not self-executing, so they have to be respected in the context of the application of law by courts or by being respected by the contracting parties.

21. BAG, 13.11. 2007 – 9 AZR 134/07 – BAGE 12524.
22. Friedrich (2018, 579 ff.); Franzen, Gallner and Oetker (2016, Rn. 37); Martiny (2010, Art 8 Rom I –VO Rn. 11, 46 f).; Deinert (2016, § 10 Rn. 5); Martiny and Reithman (2010, Rn. 4,831).
23. ECJ, 13.7.1993 – C – 125/92 (Mulox) – EU:C:1993:306.
24. Franzen, Gallner and Oetker (2016, N.28, Rn. 36); Martiny (2010, Rn. 49); Deinert (2016, § 10 Rn. 5).
25. ECJ, 10.4.2003 – C – 437/00 (Pugliese) – EU:C: 2003:219.
26. ECJ, 13.7.1993 – C – 125/92 (Mulox) – EU:C: 1993:306; – 27.2. 2002 – C – 37/00 – EU: C:2002:122 (Weber); BAG, 29.10.1992 – 2 AZR 267/92 – BAGE 71, 297.
27. ECJ, 15.3.2011 – C – 29/10, Rn. 42 (Koelzsch) EU:C: 2011:151 Rn. 45.; Deinert (2013, § 9–87).
28. ECJ, 15.3.2011 – C – 29/10 Rn. 42 (Koelzsch) EU:C: 2011:151; 15.12.2011 C – 384/10 Rn. 38 – EU:C: 2011:842 (Voorgsgeerd).

The contractual obligations between freelancing (self-employed) parties are governed by the law chosen by the parties. Such choice can be put into effect implicitly or explicitly (Article 3 of the reg. 598/2008). The freedom to choose the law is conceived as a component of the contractual liberty (Martiny, 2010, art. 3 Rom I-VO Rn. 8.14, Rom I-VO Rn. 11). In the absence of such a choice of law, Article 4 lit. b) of reg. 598/2008 provides that a "contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence". Thus, a service provider who did not convene with the recipient of the service on the applicable law renders her/his service under the law of the State of her/his residence or legal seat.[29]

On a contract for services, the rule also applies that the overriding mandatory provisions of the country where the service is to be delivered are to be observed (Article 9 of reg. 598/2008).[30] Of course, specific social protection provisions – widely in force for the protection of workers – are relatively rare for self-employed persons. Exemptions are provisions for occupational safety and health, and for pregnant women and mothers, which apply to both dependent and self-employed women.

As the demander of services normally take the initiative for the contract, it is common for the demander of services to make the first proposal for agreeing the contract. In the light of this fact and the given legislation in international law, it seems likely that the demander of services also makes a proposal for the applicable law. It is likely that the demander will propose to apply the law of the State where he/she is established. Moreover, because the demander of service normally has the choice between the offerors of service, it is likely that the demanders preferences become the fundament of the contract, to be finally concluded at the end of the competition initiated by the demander and ended by her or his choice. Under these auspices, it is likely that the applicable law will be the one under which the demander of services is economically active.

Statute of social security

International work makes it also necessary to identify the status of an employed person under social security law. Within the EU and the Single Market, the social security statute is determined by Article 11-13 of reg. No. 883/2004. For relations outside the Single Market, §§ 3-5 SGBIV defines how to determine the applicable law. The main rules are more or less the same. As to Article 11 para 1 of reg. 883/2004, "persons to whom this regulation apply shall be subject to the

29. Palandt et al. (2019, Art. 4 Rom I–VO Rn. 11); Martiny (2010, Art. 4 Rn. 35–38).
30. Palandt et al. (2019, Anm. 22, Art. 9 Rom I-VO Rn. 1, 5, 6, 8f; Martiny (2010, Art.9 Rn. 7, 9 f., 20, 27 and 35).

legislation of a single Member State only. Such legislation should be determined in accordance with this Title" (i.e. Article 11-16 of reg. 883/2004).

Article 11 para. 3 lit. a) of reg. No. 883/2004 provides: "a person pursuing an activity as an employed or self-employed person in a Member State shall be subject to the legislation of that Member State". The protection of employed and self-employed persons depends on the employees' workplace or the self-employed person's seat (Eichenhofer and Wenner, 2017, SGB IV, 2016 (2. Aufl.), §§ 3-6 SGB IV Rn. 14), and not their residence (Eichenhofer and Wenner, 2017, §§ 3-6 SGB IV Rn. 4 ff.). Article 12 of reg. 883/2004 determines the continuing applicability of the law of the habitual workplace in case of posting; the same rule applies to temporary work outside the habitual seat's State for a self-employed person.[31] Posting – also for third-states' nationals (Tiedemann, 2010) – conserves the applicable social security statute (Schoukens and Pieters, 2009). No posting is accepted if the work is to be carried out in various States[32] or posting is the only motive for contracting.[33]

In the EU, an A1 certificate provides testimony of existing protection under the social security law of the competent State.[34] These certificates bind the courts[35] of the issuing State as the administrative and judicial institutions of all other States.[36] By these rules, the fundamental freedoms in the Internal Market are to be secured. They also avoid a short-term change of the social security statute due to short-term changes of the location of one's work. Such a change would embarrass social protection by multiplying the competent States for protection and the resulting complexities of social insurance contribution records.[37] Within a Single Market, temporary economic activities of actors must be regarded as "normal", and cannot be treated as an "irregular" incident.

The rationale behind the rules on posting is that the competent State is not to be determined according to varying places of economic actions, but according to the assessed activity as a whole,[38] and is taken as the connecting factor between the working person and the competent state legislation. This rationale

31. BSG SozR 4–2400 § 4 No. 1.
32. ECJ, 4.10.2012 – Rs. C–115/11, EU:C:2012:606 (Zaklad Ubezpieczen Spolcznych).
33. ECJ, 5.12.1967 – 19/67 (van der Vecht) EU:C:1967:49.
34. For EU citizens working in an EU country other than their home country, the AI certificate is issued by a worker's home country social security institution and proves that the worker pays social contributions in another EU country, e.g. for a posted worker or one who works in several countries at the same time.
35. ECJ, 6.9.2018 – C – 427/16, EU:C:2018:609 (Salzburger Gebietskrankenkasse).
36. ECJ, 10.2.2000 – C – 202/97, EU:C:2000:75 (Fitzwilliams), 30.11.2000 – C – 178/97 EU: C:2000:169 (Banks), 26.1.2006 – C 2/05, EU:C:2006:69 (Herbosch Kiere); – 9.4.2015 – C – 72/14; C – 197/14-EU:C:2015:564 (X).
37. ECJ, 17.12.1970 – C – 35/70 – EU:C:1970:120 (Manpower); Devetzi (2015,Art. 12 Rn. 4 ff.); Devetzi (2000, p. 64 ff.); Cornelissen (1996, pp. 329, 332); Eichenhofer (2018, Rn. 158 ff.).
38. Compare the efforts to facilitate of intra-company posting (COM (2010) 378 final).

prevails also when it comes to determine the applicable law for the aircrew of airlines. Article 11 par. 5 of reg.883/2004 makes the State where the airline has its home base competent for organizing social security protection. This is the place where airlines economic activities begin and end (art. 14 para. 5 of reg. 987/2009).[39]

When it to be legally determined whether a platform is conceived as an employer or not, the role of the demander of the services is decisive. If the demander organizes and guides the work, she/he is an employer. If the demander has only to receive the service without being involved in the delivery, the provider of the service act as a self-employed person (Brose, 2017, n. 1910; Waas, 2018).

As discussed, platform work can be organized as dependent work. If platform work is bound to working time, wherein the worker has to follow orders, then the work is dependent. This is especially so if there is, in addition, an identifiable place where cooperation between the demander and the provider of service takes place. This place is to be considered as the joint workplace where the demander organizes the work process to be carried out by the provider. The key concept of a joint workplace for the employee and employer, which plays a key role in international labour and social security law, contributes also to delineate the characteristic differences between dependent and independent employment. The workplace is a place of joint social relations between the employee and employer, upon which a legal relation can be built.

If a joint work place is, however, hard to find, the law of the State where the service provider is established governs the contract, unless the choice of law leads to another jurisdiction (Borges, 2007, p. 833). Only on rare occasions does this situation occur, but it is important for determining the solution to questions of international law. If no common place of work can be established between the service demander and service provider, an employment contract cannot be assumed.

In the event of the lack of a common workplace, a joint legal relationship between the demander and provider of services can only result from a jointly chosen law – which is normally the one which is chosen by the demander. In the absence of a choice of law, it is the jurisdiction in which the service provider's establishment operates that defines the legal relationship.

The protection of the service provider in accordance with the "better law" approach is restricted to employment contracts and cannot be extended to contracts for services with a freelancing platform worker. The protection of the service provider by overriding mandatory provisions of the State wherein the

39. Devetzi (2015, Art. 11 Rn. 27a); the same applies to the status of employment: Martiny and Reithmann (2010, Rn. 4,868).

contract is to be accomplished (Article 9 of the reg. No. 598/2008) is also not promising – as there are only a handful of occupational safety and health laws that apply directly to the work of self-employed persons. The insecurity of platform workers' status is, in part, an expression of the weak position of self-employed service providers in international labour and social security law.

Social protection proposals for platform workers

In the political arena, a series of proposals have been submitted that seek to involve the demanders of services in the financing of social protection for service providers. All plans are directed towards giving platform workers an equal or, at least, a similar level of protection to that of employees. The main concern relates to the demander's role, which should include the responsibility for registering service providers with the social security institution or for making automatic deductions from service providers' salaries for social security contributions or even for the payment of contributions on behalf of service providers. Other suggestions are to extend employee status for social security purposes to all economically dependent self-employed workers,[40] to conceive platform workers as workers even if they are self-employed and the demanders of service as their employers[41] or to deem the providers of services as economically self-employed persons and apply the rules for this category to independent platform workers (Deinert, 2015).

Involving offerors in the protection of service providers

The German Federal Government articulated in its founding document (CDU, CSU and SPD, 2018, Tz 4,290–4,297) the desire to integrate all self-employed persons who do not have employees (solo self-employed) in the social security system; those who have equivalent protection under private law should have the right to opt out from social security. These proposals were inspired by comparable approaches found in other European countries.[42] To impose pledges that oblige demanders to inform social security administrations of their work relationship with service providers is also provided for by Article 3 of the EU-reg on Data Protection.[43] Additionally, a proposal has been made to make the demander of platform services responsible for deducting from the salary to be paid to the service provider payments for social security contributions. These

40. Wank (1996, p. 121 ff); Wank (1997); Wank (2016, p. 1430).
41. Kocher and Hensel (2016, pp. 984, 990); Prassl (2013); Prassl and Risak (2016).
42. Documented by the European Social Insurance Platform.
43. Plath (2018, art 3 DSGVO, Rn. 2) on the basis of ECJ, 13.5.2014 – C – 131/12 – EU:C:2014:317 (Google Spain).

payments, it is proposed, should be transferred to a bank account controlled by the World Bank or the International Labour Organization (ILO), from which the contribution should be redirected to the competent national social security administration (Weber, 2019).

To permit access to social insurance coverage for service providers is in the general public interest, because it will prevent heightened demands for, and future dependency on, public social assistance (Weber, 2019). However, while it is possible to permit employees (service providers) to contribute, there is no easy way to find a substitute mechanism for the employer's (service demander's) share of social security contributions. Possible alternatives could be a separate payment levied from the demander of services, or to offer demanders of services some form of tax subsidy in return for contributing towards the social protection of service providers.

Assessment of the proposals from an international law perspective

The above proposals are guided by a shared vision to bring the demander and the provider of the service under the same legal order. They share the implicit assumption that the demander and provider collaborate under the same jurisdiction or the same applicable law. This assumption is pertinent if the collaboration is based on an employment contract, which is embedded in a common workplace, where the employer and employee cooperate economically and convene socially.

This assumption is, however, not always appropriate. Any virtual exchange by Internet is embedded in the worldwide web, and the economic relation created is difficult to localize in a specific national jurisdiction. If the platform work is done on a contract-for-service basis and the demander and the provider of the service are established in different countries, their contract is based on the law they have chosen jointly; in the absence of a choice of law, the law of the service provider's establishment applies.

If the applicable law is chosen by the contracting parties, it is possible and likely that the parties evade legislation, which imposes on the demander of services commitments in favour of the social security protection of the service provider. If the law relating to the place of the establishment of the service provider applies, this law should make commitments for extra-territorial demanders of service effective. Such effect requires normally a special instrument of international law – which is available in the form of bilateral or multilateral social security arrangements. In the absence of such special arrangements, extra-territorial obligations to persons established outside the competent State cannot be effectively implemented (Pürling, 2016, p. 437).

Reform models from an international law perspective

International law reveals the limits of national law. These limits are seen not only in terms of the territorial restrictions of national legislation, but in how they hinder potential solutions for effective social protection under national substantive law. The ILO (Berg et al., 2018) analysed the working and social conditions of platform workers and concluded that all categories of platform workers, as should all employees, should have decent conditions of labour and appropriate social security coverage in the State of their establishment.

This imperative should be guaranteed and safeguard by the State of residence, without having to rely on any administrative or financial participation by the service demander. For the authors of the study, due to the international character of platform work it appeared unlikely and unrealistic to be able to incorporate service demanders in a suitable and feasible manner in the financing of the social protection of service providers.

The more platform work becomes prevalent, the more it will become international, and because of this, the need to extend social protection to platform workers increases. If it were to be assumed that social protection is made mandatory for all self-employed persons, they would still have to meet the full cost of financing this protection alone. For self-employed platform workers with low incomes, a mechanism for permitting reduced levels of contributions[44] would also be required.

Conclusion

In the light of the internationally acknowledged right to social security, a comprehensive integration of platform work in all its economic and legal forms is desirable and required. The article shows, in relation to German law, that platform work can only be dealt with adequately if international law dimensions are also taken into account. The necessity of this stems also from the international character of this business activity. The commitment to guarantee social protection for all platform workers is addressed to the international community and it falls upon all States jointly to respond. This task is urgent due to the expansion of internet-based work.

Self-employed persons are to be protected as independent workers, if they are not occupied as an employee. The latter is the exception, and not the general rule. Self-employed persons are normally to be protected as independent workers. As such, they are confronted with bearing the full burden of social

44. Since 1 July 2019 in Germany, this is the case for self-employed workers with monthly income between 450 euros and 1,300 euros (§ 20 Abs. 2 SGB IV).

insurance contributions without being able to rely on someone else – i.e. an employer. Therefore, the independence of these workers is also reflected in the modes of social protection typically accessible to them as independent workers – independent from that of the other partners in the service-providing relationship.

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Which social security regime for platform workers in Italy?

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Abstract This article highlights the debate on social security regimes applicable to platform workers in Italy. As social security regimes differ according to the type of employment or self-employment relationship, Italian case law dealing with platform workers' employment status will be illustrated. Italian legislation, case law and collective bargaining on health and safety at work will then be presented, clarifying the coverage to which platform workers are entitled in the event of accidents at work and occupational diseases, with a focus on the COVID-19 pandemic impact. In turn, the two main Italian minimum income schemes and the related scholarly debate will be outlined, as well as their impact on the ability of digital labour platforms to avoid their responsibilities as regards workers' rights, including access to adequate social protection.

Keywords atypical work, platform workers, precarious employment, social security schemes, occupational safety, occupational accident, occupational disease, guaranteed income, Italy

Introduction

The main challenge when discussing social security for platform workers in Italy concerns their status. Indeed, Italian social security schemes vary according to the type of employment or self-employment relationship. The main differences relate to: i) the persons obliged to pay the social contributions; ii) the amount of

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the contributions; iii) the protected events; and iv) benefits received. The first two elements have a deep impact on labour costs; in a nutshell, we can say that a higher reliance on work performed by those who are covered mandatorily by social security schemes for the self-employed reduces the social costs of the person benefiting from the work performance. Consequently, many cases of misclassification of the work relationship are linked to the intention to circumvent the application of the social security regime for employees that require employers to pay social contributions.

Recently, cases of misclassification have concerned also platform workers whose status remains uncertain due to the difficulties that judges face in understanding algorithmic management.[1] Italian case law dealing with platform workers' status will be briefly illustrated in the first part of this article. We will then present the main features of the different social security regimes for employees and self-employed. In the third part of the article, we will focus on health and safety at work regulation, clarifying also the coverage that platform workers receive in case of work accidents and occupational diseases. The importance of this regulation became clear during the COVID-19 crisis when workers engaged by food delivery platforms were considered essential and so continued performing their activities, sometimes without receiving the due personal protective equipment from the platform. In the final part of the contribution, before offering some concluding thoughts, we will briefly depict the two main Italian minimum income schemes whose role, in the context of the increasing casualization of work, have been emphasized by those who believe that social security should protect mainly the person as such, rather than the worker. This debate has been fuelled by the growing and widespread presence of digital labour platforms and has a deep impact on the ability of digital labour platforms to avoid their responsibilities as regards workers' rights, including access to adequate social protection.

The panoply of work contracts for platform workers in Italy

As described in a previous contribution (Borelli, 2020a), in Italy a person can work as an employee or with one of several types of self-employment contract. Each of these contracts is associated with a particular social security regime, which will be presented below. Due to the many differences among these regimes, it is of paramount importance to correctly classify the work relationship. This task is not easy and it is even more complex for platform workers since judges have often struggled to understand the functioning of platforms.

1. In this article, we will use the terminology of the glossary provided by the European Commission (2021).

In January 2020, the Court of Cassation (*Corte suprema di cassazione* – CSC)[2] re-classified Foodora riders as "hetero-organized collaborators" (Foodora had hired these riders as coordinated and continuous collaborators). As such, the full employment law was applied to them, unless it was considered as "ontologically inconsistent with" their hetero-organized status.[3] Indeed, hetero-organized collaborators are self-employed persons to whom the legislator has fully extended employment law.[4]

In motivating its decision, the CSC recalled that, in September 2019, the legislator broadened the definition of hetero-organized collaborations and specified that article 2, paragraph 1, of the Legislative Decree No. 81/2015 applies also when the performance is organized through digital labour platforms.[5] According to the judges, this intervention clearly aims at extending workers' protection beyond the contract of employment, as well as in cases in which the power to organize the economic activity is exerted through a digital labour platform.[6]

It should also be mentioned that the Law No. 128/2019 has introduced certain rights (such as the right to be insured in case of work accidents and the right to be protected by health and safety regulation) for food delivery workers who are neither employees nor hetero-organized collaborators. According to the main interpretation,[7] this part of the Law concerns occasional food delivery platforms' collaborators that organize autonomously their activity.

The decision of the CSC has been followed by many Italian judges.[8] However, since then, several platforms have restructured their management system, so as to eliminate or limit the elements that characterise hetero-organization.[9]

In May 2020, the Tribunal of Milan considered that the working conditions of Uber Eats' riders were exploitative and so it condemned Uber Eats for labour

2. Decision No. 1663/2020.

3. On the Cassation's decision see *Massimario di Giurisprudenza del Lavoro* (2020). See also Barbieri (2020a); Biasi (2020); Carinci (2020); Carinci (2020a and 2020b); Maresca (2020); Martelloni (2020a); Martino (2020); Mazzotta (2020); Perulli (2020a); Romei (2020); Speziale (2020); Spinelli (2020); and Tosi (2020, p. 1).

4. Article 2, para. 1, of the Legislative Decree No. 81/2015.

5. Law No. 128/2019.

6. On the elements featuring hetero organized collaborations, see the Circular No. 7/2020 of the National Labour Inspectorate (*Ispettorato nazionale lavoro* – INL).

7. See the Circular No. 7/2020 of the INL and the Circular No. 17/2020 of the Labour Ministry.

8. Tribunal of Florence, Decree of 1 April 2020, order of 5 May 2020 and Decree of 9 February 2021; Tribunal of Bologna, Decree of 14 April 2020 and order of 31 December 2020; Tribunal of Palermo, order of 12 April 2021).

9. In fact, "the business model of labour platforms is highly changeable. The numerous court decisions in favour of the employee or worker status of platform workers prompt platforms to change their initial strategy and find new ways to avoid the application of compulsory labour and social law regulations" (Chesalina, 2021, p. 47).

exploitation.[10] The Milan enquiry triggered a national investigation of more than 60,000 riders, engaged by Foodinho–Glovo, Deliveroo, Just Eat and Uber Eats, mainly with a contract of occasional collaboration.[11] In this case as well, the National Labour Inspectorate (*Ispettorato nazionale lavoro* – INL) classified the riders as hetero-organized collaborators, and consequently sanctioned the food delivery platforms for not having fully respected the health and safety at work regulation and for not having paid the due social contributions.

In November 2020, the Tribunal of Palermo qualified Foodinho riders as employees.[12] According to the Sicilian judge, "beyond the apparent and declared (in the contract) freedom of the riders to choose the working time and whether or not to provide their service", the riders' work was "managed and organized by the platform". It was only by accessing the platform and being subject to its rules that the riders could perform their work. Moreover, the platform exerted the powers of direction and control, as well as the disciplinary powers, which feature in the contract of employment regulated by article 2094 of the Italian Civil Code.[13] This legal reasoning is not inconsistent with the CSC's decision, since the latter has not ruled out the possibility to classify riders as employees insofar as "the actual manner in which the relationship" is conducted reveals the existence of a subordinate relationship.

Differently, a collective agreement signed on the 15 September 2020 by UGL Rider, a trade union created just some weeks before the signature, and Assodelivery, the main employers' association for the food delivery platforms, qualified the riders as self-employed.[14] This collective agreement aims at enforcing the derogations authorized by articles 2, paragraph 2, and 47 quater, paragraph 1, of the Legislative Decree No. 81/2015. According to the first provision, employment law does not apply to hetero-organized collaborators for which national collective agreements signed by employers' associations and trade unions that are comparatively more representative at national level provide for specific disciplines. According to article 47 quater, these collective agreements can also define criteria for determining the overall pay and derogate from the wage established by national collective agreements signed by the most representative trade unions and employers' associations in sectors similar to that

10. Article 603-bis of the Italian Criminal Code.

11. The controls concerned the period from 1 January 2016 until 31 October 2020 (for more information, see Ispettorato Nazionale del Lavoro, 2020).

12. Decision No. 3570/2020.

13. Codice civile 2021. On the Tribunal of Palermo's decision, see Cavallini (2020a), Barbieri (2020b), and Martelloni (2020b).

14. *Contratto collettivo nazionale per la disciplina dell'attività di consegna di beni per conto altrui, svolta da lavoratori autonomi, c.d. Rider*. On this collective agreement, see Martelloni (2020c).

of food delivery. The UGL–Assodelivery collective agreement was signed, thus, to lower the minimum level of protection provided for by Law No. 128/2019.

The above-mentioned agreement triggered a strong reaction from the Italian Ministry of Labour (*Ministero del Lavoro e delle Politiche Sociali*), which, at the time of the signature, was coordinating a trilateral roundtable to find a joint solution to regulate platform workers. In particular, the Ministry contested the agreement, arguing that the signatory trade union is not representative, and that it cannot therefore exploit the derogations established by articles 2 and 47 quater of the Legislative Decree No. 81/2015.[15] Moreover, the social partners cannot classify a relationship as self-employed, since the qualification of a relationship should be guided primarily by the facts relating to the work performance (the so-called principle of primacy of facts).[16]

An overview of social security regimes in Italy

The main regime for employees

The Italian social security system establishes a main regime for employees and several regimes for the self-employed. In the former, social contributions are calculated on the salary and are mainly paid by the employer.[17] Employees are protected against all risks usually covered by mandatory social security systems. Consequently, they receive unemployment benefits, benefits in respect of accident at work and occupational diseases, sickness benefits, disability benefits, and pensions; moreover, employees enjoy maternity, paternity and parental leave covered by an allowance paid by the National Social Security Institute (*Istituto nazionale della previdenza sociale* – INPS).

Almost all of the benefits are determined as a percentage of the salary (e.g. the unemployment benefit corresponds to 75 per cent of the salary). Sometimes, the duration of the benefit depends on the duration of the contract (e.g. the unemployment benefit is paid for a period equal to half the number of weeks covered by contributions in the last four years). In order to avoid unfair competition among companies, the law imposes to calculate the contribution on the salary established by the national collective agreement signed by the most representative trade unions and employers' associations.[18] This rule guarantees a minimum contribution for all employees, but it does not eliminate the

15. See the Circular No. 17/2020 of the Ministry of Labour.
16. See the CSC decision No. 25711 of 15 October 2018.
17. The social contributions amount to 23.81 per cent of the wage for the employer and 9.19 per cent for the employee.
18. Art. 1, para. 1, Law Decree No. 338/1989; Circular INPS No. 10/2021.

consequences of work casualization on the value of in-cash benefits. In fact, the benefits received risk being very low, both in the case of the reduction of the normal working time duration (as happens in part-time work or jobs on call) and in the case of short-term contracts.

Moreover, work casualization affects the eligibility conditions to access social security benefits. Indeed, in many cases, the right to a benefit is acquired only if the employee has a certain service seniority or has paid social contributions for a certain period. Moreover, it should be noted that, for the purpose of calculating the length of the contributory period, a work week is fully considered only if the minimum weekly salary is 206.23 euros (EUR) (EUR 10,724 per year in 2020; if the salary is below this threshold, the contributory period is proportionally reduced). Thus, job instability, as well as the extension of the on-call period during which the casual worker is waiting for an employer's work request while not being fully paid,[19] threaten the fulfilment of the eligibility conditions and significantly lower the amount of the benefits.

As demonstrated by many studies, work casualization is boosted by the widespread presence of digital labour platforms that divide work into small tasks entrusted to a crowd of homebased service providers or on-location platform workers (Degryse, 2019, p. 27). Indeed, according to the on-demand nature of platform work, "the performance of a task is offered when and if a person requests it, without any obligation by the platform to ensure that a minimum amount of work is performed by the workers registered in it" (Schoukens, 2021, p. 312). Platforms are thus able to "engage in micro-negotiations over these bits, called "gigs", to further externalize costs surrounding each task onto workers. This alters labour relations by breaking down wage labour into ever smaller fragments and exerting new forms of control over each fragment of work" (Athreya, 2020, p. 86). Consequently, the platform economy emphasizes and accelerates trends that have already been present in the labour market for several decades, such as the fragmentation, segmentation and precariousness of work (Chesalina, 2021, p. 43).

The classification of platform workers as employees, therefore, does not always guarantee adequate social protection (D'Onghia, 2017, p. 85). Many authors have called for a redesigning of mandatory social security schemes to accommodate "irregular work patterns where active periods followed by periods of inactivity and/or work periods generating low income alternate with high-income work assignments" (Schoukens, 2021, p. 312).[20] Among the measures suggested are the

19. A company collective agreement signed by FILT-CGIL, FIT-CISL and UILTrasporti on the 19 January 2021 commits Montegrappa (a food delivery platform) to hire its workers as employees. However, during the availability period, the employees receive just an hourly allowance of EUR 0.60.
20. For the Italian debate, see Bozzao (2005) and Renga (2006).

transferability of rights and social contributions across different schemes (to address the challenge posed by discontinuous careers), the promotion of the "notional" contribution for periods in which no contribution is paid (to address the challenge posed by job instability), or the increment of social contributions for precarious contracts (to ensure adequate coverage). Others have also underlined the exigency to limit or eliminate the worst forms of work casualization by guaranteeing, for example, a minimum working time.[21] Indeed, it should be underlined that work casualization exists insofar as it is permitted by a legal order. What is more, since work casualization generates relevant social consequences (e.g. in-work poverty, higher unemployment rate, increased number of poor retired people), when deciding on its degree, the legislator is deciding on the extent to which these social consequences should be borne by society as a whole, so as to ensure higher profits for companies. Considering the huge and increasing inequalities present in many countries (including Italy), it is clear that work casualization needs to be reduced. Simply arguing that the costs of work casualization borne by companies should be raised (e.g. by increased social contributions for precarious jobs) is not a convincing solution. Indeed, many in-kind or in-cash benefits to alleviate the social consequences generated by the casualization of work are financed by general taxation, and several studies have illustrated the strategies of fiscal optimization adopted by companies that manage digital labour platforms (Johansson et al., 2017; Pantazatou, 2021, p. 363 ff.; OECD, 2020).

Several regimes for the self-employed

As already mentioned, in Italy there are several social security regimes for the self-employed. These regimes provide different levels of coverage that are determined by the work contract. Digital labour platforms usually make use of three contracts: i) the contract for occasional collaboration, ii) the contract for coordinated and continuous collaboration, and iii) the contract for hetero-organized collaboration.

The contract for occasional collaboration is the least costly in terms of social contributions. Indeed, occasional collaborators earning less than EUR 5,000 per year are not obliged to pay any social contributions.[22] Therefore, it is not by coincidence that the contract for occasional collaboration has been widely used by digital labour platforms, as shown by the outcome of the enquiry run in 2020 by the National Labour Inspectorate and the Milan public prosecutor's office,

21. See article 11 of the directive 2019/1152 on the measures to prevent abusive practices concerning on-demand or similar employment contracts, and Principle No. 5 of the *European Pillar of Social Rights* according to which "employment relationships that lead to precarious working conditions shall be prevented, including by prohibiting abuse of atypical contracts".
22. Article 44, para. 2 of the Law No. 269/2003.

which re-classified more than 60,000 riders hired with this contract as hetero-organized collaborators (see below).

The social security regime for coordinated and continuous collaborators was set up in 1995[23] and has been amended several times. One of the main changes has been the increase in social contributions, as a way to limit the convenience of hiring coordinated and continuous collaborators compared to employees.[24] Currently, the rate of social contributions is practically equivalent to the one paid for employees (34.23 per cent). However, there are two main differences: first, coordinated and continuous collaborators have to pay a third of the contribution (in contrast, employees pay only 9.19 per cent); moreover, there is no minimum wage for coordinated and continuous collaborators and, thus, the social contributions can be much lower than those paid for employees.

The second difference between the employees' social security regime and the coordinated and continuous collaborators' regime is that the legislator has not expressly applied to the latter the principle according to which benefits shall be paid to employees, even if the employer has not paid the due contributions (the so-called principle of automaticity of benefits: article 2,116 c.c.).[25] The jurisprudence has tried to remedy this problem by arguing that coordinated and continuous collaborators cannot bear the consequences of the client's violation of the duty to pay social contributions.[26] However, the principle of automaticity is not applied, *ex lege,* by the National Social Security Institute.

It should also be underlined that, in many cases, the benefits are calculated on a percentage much lower than the one applied to employees,[27] paid for a shorter period,[28] and the eligibility criteria are stricter.[29] Besides, the rule to calculate the yearly contribution period requires minimum annual earnings of EUR 15,593 in 2020 (if earnings are lower, the contribution period is proportionally shortened). Consequently, the benefits received by coordinated and continuous collaborators

23. Article 2, para. 26 of the Law No. 335/1995.

24. As noted by Ales (2021, p. 103), "the possibility to qualify a work relationship as "coordinated and continuous collaboration", de facto outside any social security scheme (and burden), accentuated the fraudulent contractual behaviour of a part of the employers".

25. The only exception concerns maternity benefits, to which the above-mentioned principle is expressly applied also in case of coordinated and continuous collaborations (article 64ter of the Legislative Decree No. 151/2001).

26. Constitutional Court No. 347/1997.

27. For example, sickness benefits correspond only to 8–16 per cent of earnings (for employees, the amount is 50–66 per cent of the salary).

28. For example, unemployment benefits are paid for a maximum period of six months (the maximum period for employees is 16 months) (article 15 of the Legislative Decree No. 22/2015).

29. For example, the collaborator has the right to maternity benefits only if, in the 12 months preceding the event, at least one month of social contributions have been paid (no eligibility criteria are established for employees).

are usually much lower than the ones guaranteed to employees, and the eligibility criteria are much more difficult to satisfy.

As already mentioned, hetero-organized collaborators are covered by the employment law.[30] However, it is not clear if this rule concerns also social security regulation, a point that was not clarified either by the CSC in its decision on the Foodora riders.[31] Recently, a circular of the National Labour Inspectorate (INL) has specified that hetero-organized collaborators are self-employed, but their relationship is regulated by employment law also with regard to social security.[32] Consequently, according to the INL, hetero-organized collaborators have the right to the same social security benefits guaranteed to employees.

During the enquiry undertaken in 2020, the INL sanctioned several food delivery platforms for not having paid the due social contributions for hetero-organized collaborators; in order to calculate the contribution evasion, the National Social Security Institute should apply the rule on minimum contribution established for employees (the information currently available does not clarify this aspect). If, as is highly likely, the involved digital labour platforms challenge the decision of the INL, it is to be expected that Italian judges will finally clarify the social security regime applicable to hetero-organized collaborators.[33]

It is to be recalled that social security regulation cannot be derogated by collective agreements, because it belongs to public law. Consequently, article 2, paragraph 2, and article 47 quater of the Legislative Decree No. 81/2015 do not allow national collective agreements to rule out the mandatory social security regime for hetero-organized collaborators.

From this short presentation of the social security regimes for employees and the self-employed, it is clear that many differences remain; notwithstanding the tendency to extend certain forms of protection to the latter.[34] Consequently, the panoply of work contracts present in Italy facilitates a "cherry picking" strategy by the digital labour platforms. Specifically, they can choose the work contract with the lowest social charges that suits their needs, in the hope that workers will not contest this. Nevertheless, even if workers were to contest their contractual status and were to demand respect of the principle of the primacy of facts, it is far

30. Article 2, para 1 of the Legislative Decree No. 81/2015).
31. Decision No. 1663/2020. See also Cinelli and Parisella (2020) and Cavallini (2020b).
32. Circular No. 7/2020 that confirms what was states in a Circular of the Ministry of Labour in 2016 (Circular No. 3/2016).
33. It should be underlined that the Circular of the INL is not binding for judges.
34. See also the Law No. 81/2017 that has introduced some basic rights for genuinely self-employed workers.

from certain that their contracts would be reclassified, as the fluctuating case law of the Italian courts demonstrates.[35]

The rise of the platform economy acts to underline that mandatory social security should be expanded and harmonized to ensure the right to adequate social protection to employees (regardless of the type and duration of their relationship) as well as to the self-employed.[36] However, the burden of the harmonization of social security regimes cannot be borne by workers (be they employees or self-employed). The responsibility for this burden should fall on the entity that manages the economic organization in which their professional activity is integrated. Put alternatively, whoever profits from workers' activity shall contribute to the social security schemes necessary to protect such workers against the implications of social risks that they face. Besides, to guarantee adequate coverage, it is of paramount importance to increase workers' remunerations and consequently the levels of social contributions. To that end, the right to collective bargaining, as well as all other collective rights, should be assured for all workers, regardless of their employed or self-employed status.[37]

Platform workers' occupational health and safety in Italy

This section addresses the issue of occupational health and safety for platform workers, assessing the legal framework, the recent case law and the collective agreements negotiated between Italian trade unions and digital labour platforms.

Occupational health and safety regulation

Health and safety issues became extremely important during the lockdown caused by the COVID-19 pandemic, which provoked both an exponential rise in the use of food delivery services and a correlated increase in health and safety risks for these workers (Barbieri, 2020c, p. II). In fact, the Decree of the President of the Council

35. Before being reclassified by the CSC as hetero-organized collaborators, Foodora riders were considered correctly hired as continuous and coordinated collaborators by the Tribunal of Turin (No. 778/2018) because, according to this judge, they were free to decide their own time schedules. In 2019, the decision of the Tribunal was partially overturned by the Turin Court of Appeal (No. 26/2019), which classified the riders as hetero-organized collaborators but applied the employment law only in part to them.

36. See principle 12 of the *European pillar of social rights* and the Council of the European Union (2019). According to the European Parliament (2019, point 9), "formal and effective coverage, adequacy and transparency of social protection systems should apply to all workers including the self-employed".

37. On this point, see Borelli (2020b, p. 109).

of Ministers, adopted on the 11 March 2020, that imposed the temporary closure of restaurants, did not suspend food delivery services.[38]

Law No. 128/2019, amending the legislative decree No. 81/2015, has established two regimes for platform workers. The first covers "workers whose performance is organized by the client by means of digital platforms" (the hetero-organized collaborators), while the second outlines a set of labour guarantees for "self-employed riders delivering goods by means of two-wheels vehicles in urban areas".[39]

According to article 2, paragraph 2, of the legislative decree No. 81/2015, hetero-organized collaborators benefit from the same health and safety regulation applied to employees, as well as from the general compulsory insurance coverage for work accidents and occupational diseases.[40] Article 47 septies, paragraph 1 and 2, of the decree extends this insurance also to self-employed riders. Therefore, from 1 February 2020, all platform workers who carry out a delivery activity, regardless of their type of work contract, are insured by the Italian national body for work accident and occupational disease insurance, the National Employment Accident Insurance Institute (*Istituto Nazionale per l'Assicurazione contro gli Infortuni sul Lavoro* – INAIL).

The client (i.e. the delivery company using the platform) is obliged to comply with the specific obligations imposed on the employer. This means that contributions to INAIL are to be paid entirely, exclusively and in advance by the food delivery platforms.[41] The latter are obliged also to promptly report work accidents and occupational diseases to INAIL. In the event of a work accident or an occupational disease, self-employed riders are entitled to the same benefits as those provided for all insured employees, i.e. the allowance for absolute temporary disability, benefits for permanent damage, as well as initial treatments and prosthetic and rehabilitative services, in addition to other supplementary health benefits recognized by INAIL. Moreover, all delivery riders are insured for all accidents occurring during their work as well as for accidents while commuting to and from work.[42]

Article 47 septies, paragraph 3, of the Legislative Decree No. 81/2015 further obliges digital labour platforms to respect occupational health and safety regulation. However, the law does not specify if the platforms have to apply only the rules concerning self-employment or if they have to fulfil also the rules for employees.[43]

38. *Decreto del Presidente del Consiglio dei Ministri, 11 marzo 2020.*
39. For an analysis of the law, see Perulli (2020b).
40. See the Circular No. 7/2020 of the INL, p. 7.
41. See the Circular No. 7/2020 of the INL, p. 9 and the INAIL Note of 23 January 2020.
42. See the INAIL Note of 23 January 2020.
43. For an analysis of the law, see Pascucci (2019, p. 37).

Due to the unclear legal text, many digital labour platforms refused to grant their workers the rights guaranteed by health and safety regulation to employees. Consequently, during the COVID-19 crisis some workers addressed Italian courts to force platforms to provide personal protective equipment (PPE). In April 2020, the Labour Courts of Florence[44] and Bologna[45] ruled that companies managing the delivery platforms violated their obligations by not providing to their riders the PPE against COVID-19 (i.e. protective mask, disposable gloves, disinfectant gel and alcohol-based products for cleaning the backpack). According to these judges, the full occupational health and safety regulation for employees applies to delivery riders. In fact, article 47 septies, paragraph 3, cannot be interpreted as imposing only the application of health and safety rules on self-employment. This is so, because when explicated as such, this provision would be useless and "it would frustrate the rationale of the legislative intervention aimed at ensuring that food delivery self-employed workers enjoy mandatory minimum levels of protection" (Tribunal of Florence, decree 22, July 2020).

The interpretation provided by the courts was also supported by the Milan public prosecutor's office and the INL that, in their 2020 enquiry, sanctioned several food delivery platforms for the violation of the employers' obligations to prevent risks to workers' health and safety.

The intervention of collective agreements

To protect workers' health and safety, the Italian social partners have taken several initiatives. At the national level, it is worth mentioning the national collective agreement for the logistics, goods transport and shipping sector, signed on 18 July 2018, between the FILT-CGIL, FIT-CISL, UILTrasporti (the three main trade unions for the sector) and several employers' associations.[46] This agreement considers riders as employees, applying also occupational health and safety regulation to them (Allamprese, 2020). In November 2020, the social partners who had signed the 2018 collective agreement stipulated an additional protocol concerning self-employed platform workers in the goods delivery sector.[47] This protocol extends to self-employed riders the rules on wages established for employees, as well as supplementary benefits provided for by the bilateral body created by the social partners in the transport sector.

44. Tribunale di Firenze, Decree No. 886 of 1 April 2020; Monda (2020, 375 ff.) and Carrà (2020, 1,000 ff.).
45. Tribunale di Bologna, Decree of 14 April 2020, and D'Ascola (2020, p. 1267 ff.).
46. Accordo integrativo sui riders.
47. Protocollo 2 novembre 2020.

The Assodelivery-UGL collective agreement[48] obliges the food delivery platforms to provide safety equipment (article 14) and to organize training courses on road safety (article 18). However, the agreement states that "the Platforms can make available to the Riders additional safety equipment as well as additional working tools, within the frame of self-employment contracts provided for by this agreement, without the same constituting an indication of subordination" (article 14). This rule can be contested from two perspectives. On the one hand, the law obliges food delivery platforms to respect occupational health and safety regulation, regardless of the worker's status. On the other hand, a collective agreement cannot classify a relationship (as already mentioned, classification depends on how the work is performed).

It is also worth mentioning the Protocol against labour exploitation in the food delivery sector, signed on 24 March 2021 by CGIL, CISL, UIL and Assodelivery, in the presence of the Italian Minister of Labour.[49] The Protocol aims to put an end to the exploitative practices that severely undermine workers' rights in the food delivery sector. Through the Protocol, Assodelivery members commit to adopt an organizational model suitable for preventing workers' exploitation. This commitment is relevant as such organizational models are primarily aimed at avoiding violations of occupational health and safety regulations.

At the company level, we should recall the agreement, signed by NIDIL-CGIL and Deliveriamo on 26 May 2020,[50] to set up a COVID-19 health and safety corporate committee for applying and monitoring the company protocol on measures to prevent and limit the spread of COVID-19.

Moreover, on 29 March 2021, FILT-CGIL, FIT-CISL, UIL trasporti, Riders X I Diritti and Just Eat Italy signed a company collective agreement that commits the latter to hire riders with a contract of employment and to apply the national collective agreement for logistics, goods transport and shipping.[51] Just Eat's riders will therefore enjoy the full health and safety regulation. Moreover, the agreement, in envisaging an additional wage linked to the number of deliveries, limits its payment to a maximum of four deliveries per hour, in order to minimize the risk for riders' health and safety.

Finally, mention is to be given to the Protocol on health and safety adopted unilaterally by Uber Eats in February 2021, which obliges the company to provide to its workers information on the use of PPE, and to sign a private insurance contract to guarantee supplementary benefits in case of illness, disability and work accident. Uber Eats commits also to introduce in its App a

48. See text of the Assodelivery-UGL collective agreement. In Italian.
49. Servizi - Food delivery: Protocollo.
50. Reported in Firenze Today. In Italian.
51. Trasporto-Logistica-Rider - Just Eat: Accordo integrativo aziendale, 29 marzo 2021.

function to contact the phone number for emergencies (112); moreover, Uber Eats will inform its workers on the correct use of PPE and will monitor their appropriate use.

The minimum income schemes against poverty and to promote labour inclusion

In this section we present the so-called *Reddito di Cittadinanza* (citizenship income, henceforth "RdC") and the *Reddito di Emergenza* (emergency income, henceforth "REM"). The first measure guarantees a minimum income aimed at combating poverty (a "welfare" approach) and integrating or re-integrating beneficiaries in the labour market (a "workfare" approach). In contrast, REM is an extraordinary and temporary poverty alleviation measure adopted in the context of the COVID-19 pandemic.

These measures are supported by those who believe that social security schemes should be disconnected from the work relationship and should guarantee a universal minimum income so that no one will be obliged to accept precarious or, indeed, ultra-precarious jobs (Petropoulos et al., 2019). For the reasons that are explained below, in our opinion, the need to develop universal social protection schemes, e.g. against poverty or to provide universal access to basic health care (Durán-Valverde et al., 2020), should not challenge the fact that social security should be linked to the work relationship. Neither should it bring into question the need to develop mechanisms to ensure adequate social protection for all workers, regardless of their status.

The RdC is a minimum income granted to families that, at the time of application and for the entire duration of the benefit, meet certain economic, citizenship and residence requirements (article 2, paragraph 1, a) and b) of the Law No. 26/2019).[52] The most contested aspect concerns the long-term residence permit and the ten-year period of residence required for third-country nationals to access the RdC; these requirements de facto exclude the majority of foreign families from accessing the minimum income (D'Onghia, 2020, p. 35 ff.).

The family receives an economic benefit composed of two elements. First, an income supplement (up to EUR 6,000 per year). Second, a sum to support the payment of the rent or mortgage equal to the amount of the annual rent stipulated in the contract (up to a maximum of EUR 3,360 per year in the case of rent; EUR 1,800 in the case of a mortgage) (art. 3, paragraph 1, Law No. 26/2019).

To be eligible to receive the RdC, the employable members of the beneficiary family have to respect several obligations. First, they have to sign a declaration of immediate availability for work and an employment pact at the public

52. For a detailed analysis of the RdC, see Ravelli (2018) and Ferraresi (2018, p. 1 ff.).

employment centre; or, in the case of a multidimensional need that makes it difficult for the applicant to start working, a pact for social inclusion at the public social services (art. 4 paragraph 1 of the Law No. 26/2019). Beneficiaries are also obliged to accept at least one of three suitable job offers. An offer is suitable if it is located within 100 kilometres of the beneficiary's residence (for the first offer), 250 kilometres (for the second offer), or on the national territory (third offer). The offered employment contract should be open-ended or a fixed-term contract whose duration is at least of six months. Finally, the salary should not be less than EUR 858 per month (art. 4 par. 8 and 9 Law No. 26/2019). As for its duration, the RdC is granted for a continuous period not exceeding 18 months, but it can be renewed. The measure is withdrawn at the end of the due period, or when one of the requirements is no longer met, or the beneficiary does not communicate to the competent public authority the work she or he performs while receiving the RdC.

The RdC is enforced by a severe penalty framework, to avoid opportunistic behaviour. In fact, the RdC's regulation is based more on sanctioning than on promotional measures. The use of criminal law in regulating the RdC reveals widespread pejorative views about poverty in Italian society, a belief that deviance should be punishable by law, that foreigners be excluded, and the enrolment of the needy in activation policies is a moral duty (D'Onghia, 2020, p. 44).

Therefore, we are dealing with a workfare scheme where social rights are transformed into a reward for those who sign a contract subscribing to stringent obligations and control and verification procedures *ex ante, in itinere* and *ex post*.[53]

The REM is an income support scheme for families in economic need because of the COVID-19 outbreak.[54] The REM is granted to families that meet certain socioeconomic requirements (art. 82, par. 2, 3 and 6). Initially the maximum duration of the measure was two months. However, due to the persistence of the pandemic, the REM has been prolonged several times.[55]

There is no specific activation mechanism for entitlement to receive the REM.[56] However, the complexity of the application procedures, the scarce information offered to the population and weak coordination between REM and RdC has made access to the former very difficult and, ultimately, only few families have benefited from it (Buoso, 2021).

53. On this point, see Bozzao (2020, p. 1).
54. Art. 82, par. 1, of the Law No. 77/2020.
55. Art. 23 Law Decrees No. 104/2020, Art. 14,137/2020 and Art. 12 Law Decree no. 41/2021.
56. During the pandemic, the link between monetary disbursement and labour insertion obligations was suspended also for the RdC (article 40 para. 1 Law-Decree No. 18/2020).

Although Italian scholars have warmly welcomed the RdC as well as the REM,[57] there are risks arising from their regulation. First, the RdC is not a universal minimum income, but a welfare-to-work measure. Such measures impose obligations on individuals to seek and accept (almost) any kind of work, otherwise they will be sanctioned by losing access to social support. Therefore, these schemes coerce "the poor and disadvantaged into precarious work, and conditions of in-work poverty" (Mantouvalou, 2020, p. 929).[58] According to Mantouvalou (2020) "forcing people to work in these conditions creates and sustains widespread and routine structures of exploitation". Moreover, welfare-to-work schemes often do not (fully) consider the situation of those who are the most vulnerable, who can barely fulfil the entitlement conditions necessary to "deserve" the social benefit. It should also be underlined that, in order to be effective, welfare-to-work schemes require two additional conditions: on the one hand, public employment services should be fully operative and well-functioning; on the other hand, there should be growing labour demand. Both conditions are currently not present in Italy.

For its part, the REM is a minimum income scheme that requires the beneficiaries to fulfil very strict conditions. Such condition are somewhat inevitable in a period when the national budget is under stress because of the increasing expenditure and reduced revenue caused by the COVID-19 pandemic crisis.

Minimum income schemes, as well as all the universal social protection schemes, are financed through general taxation. Consequently, boosting these schemes as a solution to work casualization means that the cost of the latter will be borne by the entire community. In other words, those who argue in favour of guaranteeing a minimum income as a means to liberate people from the need to accept jobs of any kind are, in reality, arguing that the socioeconomic cost of work casualization should be transferred onto the community at large, while companies (including digital labour platforms) continue to profit from casualization. Besides, as mentioned, some companies (including digital labour platforms) actively pursue fiscal optimization strategies, which often means that they do not pay taxes, or pay low levels of taxes, in countries that have set up universal schemes.[59]

Finally, if resources are allocated to finance universal minimum income schemes without tackling work casualization, we reduce the resources available for other important issues (such as strengthening labour inspectorates, health services,

57. See Bronzini (2020), Giubboni (2019), and Sandulli (2019, p. 619).
58. See also Treu (2018); Ciarini, Girardi and Pulignano (2020); and Balandi (2020).
59. The effects of corporate tax avoidance and evasion on social protection system are pointed out by the ILO (2020, p. 6).

social services, schools, etc.) whose importance, especially in times of a pandemic, is all the more evident.

Concluding thoughts

The growing and widespread presence of digital labour platforms and the panoply of workers' status in Italy underlines that work casualization has to be tackled and limited. It is evident that universal social security schemes, whose necessity in certain fields is of paramount importance, will never be able to alleviate the socioeconomic consequences generated by precarious work contracts. Furthermore, to avoid that companies which profit from workers' activities fail to live up to their responsibilities for the socioeconomic consequences entailed by work casualization, tax-financed (non-contributory) schemes should complement but not replace insurance schemes that are linked to work.

Consequently, in Italy as elsewhere, digital labour platforms force us to rethink social security systems, to ensure that all workers (regardless of their employee or self-employed status) have effective and adequate protection against all the social risks that they face (Daugareilh, 2019).

To conclude, and to reiterate a key argument, providing a tax-financed guaranteed minimum income as a means to liberate people from the need to accept jobs of any kind may transfer the socioeconomic cost of work casualization onto the community at large, while companies – including digital labour platforms – continue to profit from such casualization.

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The social protection of platform workers in Romania: Meeting the growing demand for affordable and adequate coverage?

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Abstract In a changing world of work, platform workers struggle to gain adequate protection, and effective access to the benefits provided by the social security system form a part of this. Social security benefits in Romania are particular in that access is based on a person having a professional income, regardless of the legal status of the worker (subordinate or self-employed). As a rule, all workers are covered in the event of illness and changing family circumstances as well as for pensions. In contrast, coverage for self-employed workers for unemployment benefits, work injury and occupational disease benefits, paid leave in the event of illness, protection against the risks related to pregnancy or to care for a sick child is voluntary. Given the diffusion of platform work, the article addresses the specific situation of platform workers in Romania, formally covered by the social security system, but who face obstacles related to eligibility criteria, administrative formalities, the risk of the automatic termination of work and intermittent work patterns.

Keywords atypical work, platform workers, self-employed, social security schemes, coverage, Romania

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Introduction

The digital revolution is a global phenomenon affecting all countries, and Romania is no exception. With a total population of 19 million, Romania has 11 million Internet users and almost 8 million smartphone users.[1] However, neither the use of Internet and apps nor the rapid digitalization of many services have solved the coverage problems of those working behind the app or the online service. Despite the growth of digital work platforms, a trend driven further by the rise of digitally mediated services during the COVID-19 pandemic, the labour market and social security status of persons performing such work has remained unchanged.

Only recently has the social protection of platform workers given rise to major debates. This has been so because of the specificity of the Romanian social protection system, which is an "open system" (permitting coverage for all citizens, regardless of their employee or self-employed status) that aims to ensure universal social protection of the population and access to health care. The social security system is a general statutory scheme, covering both employees and self-employed workers, as well as students, jobseekers, etc.

The crisis generated by the COVID-19 pandemic has revealed that platform workers have additional vulnerabilities, such as limited access to paid medical leave insurance, and are disadvantaged by the effects of low income – and thus low contributions – on the adequacy of benefits eventually received.

The pandemic has been a genuine accelerator of "digitalization", with online services such as food delivery having become essential, especially during the state of emergency.[2] Among the large variety of digital platforms, we shall focus on digital platforms that exchange labour but which still lack a uniform definition and a uniform business model: they play different roles, with some acting as an intermediary while others act as an employer, often exerting an important degree of control and influence over the person who works (EC, 2016). Definitions of work platforms usually highlight one main feature, such as their role in the outsourcing of work,[3] the use of algorithms in "coordinating labour service transactions" (Pesole et al., 2018), or in mediating between labour demand and supply (Engels and Sherwood, 2019). Such definitions tend to focus on the

1. See InvestRomania, IT&C Market size.
2. In Romania, the state of emergency lasted for two month, between 16 March and 15 May 2020, entailing numerous restrictions: as a result, pizza delivery has increased by 33 per cent and fast-food delivery by 68 per cent (*Digi24*, 2021).
3. Platform workers perform "outsourced digitally mediated work" (Graham, Hjorth and Lehdonvirta, 2017, p. 137).

novelty of the technological aspects of platforms' operations, rather than on the employment relationship.[4]

One of the commonly used definitions focuses on the spatial parameters of the work performed (Rosioru, 2020, p. 102), allowing for a distinction between web-based platforms, "where work is outsourced through an open call to a geographically dispersed crowd (crowdwork)" and location-based applications (apps) that allocate work "to individuals in a specific geographical area" (Berg, 2018, pp. 3–4). There is a degree of consensus on this classification of platform workers among legal scholars, who distinguish between the provision of location-independent labour and location-based labour services (Engels and Sherwood, 2019, p. 5). Given the differences between places of work and relationships with clients (Huws, Spencer and Joyce, 2016, p. 2), platform workers are divided in two main categories: crowdworkers (or online workers) and location-based workers, often performing "work on-demand via apps" (De Stefano, 2016, p. 3). The two categories experience different degrees of control exerted by the platform or the app in establishing payment, working conditions and even regarding the ways work is to be performed, leading to different patterns of work. In addition, the risks that crowdworkers and location-based workers are exposed to are radically different (Rosioru, 2020), with workplace injuries being more frequent in the case of workers on demand via an app in the delivery or transport sectors. A survey has revealed that platform workers consider that their work puts their health and safety at risk, and it is monotonous and stressful, especially in the case of online professional services and transportation and delivery services (Urzì Brancati, Pesole and Fernández-Macías, 2020, pp. 44–45). In addition, the continuous evaluation and rating of work performance, competitive mechanisms for allocating work, as well as uncertain payment and blurring of work–life boundaries induce a significant level of stress, affecting the health and family life of platform workers (Garben, 2017, pp. 46–47).

However, the distinction between crowdworkers and location-based workers is not so relevant for social security purposes. Both categories obviously need social protection[5] and, despite the relatively different risks that they are exposed to, they face the same obstacles related to access to social protection systems. Specifically, this relates to the challenges of paying contributions and receiving adequate benefit.

4. Thus, digital labour platforms appear as intermediaries, most often of a single task or service, not as conventional employers (Urzì Brancati, Pesole and Fernández-Macías, 2019, p. 4).

5. Of course, both categories also need "labour law protection", i.e. fair working conditions, which is more difficult to achieve in the case of crowdworkers, mainly due to their lack of visibility.

In Romania, the status of worker – employee or self-employed – is not relevant for access to social protection. Over the years, legislative reform has sought to extend the social security system, initially conceived for employees, to all those who gain a professional income. A major reform enacted in 2018 aimed to establish a uniform regime for access to coverage and for benefits, for employees and other workers. Nonetheless, for paid medical and maternity leaves, unemployment benefits and benefits for work injuries and occupational diseases, a voluntary opt-in scheme is still necessary. Due to the specificity of the Romanian social insurance system, there are currently no collective actions or litigation related to the social security of platform workers. However, due to their low incomes and precarious position on the labour market, as well as the (sometimes) abusive behaviour of the company operating the platform, this situation is likely to change.

In the sections that follow, after highlighting some aspects of platform work in Romania and the national social security system's legal environment, we focus on the social risks associated with platform work and the social security benefits available for platform workers. We then look to the challenges and opportunities for coverage extension and for sustainable and adequate benefits.

The social protection of platform workers

The legal provisions on labour and social security protection are very detailed in Romania, enabling access to social security coverage for employees and the self-employed alike. However, behind the general provisions and generalized access and benefits lie specific problems, which affect people in particular situations. The existing situation can be characterized as one of a passive legislator being confronted by an active labour market, with many changes rapidly occurring, including the diffusion of platform work. In the following, we first offer an overview of the (quasi) inexistent framework for platform workers in Romania, then look at the comprehensive social security system for self-employed workers.

The legal framework for platform workers

Digital technology has impacted the Romanian labour market in different ways. On the one hand, there is a rising number of employees in information technology and communication (ITC) services; IT firms account for more than 6 per cent of Romania's GDP.[6] Many such workers enjoy the status of employee, fully covered

6. See InvestRomania, IT&C Market size.

by labour law and social security. This outcome is commonly the result of tax incentives that are applicable if an employment contract is concluded. On the other hand, there is an important expansion of platform work, especially of delivery (by bike) and transport services (that are visible to the regulatory authorities). Such work operates alongside traditional delivery services using employees, which are operated by restaurants and large delivery companies. Platform work and platform workers are quasi-ignored by the national authorities for a number of reasons. Although platform work is expanding, the number of workers remains relatively low. There is a belief that the social security system is sufficiently adequate. There is also a desire to support the promotion of the development of the tech start-up sector. The lack of trade union support is a further important factor, as the collective voice of platform workers is still relatively unheard.[7]

As stated, currently, there is no legislative initiative concerning the social protection of platform workers or, indeed, any litigation related to this. Not even the COVID-19 pandemic has changed this state of facts, which has seen the Romanian Government focused on the pandemic's economic effects and on "employment relationships" (seen broadly as any relationship generating professional income). However, its efforts have focused mainly on compensating large professional groups by means of innovative responses, while ignoring the specific needs of platform workers. Compensation measures have been gradually extended, however, to independent workers. "Authorized individuals" (who may pursue economic activities, mainly by using their own labour) were also entitled to financial compensation in case of loss or significant diminution of revenues due to the pandemic. However, especially in the case of crowdworkers, such diminution of revenue has been difficult to prove. In addition, crowdworkers – who are not visible on the labour market and usually have (other) "regular jobs", using digital labour as a secondary source of income (Urzì Brancati, Pesole and Fernández-Macías, 2020, p. 40; Huws et al., 2017, p. 37; de Groen et al., 2018, p. 19) – are often not authorized as individuals to perform economic activities. In turn, the under-insurance of some workers within statutory social security schemes – which is more likely to occur in the case of crowdworkers – has also affected their protection.

The only normative act adopted concerning platform workers is the Government Emergency Ordinance No. 49 of 2019 on alternative transport services, adopted following the pressure exerted in particular by the platform Uber. In fact, the Cluj Court of Appeal decided (upholding the decision

7. Protests against unilateral changes made to working conditions by the platform are, however, becoming more commonplace.

No. 1192/2018 of the Cluj Court of First Instance)[8] that the services offered by Uber represent acts of unfair competition and had banned its activity in a Romanian department (Cluj). The complaint was made by a taxi association, but the request to suspend the activity of the platform was rejected because it is controlled by a legal person located in the United States. In this context, as a first step, the legislator has tightened the sanctions for breaches of the law governing the activity of taxis and services for the road transportation of persons; accordingly, the Transport Police intensified their controls. Uber reacted, demanding the regulation of its activity, which led to the adoption of the Emergency Ordinance No. 49 of 2019 on alternative transport services, requiring the registration of platforms in Romania. Both the drivers and the cars used for the road transportation of persons have to meet certain conditions, and the transport platforms have to be authorized.[9] The debate has been centred squarely on the question of unfair competition, so the new regulation does not bring any improvements to the situation of drivers, who are deemed to be self-employed.

Yet, in Romania, some couriers are not self-employed, because some platforms (such as foodpanda, hipMenu) prefer to conclude employment contracts, in particular part-time contracts. This is possible, on the one hand, because the Romanian Labour Code allows the parties to the contract to establish personalized schedules and the employee may choose the exact working hours. The personalized schedule is possible on the condition that it does not exceed the statutory working time (40 hours per week) and with the obligation for the employer to set up a system of proof of working time and to present it, on request, to the Labour Inspectorate. Another explanation lies in the fact that, since 2018, the social charge weighing on the employer is very low. On the other hand, the penalties for concealing the legal nature of the employment contract are very high (around 8,000 euros (EUR) per person in an irregular situation).

8. Decision No. 1192/2018 of the Cluj Court of Appeal involves the applicant, the Association for the Supervision of Taxi Activities in Transylvania *(Asociatia de Monitorizare Taxi Transilvania)* and the Confederation of Authorized Transport Operators of Romania *(Confederatia Operatorilor de Transport Autorizati din Romania)*, an employers' confederation, against Uber (SC Uber Systems Romania SRL, established in Romania) and the Dutch company Rasier Operations BV. On the merits, the Court of Appeal have relied on the CJEU judgment in case C-434/15 *(Asociación Profesional Elite Taxi v Uber Systems Spain SL)*, according to which the contacting service provided by Uber is inextricably linked to the transport services. Uber therefore indirectly falls within the scope of Romanian Law 38/2000 on Taxi Transport, which prohibits paid public transport for cars without a taxi license. According to the Court, the way the Uber platform operates distinguishes it from ride-sharing services, and therefore Uber was found liable for unfair competition practices.

9. To date, in Romania the following are authorized for alternative transport services: Uber B.V. Amsterdam; Bolt Technology OÜ Talinn; Clever Tech SRL; BlackCab Systems SRL; Yandex.Go SRL; see Romanian Government data. The authorization is temporary and must be renewed periodically; in addition, the alternative transport platforms have to be Romanian legal persons or to have a subsidiary established in Romania.

Overall, the number of employees in the app-enabled delivery sector remain relatively low, among other reasons due to the remuneration system (an hourly rate compared to a "piece" rate or delivery rate) as well as a lack of willingness among young bike couriers to become employees.

Often, couriers are deemed by the platforms to be self-employed, leaving the workers completely unprotected in terms of labour law. The platform Glovo uses umbrella companies, which hire couriers. The process is illegal, because Romanian law does not allow the procurement of human work, except in the event of secondment or through temporary employment agencies. In addition, couriers have to "pay" the partner company a certain percentage of their monthly income in exchange for the status of subordinate worker, which is also not allowed by Romanian law. In terms of labour law, Romania acknowledges the traditional binary divide between employees and independent (self-employed) workers, with clear criteria for assessing the employment status of a person – employee or self-employed (independent) worker – established by the Tax Code. Tax authorities, labour inspectorates and judicial authorities (courts) may reclassify a contract according to its genuine legal nature, based on the "primacy of facts" – the conditions under which work is performed – if four of the seven legal criteria are met.[10] Despite numerous decisions to reclassify Glovo or Deliveroo riders or, indeed, Uber drivers as employees or as workers, the national authorities ignore the wide diffusion of platform work and the need for a clear labour status and adequate social protection for platform workers.

The Romanian social security system for self-employed workers

The Romanian social security system has the particularity of being "open" to all citizens, regardless of their employee or self-employed status; access to the social security system is granted or affiliation is compulsory. There is, therefore, no perfect overlap between labour law and social security law. While labour law is built on the binary division between subordinate workers (employees) and self-employed workers, in social security this division is not decisive. In fact, social insurance presupposes, as a principle, the payment of a contribution determined on the basis of a professional income, and it is irrelevant whether it is obtained as a subordinate worker or as self-employed.

10. A service provider performs work in an independent manner if he/she 1) is free to choose where, when and how the work is performed; 2) free to work for several customers; 3) bears the financial and business risks of the work performed; 4) invests his/her own capital, using his/her own equipment for the work; 5) belongs to an occupational organization or association representing, regulating and overseeing the profession; 6) is free to perform the work, either personally, or with the help of employees or colleagues; and 7) invests his/her physical or intellectual capability to perform the work.

This broad approach to social security coverage is in line with the fact that Romania is constitutionally defined as a social state, governed by the rules of law[11] and by the principles of democracy. The Constitution also grants the right to pensions, paid maternity leave, medical care in public health centres, unemployment benefits and other forms of public or private social insurance, as well as to social assistance, according to the law.[12] Social security is managed solely by the State,[13] without any involvement of the social partners. As a former communist state, Romania does not acknowledge the joint management of social insurance funds. In addition, collective agreements very rarely cover aspects relating to the social protection of workers, often being limited to financial support in the event of maternity or retirement. Accordingly, the social security system in Romania is institutionalized, governed by public authorities (the Ministry of Labour and specialized institutions) and by public law, aspects that are largely inherited from the communist system.

The public social security system comprises two branches: social insurance and social assistance. There is no Social Security Code. There are, however, several laws regulating health insurance and sickness benefits, unemployment benefits, paid leave for incapacity to work and for the care of a sick child, maternity leave and maternity allowance, maternal risk leave, paternity leave and paternity allowance, child raising allowances, work injuries and occupational diseases, disability and old-age pensions. Further laws regulate the different benefits and allowances granted through social assistance.

Social insurance supposes, as a rule, the payment of contributions, normally calculated on the professional income of the insured person. These contributions are paid by the employer in the case of employees, or directly by self-employed workers. Social assistance benefits are provided based on the specific needs of the claimant, without a counterpart paid on their behalf.

Following what proved to be a highly controversial reform of Romania's social insurance system, since 2018, the social insurance contribution is identical for both groups of workers (employees and self-employed). In subordinate employment relationships, contributions for health insurance (10 per cent) and for the pension fund (25 per cent) are deducted exclusively from salaries (fully payable by the employee). Previously, the employer as the beneficiary of dependent work covered part of these contributions. The employer now only has to pay a contribution amounting to 2.25 per cent of the wage bill, which is

11. Article 1 para (3) of the Romanian Constitution.
12. Article 47 para (2) of the Romanian Constitution.
13. This article focuses on the social insurance system only. It does not address the pension coverage provided under the system of mandatory individual savings accounts. The Financial Supervisory Authority regulates and supervises private pension fund administrators. Private pension fund administrators manage individual accounts.

intended to finance the guarantee fund for wage claims (to cover wages in the event of bankruptcy), as well as unemployment benefits and allowances, sick leave and maternity benefits, and benefits for work accidents and occupational diseases.

The contribution rate is the same for the self-employed, but the self-employed must pay these contributions themselves. This differs from the case for waged employees, where the contributions are collected at source and paid by the employer. Self-employed platform workers have access to the social security system, to all the allowances and benefits. In reality, self-employed platform workers bear alone the full costs of social security contributions. The legislator has tried to simplify the process of declaring professional income and paying contributions, mainly through a single annual tax statement (for health insurance and pensions). However, a number of social insurance benefits (i.e. for unemployment, and work injuries and occupational diseases) are not part of this. Coverage against these risks therefore involves an insurance contract with the relevant public authority and the periodical payment of contributions.

Besides the introduction of this partly simplified system for declaring professional income and the payment of contributions, the legislator did not introduce new forms of monitoring and paying contributions adapted to the specificity of platform work. Neither were they able to take into account the atypical work circumstances that have arisen because of the COVID-19 pandemic. It has been argued that to adapt to the specificity of platform work, it would be far more efficient to make deductions for contributions "at source". This would simplify the process and reduce the administrative burden on the worker and prevent "contributions from being accidentally or deliberately not paid in full" (DSV-Europa, 2018, p. 9). However, this proposal was not taken into consideration by the Romanian authorities, who were still largely insensitive to the specificity and risks of platform work.

The reform of the social security system – achieved through the reform of the tax law – has been accompanied by the corresponding adaptation of the laws governing the various social benefits.[14] As stated, it is compulsory for self-employed workers to be insured in the statutory health and pension insurance schemes. As of 1 January 2018, any natural person residing in Romania[15] benefits from health insurance and pensions, subject to the obligation to pay the corresponding contributions: 10 per cent and 25 per cent on all monthly

14. Specifically, Law No. 95/2006 concerning health insurance, Law No. 263/2010 on the pensions' scheme, Law No. 76/2002 on the unemployment benefits, and Law No. 346/2002 on occupational diseases and accidents at work.

15. However, the European social security coordination rules and the principle that a person cannot be insured twice, in different European Union Member States, are respected.

income, from salaried or other professional activities, to which is added 10 per cent of monthly income for income tax.

The guiding principles of social insurance in Romania are that all people with professional income must contribute to the social security system by paying a contribution, while benefits (with the notable exception of pensions) are awarded according to the assessed need of the applicant, and not according to the contributions paid. This means, for example, that a person who has paid a low level of contributions for health insurance will benefit from medical care according to his or her medical condition, and not according to the amount of contributions paid; for certain diseases, a minimum period of contribution to the social health insurance system is required.

Thus, with few exceptions, all workers are covered in the event of illness, to meet changing family circumstances (through the provision of parental leave) and for pensions. In contrast, for unemployment, work accidents and occupational diseases, paid leave in the event of illness, risks related to pregnancy, and to care for a sick child, coverage for self-employed workers is voluntary.

Specific features of social security risks and benefits for platform workers

Platform workers face different risks, according to the task performed. Those who work in the transportation sector face the negative effects of spending long hours in a vehicle or car. Delivery workers report a variety of physical problems, related to the physical effort exerted, exposure to the weather, as well as the risks of accidents and of personal attack.[16] Crowdworkers report hazards that are common after spending long hours in front of a computer screen, such as eyestrain and back problems. However, all platform workers report psychological hazards, such as stress and depression (Garben, 2017, p. 47). These may arise owing to customer complaints and user ratings, arbitrary decisions by the platform, the risk of work being terminated, difficulties in communicating with platforms, unpaid time spent waiting or bidding for work (Garben, 2017, pp. 41–45), constant monitoring[17] of work performance or (sometimes) having to be permanently available for work in order to gain a decent income.

16. A bike courier revealed that, after an accident, workers rarely give themselves the time to recover fully: "These are all massive costs that are shouldered by the workforce, and they enable companies like [name of platform] to grow rapidly at minimum cost" (Garben, 2017, p. 46).

17. See Urzì Brancati, Pesole and Fernández-Macías (2020, p. 45). The authors highlight the main risks for the health and well-being of platform workers, according to the type of work performed, and found that stress associated with platform work is highest for online professional services and lowest for micro-tasks and translation work.

In many European Union (EU) Member States, self-employed workers have no or limited access to social insurance (DSV-Europa, 2018, p. 4; Spasova et al., 2017, pp. 7–8), because the system was originally built to cater to employees. In such instances, self-employed workers risk being misclassified, as there are often significant differences between the factual circumstances of their work and their contractual status.[18] In addition, platform workers have limited awareness of the effects of such misclassification as regards employment and social protection rights. However, some may intentionally opt for the status of independent contractor, to benefit from more favourable tax regimes (de Groen et al., 2018, p. 20).

Given that self-employment is important to Romania's economy, these were some of the considerations taken into account when deliberating on its social insurance reform seeking to extend social security coverage towards the universal protection of the population. Framed by international good practice, the aim was to ensure "at least minimum levels of income security and access to essential health care" (ILO, 2012, p. 1). However, even if major steps have already been taken in this direction, many platform workers (especially those who are very young) remain unaware of the social security benefits made available through voluntary insurance (i.e. for unemployment, work injuries and occupational diseases, or paid medical leave). Despite the relatively low monthly contribution required, the possibility to enrol may not be grasped because platform workers lack accessible and adequate information as well as the support of a trade union, and often consider voluntary insurance administrative formalities as burdensome.

Health insurance

Health insurance coverage is universal and medical benefits are provided for free in the event of medical emergencies, including for surgery, chronic diseases, contagious illnesses (such as tuberculosis or other diseases with the potential to cause an epidemic), pregnancy and childbirth, and for HIV treatment and AIDS diagnosis. In these cases, medical assistance is granted to all persons, regardless of the insured's status – this is referred to as the minimum package of medical services. Article 34 of the Romanian Constitution guarantees the right to health protection, provided through statutory measures for public hygiene and health as well as by medical care and social security benefits – in the case of sickness, accidents, maternity and rehabilitation – as well as other measures to protect the physical and mental health of citizens.

18. This is especially the case for those who engage in "on-location platform-determined" types of work (de Groen et al., 2018, p. 20).

As a rule, health insurance is compulsory (all citizens are insured or must be insured). A basic package of free medical services, that includes periodic health check-ups, as well as healthcare in case of illness or accidents that are not work-related, is available to all the insured persons.[19] To realize the right to these benefits, the insured must first register on the patient list of a family doctor (a primary care physician). Health insurance involves a 10 per cent contribution. The contribution may be levied on the insured's salary. Alternatively, it may be levied on the income from independent activities, intellectual property rights, lease contracts (the rents received for rented estate), investments, agricultural activities, logging activities, fish farming activities, on the sole condition that the total income exceeds the minimum statutory wage for 12 months.[20] If the cumulative income from all these activities does not reach this threshold, the 10 per cent contribution is applied to six gross minimum wages per year.[21]

For platform workers who earn a low income from their online or location-based activity, the annual contribution to health insurance represents an important amount. In particular, the challenge of paying the annual contribution may be greater for crowdworkers who face a higher risk of non-payment for work undertaken or, in some instances, may receive payments that are not in cash.[22]

Prior to the 2018 reform, compulsory coverage for self-employed workers with professional income (self-employed workers) extended to health insurance only, regardless of the level of income. The health insurance contributions paid by the self-employed were proportional to their income (the self-employed could affiliate and contribute voluntarily for pensions, unemployment benefits, and paid leave in the event of sickness, maternity or to care for a sick child).

19. The rights and duties of insured persons are established by Law No. 95/2006 on health care reform. The basic package of medical services include free-of-charge emergency medical and surgical services; consultations and disease risk assessments; medical services for acute conditions or chronic illnesses (including type 2 diabetes, bronchial asthma, chronic obstructive pulmonary disease and chronic kidney disease); some dental services; day and continuous hospitalization services; in-home medical care; medicines with or without a personal contribution for outpatient treatment and some medical devices. The basic package is established periodically by the National Health Insurance Authority; see also EC (2020).

20. In 2020, the minimum wage in Romania was 2,230 lei (the Romanian currency is the leu; plural lei (RON); approximately EUR 465). The threshold is established as RON 26,760 (RON 2,230 x 12 months), which is approximately EUR 5,575 per year. The annual contribution is RON 2,676 (EUR 558).

21. In this case, the 10 per cent contribution applies to RON 13,380 (2,230 RON x 6 month), which is approximately EUR 2,788 (thus, the annual contribution is RON 1,338; approximately EUR 279).

22. As was previously the case for workers on Amazon Mechanical Turk who were based outside of the United States and who received Amazon.com gift cards instead of cash payments. Starting from 1 May 2019, workers in 25 countries outside of the United States (including Romania) may receive cash earnings and transfer their earnings to a bank account in their home country; see Amazon Mechanical Turk.

Certain categories of persons are insured in the health system without having to pay contributions.[23] These include students and apprentices younger than age 26, the spouse without own income of an insured person, or beneficiaries of the guaranteed minimum income (as established by Law No. 416/2001).[24] No contribution is necessary and free medical assistance is provided when the person's income is below the threshold of the guaranteed minimum wage. However, if an insured person from a category that does not pay contributions earns a wage or has a cumulative monthly income from independent activities, agricultural activities, forestry and fishing farming, higher than the value of the guaranteed minimum wage, the person contributes 10 per cent of their income that exceeds the minimum wage.

Among those who receive free medical insurance are the economically vulnerable, thus many who perform platform work. The economic precarity faced by many platform workers is alleviated by free access to all health insurance benefits.

With regard to the aforementioned guaranteed minimum income, the amount paid by the State, according to Law No. 416/2001, is determined as the difference between the level provided by law and the net monthly income of the single person or the family. The exercise of a professional activity (including platform work) does not exclude, therefore, the right to benefit from the guaranteed minimum income. Moreover, working beneficiaries are entitled to a 15 per cent increase in the guaranteed minimum income (which, as a rule, is very low), if they earn wages as employees. This rule could incentivize those who perform platform work to become subordinate workers.

Pensions

Under the contributory public social insurance pension system, the pension amount is established according to the level of income that was used to calculate the social insurance contributions. Old-age pensions are granted to people who have reached the standard retirement age and have contributed to the public

23. In particular, young pupils, students or apprentices younger than age 26; doctoral students who carry out teaching activities for 4–6 hours per week, as well as people who follow the individual training module to become soldiers or professional graduates; people persecuted during the communist regime for political reasons, war veterans, invalids and war widows, and participants in the Romanian Revolution of 1989; disabled people; pregnant women; the spouse and parents without income of an insured person; beneficiaries of the guaranteed minimum income; patients suffering from diseases included in national health programmes (such as diabetes, haemophilia, neurological diseases), until recovery; retirees, for the retirement income, as well as for income derived from intellectual property rights; beneficiaries of sick leave and sick allowance; persons on parental leave; recipients of unemployment benefit, etc.

24. Law No. 416/2001 established a minimum income threshold for which every person or family in Romania should benefit.

pension system for a minimum period of 15 years (women and men). The standard retirement age is set at age 65 for men and age 61 for women (for women, the retirement age is rising progressively to reach age 63 in 2030). In addition, women may request to continue their employment relationships, which employers must respect, until age 65. The minimum contribution period of 15 years includes the duration of university education (with some limits), periods of sick leave and parental leave, and periods in receipt of unemployment benefits. The contribution is set at 25 per cent of professional income (wages, income from independent economic activities, unemployment benefits, paid leave),[25] both for subordinate workers and for the self-employed.

The amount of the pension is established by taking into account the insured person's monthly income from professional activities, subordinate or independent. The gross monthly income is divided by the national gross average wage.[26] The pension is calculated on the basis of a points system.[27] On satisfying the minimum contribution period, a higher pension is paid to those who have completed the full contribution period[28] (35 years for men; 31 years for women),[29] or longer. If the resulting pension is lower than the guaranteed minimum pension (RON 800; approximately EUR 150), the retiree receives this minimum pension, the difference being paid from the public budget. The median pension in Romania in 2020 is RON 1,436 (approximately EUR 300).

The general pension system integrates subordinate workers, the self-employed, military personnel as well as farmers. Reforms carried out in 2000 and 2010 aimed to create a unitary pension system, integrating almost all workers, with the notable exception of lawyers and the clergy of religious cults recognized by law.

The statutory insurance of platform workers – even when self-employed and with low income – guarantees their participation in the earnings-related pension programme. However, for many platform workers as well as other workers with low levels of professional income, contributions based on a low income will lead to a low pension.[30]

25. The contribution rate of 25 per cent of professional income referred to here concerns those workers covered by the social insurance system only. The 25 per cent contribution calculated for periods in receipt of unemployment benefits or insurance benefits is paid by the public budget, not by the individual.

26. The national gross average wage is reported monthly by the National Institute for Statistics. The national gross average wage is the level established for 1 point, which is used to determine the pension amount.

27. Since 1 September 2020, the value of the pension point is RON 1,440 (approximately EUR 300).

28. The full contribution period is used to determine the amount of the pension.

29. The full contribution period for women will increase gradually to 35 years by January 2030.

30. Any person residing in Romania may voluntarily complement the income taken into consideration to determine the amount of the pension paid by the public system by concluding a contract with the National Pensions' House. In this case, the minimum income taken in consideration is the statutory minimum wage.

Under the pension programme, a disability pension is paid to insured people who are assessed as having lost at least half of their capacity to work, either due to a work accident or occupational disease, or due to illnesses or accidents that are not connected with work. To calculate the disability pension, the contribution period that was not completed due to the disability is credited as a potential period (EC, 2020, pp. 21–22). This is awarded automatically in the event of a workplace injury or occupational disease, but depending on having satisfied a minimum contribution period in other cases.

In the event of the death of an insured person, a retiree, or of an uninsured family member, death grants are paid to the person responsible for the burial expenses.

Subject to rules, survivors' pensions are paid to the children and surviving spouse, on the condition that the deceased person was a retiree or met the requirements to receive any type of pension paid from the public pension system.

Children up to age 16 are eligible for the survivor's pension unconditionally; up to age 26 if in education. The surviving spouse is entitled to the survivor's pension only on reaching the standard retirement age and if he or she was married to the deceased person for at least 15 years. There are many exceptions to this rule, depending on certain circumstances, such as the surviving spouse is a disabled person, or has no or limited income, or the death of the supporting spouse resulted from a work accident or occupational disease.

Many platform workers lack insurance for work injuries and occupational diseases. Therefore, in the case of a worker's death, even a work-related death, the survivors' pension for their children (paid through the pension system) would be very low because of the way the pension is calculated. Once more, the problem of low benefits is not exclusive to platform workers, but is one faced by all workers with low levels of contributions.[31]

Unemployment benefits

Protection against involuntary job loss provides for cash benefits and non-cash benefits intended to facilitate the return to work. At present, unemployment insurance is compulsory for employees; civil servants; persons elected or appointed to executive, legislative and judicial authorities; persons elected to

31. The proportion of young couples with children ranges between 20 per cent and 26 per cent among platform workers (respondents aged 35 or older, who live as part of a couple and have children, represent between 19 per cent and 23 per cent of platform workers), depending on the (low versus high) importance of platform work in their overall professional activities (Urzì Brancati, Pesole and Fernández-Macías, 2020, p. 23).

NGOs, political parties, employers' organizations, trade unions, and religious cults; and company managers.

Jobseekers who have paid contributions to the unemployment fund for 12 months within a period of 24 months at the date of application receives unemployment benefits, comprising a fixed sum (RON 375) and a sum determined according to the jobseeker's length of service (EC, 2020, p. 42). If the beneficiary resumes a professional activity during the period of payment of unemployment benefit, he or she will still receive half of the corresponding unemployment benefit. The duration of the period of payment of the unemployment benefit depends on the work seniority of the applicant. Other non-cash benefits are granted to jobseekers without a minimum qualifying period (membership period). These include, in particular, active labour policies such as vocational training and measures to support reinsertion, including of young workers.

As stated, to be eligible to receive unemployment benefits requires a work history and compulsory membership in the unemployment insurance programme for 12 months out of the 24 months preceding the claim to benefit, and unemployment must be involuntary. The precarious nature of platform work, such as the risk of the automatic termination of work and intermittent work patterns, can act to nullify the right to unemployment benefit. Platform workers, however, can take advantage of all the other benefits guaranteed by this insurance system, such as vocational training, a low interest loan for starting a business, the certification of professional qualifications, etc.

A further problem for platform workers stems from the process of affiliating to unemployment insurance, because originally unemployment insurance was designed for employees. At present, the contribution of 2.25 per cent of payroll is paid by the employer. On the one hand, this contribution is intended to finance the guarantee fund for wage claims, to cover wages in the event of bankruptcy (15 per cent of the 2.25 per cent). On the other hand, it also finances the unemployment insurance system (20 per cent of the 2.25 per cent), sickness and maternity leave (40 per cent of the 2.25 per cent), and work injury and occupational disease insurance (5 per cent of the 2.25 per cent).

In practice, the self-employed have to insure themselves against unemployment by concluding an insurance contract with the unemployment agency and by paying the monthly contribution of 20 per cent of the 2.25 per cent of the minimum wage (therefore 0.0045 of the minimum wage, or about RON 10; EUR 2.10). Often for the self-employed, it is difficult to prove the involuntary nature of the cessation of activity that conditions the payment of unemployment benefits. In addition, even if the monthly contribution is low, the administrative formalities and the lack of information and support often render access to this right ineffective.

Insurance in the event of a work injury or occupational disease

Employers are obliged to insure subordinate workers against workplace accidents and occupational diseases (financed by 5 per cent of the employer's 2.25 per cent of monthly payroll contribution). The self-employed, including platform workers classified with self-employed status, may insure on a voluntary basis. For such voluntary coverage, which also covers road accidents that occur while commuting to and from work, the self-employed must contribute 5 per cent of 2.25 per cent of the minimum wage (0.001125 of the minimum wage, i.e. RON 2.50; approximately EUR 0.50).

Workers in the transportation and delivery sectors, as well as those who perform on-location services, are more likely to suffer work-place injuries. However, the risk of occupational disease is important for all tasks carried out on, or through, platforms. For platform workers, voluntary insurance confers only an *a posteriori* compensation and the platform – as the genuine beneficiary of the human work performed – avoids all the occupational safety and health responsibilities that impact the health and well-being of workers, the surrounding communities, as well as the general environment (Alli, 2008, pp. VII and 17–19).

Family benefits

Child-raising (parental) leave and benefits are granted to Romanian residents. Entitlement is subject to the residents being natural or adoptive parents, or having been granted temporary custody of children pending adoption, or being legal guardians. Furthermore, they should have earned income subject to income tax (including unemployment benefits, paid medical leave or disability pensions) during 12 months in the 2 years preceding the child's birth. The parental leave and benefits (ranging from RON 1,250 to RON 8,500[32] per month, depending on previous income) are granted for up to the first 2 years of the child's life; 3 years for disabled children. This benefit is paid by the National Agency for Payments and Social Inspection, and entitlement is not subject to a previous contribution; a constant professional income suffices. A monthly return-to-work bonus of RON 650 may be paid for up to a year to parents who decide to resume work before their child-raising leave ends.

This benefit is accessible to platform workers, as it does not require a previous contribution or a specific status. Platform workers, as do all who apply, must have been in receipt of a professional income for 12 months in the last two years before the birth or adoption of a child. In this regard, as for other benefits, the

32. From EUR 260 to EUR 1,770 per month.

risk of automatic termination of work and intermittent work patterns may act to prevent the effective exercise of this right.

The maternity leave and maternity allowance, granted to pregnant women or those who have recently given birth or are breastfeeding, are voluntary and subject to 6 months' contributions by the applicant. Paternity leave is available currently only to employees.

Conclusions

Social security is a fundamental right and the Romanian legislator has deployed efforts to ensure a uniform regime, in terms of obligations and of benefits for employees and the self-employed. The intention is to give employees and the self-employed full and equal access to the protection afforded by the social security system, in line with Principle 12 of the European Pillar of Social Rights.

Social security protection plays an essential role in protecting people against the financial implications of social risks, of preventing and alleviating poverty and of upholding a decent standard of living. The recognized right to social security should be made available to all workers.

Coverage under the health insurance and pension system is compulsory for platform workers in Romania, and access is provided under the same conditions as for employees. The self-employed can also voluntarily affiliate for unemployment insurance, work injury and occupational disease insurance, and insurance for paid medical leave. In this regard, Romania is in line with those other countries that offer "the most comprehensive coverage", where access to work injury and occupational disease insurance as well as unemployment insurance is voluntary for self-employed workers (DSV-Europa, 2018, p. 5). While efforts have been made to ensure effective coverage, platform workers might not always satisfy the eligibility criteria (Spasova, 2017, p. 54).

The Romanian social security system is particular given that neither labour market status nor the type of employment relationship hinders access to social protection. Furthermore, the unitary general social security system allows for the acquirement of rights regardless of employment status and thus eliminates the risks deriving from the limited transferability of rights between different sectoral schemes. However, low levels of contributions generally lead to low benefits. Clearly, the right to participate in a social security scheme should not be limited to legal coverage, but to coverage that is effective and adequate. The European Commission has made a proposal for a Council Recommendation on access to social protection for workers and the self-employed (EC, 2018). In this proposal, Member States should extend their formal coverage "on a mandatory basis for sickness and healthcare benefits, maternity/paternity benefits, old age and invalidity benefits as well as benefits in respect of accidents at work and

occupational diseases", while coverage for unemployment benefits should be voluntary. Romania has still to put these proposals fully into practice.

Adequate social protection is key for decent livelihoods and decent work, and should be a reality for all. Important steps have been taken in Romania. However, there is still some way to go before the achievement of effective and adequate coverage for all workers, and platform workers seem to be particularly disadvantaged in this regard.

Even where social security programmes are designed to cover as many people as possible, the generally low income levels of platform workers, as well as (eventually) their under-insurance, especially so in the case of crowdworkers, represent genuine challenges to realizing sustainable coverage extension and benefit adequacy. Platform workers experience obstacles related to eligibility criteria as well as administrative formalities and a lack of information and support. Ignored by the authorities and trade unions, these workers struggle alone to gain access to decent working conditions and adequate social security coverage.

In the longer term, the rapid growth of the digital economy can be expected to lead to further social security reform in Romania. In the meantime, the current lack of debate concerning the need for adequate protection for people engaged in platform work is of concern. The social and economic effects of the COVID-19 pandemic currently monopolize policy debates in Romania. Despite this, and not least because of the rapid diffusion of platform work as a result of the effects of the pandemic, the responsibilities of platforms as regards (at the very minimum) the workplace health and safety of platform workers can no longer be ignored by the public debate.

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Social security for Spain's platform workers: Self-employed or employee status?

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Abstract Studies on the social protection of platform workers in Spain have focused on the bike couriers (or "riders") who deliver meals to customers' homes and whose services are used by some of the best-known platforms on the country's social and economic scene. Most of these workers are covered by the social security scheme for self-employed workers. However, a Supreme Court ruling issued on 25 September 2020 reclassified the relationship between Glovo and its couriers as a contract of employment. This decision has changed the outlook for platforms and prompted the Spanish Government to regulate platform work in Spain. Nonetheless, the government ruling is limited to couriers, whereas, in reality, the issue is much broader. In this article, we look at the current reality of Spain's platform workers vis-à-vis the social security system and the latest court rulings.

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Keywords atypical work, platform workers, employee, self-employed, social security schemes, social protection, Spain

Introduction

Over recent years, the social protection of platform workers has been the subject of much research in Spain in light of the many issues it raises. These studies on worker social protection fall into two categories. A small proportion are monographs, focusing exclusively on this one aspect. The remainder incorporate many aspects other than social protection and take one of two forms. First, there are comprehensive studies on the legal framework surrounding this form of employment, based on the normative elements available. Second, and more commonly, the studies serve to contribute to the ongoing debate on the legal nature of the relationship between platforms and their workers. This latter question has been the focus of most of the analysis to date, in Spain and elsewhere, owing to the novelty of the phenomenon and the platforms' defence of an economic model based on concluding commercial contracts with workers acting on their own account.

This is all taking place in a context in which the phenomenon of "bogus self-employment" is becoming so widespread that it is considered the most common form of fraudulent activity. Working via a platform is therefore paradigmatic of the irregular use of self-employed status. To cite just one example, research by Spain's General Union of Workers (*Unión General de Trabajadores* – UGT) estimates that the systematic use of self-employment permits home-delivery platforms to make annual savings amounting to some 92.6 million euros in salaries and 57.6 million euros (EUR) in social security contributions (Ranz Martín et al., 2019).

Thus, our knowledge surrounding the social protection of platform workers is relatively extensive. It forms the basis of a sound body of academic literature that deals with all the key aspects of the subject, and from which important proposals for reform can be drawn.[1]

Finally, it is striking that the Spanish researchers studying this form of employment have focused on the bike couriers (riders) working for the

1. Studies have proposed a variety of solutions to the problem of platform work in Spain. For instance, the possibility of a special working relationship pursuant to article 2 of the Workers' Statute (González Ortega, 2017, pp. 85–123); or a proposal that aims to improve social protection for the self-employed and address bogus self-employment (Vila Tierno, 2019, pp. 105–128; Sierra Benítez, 2017, pp. 133–159).

highest-profile platforms on the country's social and economic scene (Deliveroo, Glovo, Uber Eats, etc.). The fact that Spain's platform work debate is centred on these particular platforms' practices is down to the fact that this sector has seen the principal legal and practical developments to date. The almost exclusive focus on this type of platform can equally be seen in other European Union (EU) countries. This may lead to an assumption that the problems faced by this specific category of worker are shared by all who work through the medium of a platform, and that solutions should be developed that are tailored entirely to this category of worker. In fact, the true picture of Spain's platforms is far more diverse in that they encompass numerous sectors of activity and generate a multiplicity of working contexts and economic realities.

Spain's social security system can be defined as mixed, combining protection of a contributory, eminently professional, nature with non-contributory protection or more universal support. The latter aims to safeguard those who find themselves in a "situation of need", regardless of whether they have contributed to the system. As such, the protection of citizens, in particular those "in need", is ensured through a system of minimum state benefits; a right enshrined in article 41 of the Spanish Constitution[2] and implemented by the *Ley General de la Seguridad Social* (General Social Security Act – LGSS). This said, the dividing line between the two parts of the social security system is not clearly defined and where the various benefits sit is determined not by benefit type, but instead by how they are financed – in other words, whether by social security contributions or the state budget (Cabeza Pereiro, 2017, p. 205).

To complete the picture, it is important to note that the Spanish social security system comprises a number of distinct schemes. First, the general scheme *(Régimen General)*, which is intended to cover the majority of employees. Then there is a special scheme for self-employed workers (*Régimen Especial de Trabajadores Autónomos* – RETA). Finally, there are a series of more specific schemes (Regímenes *Especiales*), such as those for seafarers, civil servants or students, which are distinguished by how they are managed, what coverage they provide and the nature of their beneficiaries' professional activity (with the exception of the one for students). Despite the tendency to funnel workers into the first two schemes, the general scheme and the self-employed scheme, special schemes still exist in Spanish legislation.

In the RETA, the workers are responsible for paying the social security contributions. Meanwhile, in the general scheme, this responsibility falls to the

2. According to article 41 of the Spanish Constitution, "The public authorities shall maintain a public social security system for all citizens that will guarantee adequate social assistance and benefits in situations of hardship, especially in cases of unemployment. Supplementary assistance and benefits shall be optional".

employer, who retains part of each worker's salary to pay into the social security system. In the RETA, the self-employed workers are also responsible for registering with the system (signing up with the appropriate scheme) and for submitting a declaration to establish the start of their professional activity and, thus, the requirement to pay contributions.

Yet, before looking at the social protection framework available to platform workers, we must first examine two legal categories that relate to the platform economy: those of "self-employed worker" and "economically dependent self-employed worker" (*trabajador autónomo económicamente dependiente* – TRADE). Most digital platform workers currently find themselves in the latter category.

The legal category of self-employment is established in Spanish law through Law 20/2007 of 11 July 2007 on self-employment (*Ley 20/2007 de 11 de julio, del Estatuto del Trabajo Autónomo* – LETA). Its opening article defines self-employed workers as "natural persons who regularly, personally and directly, on their own account and free from the management or organization of another person, carry out an economic or professional activity for profit", and who may employ others without losing their "self-employed" status.

Self-employment is defined in the Spanish system by the twin criteria of regularity and self-organization of the economic or professional activity. In contrast, an employee is a natural person who provides services within a structure managed by another person (article 1 of Spain's Workers' Statute) in exchange for remuneration. The criteria of subordination and dependency, as well as the onerous nature of the service provided, are crucial to determining employee status. Alternatively, the absence of both subordination and a salary leads to the conclusion that a worker is self-employed, and thus exclusion from the general social security scheme.

As previously mentioned, in the case of an employee, the employer is responsible for the worker's registration and declaration in the social security system, as well as for the payment of any contributions due. Self-employed workers, in contrast, must assume responsibility for their own registration and declaration and contribute directly to the system.

Regarding the level of protection accorded, employees benefit from health coverage regardless of whether they are contributory or non-contributory members of the system. They also receive the following benefits or "advantages": medical assistance for health care; temporary incapacity benefit; maternity and breastfeeding benefits; birth allowance; child-care allowance (breastfeeding, illness …); permanent incapacity benefit; permanent non-disabling injury benefit; retirement benefits; unemployment benefit; death and survivors' benefits (widows and orphans); family benefits; support in the event of death.

For self-employed workers, the reforms of 2017 and 2018[3] sought to better align the protection accorded under the self-employed social security scheme (RETA) with that offered to employees (in the general scheme). This is a consequence of the General Social Security Act (LGSS), whose goal is to "homogenize" the special schemes with the general scheme.

The social protection of self-employed workers has thus improved since 2019, following the reform introduced by Royal Decree-Law 28/2018 of 28 December 2018. This made it mandatory for self-employed people to be insured – and therefore to pay contributions – for occupational risks (occupational accidents and diseases) and cessation of activity (comparable to unemployment in the case of employees), something that had until then been optional for the self-employed. This has led to greater equality between self-employed workers and employees in social protection terms.

However, part-time contributions are not permitted, except in the case of multiple jobs. As such, all forms of "on demand" work or work via digital platforms do not qualify. Consequently, this has incentivized the informal economy since low-income workers, enlisted by these new types of organization in a digital environment, are excluded from the system.

The reform process currently underway in Spain seeks to address this systemic shortcoming, by moving towards a system that obliges self-employed workers to pay contributions based on their actual income. The aim is to strengthen the level of protection provided to self-employed workers without reducing system revenue.[4] However, the reforms required to achieve these objectives have not yet been adopted.

The various benefits accorded under the special scheme for self-employed workers, as set out in article 314 of the LGSS and article 26 of the LETA, correspond to those established by the general scheme with the exception of unemployment protection, here known as cessation of activity, which is governed by different rules and provides non-contributory benefits. These workers therefore enjoy the same social protection as covered employees.

In addition to the categories of employee and self-employed worker, there exists a third category. Although legally linked to self-employment, the third category has entitlements that confer a supplementary layer of protection more closely resembling that of the scheme for employees. This third category is that of economically dependent self-employed worker (TRADE), a legal status that applies to a large number of platform workers in accordance with recent court rulings.

3. Law 6/2017 of 24 October 2017 – Reformas Urgentes del Trabajo Autónomo [Urgent Reforms for Self-Employment] (*Boletín Oficial del Estado*, 25 October 2017) and Royal Decree-Law 28/2018 of 28 December 2018 on the revaluation of state pensions and other urgent social, labour and employment measures (*Boletín Oficial del Estado*, 29 December 2018).

4. See the preamble to Royal Decree-Law 28/2018 of 28 December 2018 (*Boletín Oficial del Estado*, 29 December 2018).

Article 11 of the LETA defines a TRADE as "someone who carries out an economic or professional activity for profit on a regular, personal and direct basis, and primarily on behalf of one natural or legal person known as a client". The most important criterion is dependency on a single client for at least 75 per cent of one's total income. The rules also stipulate a number of other conditions, including having no employees and not subcontracting any or all of the activity to third parties, except in exceptional cases provided for in the law itself, which are linked to taking leave to reconcile work and family life. Further conditions are imposed, such as not carrying out the activity in the same way as the other workers providing services to the same client; having one's own production infrastructure and equipment; organizing one's own work, without prejudice to any technical instructions that may be provided by the client; and receiving remuneration based on the results of the activity, therefore assuming the financial risk for that activity. These criteria are used to classify TRADEs, and to distinguish them from employees. From a social protection perspective, these workers have the same social security entitlements as self-employed workers and are covered by the special scheme for self-employed workers (RETA).

The remainder of this article is structured as follows. In the next section, we look at how platform workers are integrated into the social security system, considering both public and private means of social protection. We then look at the current reality of Spain's platform workers, and bike couriers in particular, vis-à-vis the social security system and the latest court rulings, before offering conclusions.

Platform workers' integration into the social security system

Platform workers can enjoy the benefits of public and private social protection.

Public social protection and platform workers

In Spain, the majority of platform workers are covered by the self-employed workers' scheme (LETA). For the first time, Spanish law has incorporated these new forms of work. With platform workers being covered by this scheme, the platforms can relinquish responsibility for their social protection. The problem is that most of these workers, as shown by recent case law, are really in an employee-employer relationship with their platforms. This phenomenon is known as "bogus self-employment", where an employment relationship is concealed.

Yet, it is important to distinguish between the different types of workers who perform distinct activities within the so-called platform economy. Currently, it is couriers, "riders" (transport sector workers), who are the focus of the Spanish

judiciary. This is so because of their extremely precarious labour market position resulting from low income and a widespread absence of adequate social protection.

Spanish platforms class most of their couriers as self-employed, although some actually belong to the legal category of TRADEs. The latter interpretation is shared by certain judges of first instance,[5] while other judges at the same level have reclassified the relationship between the worker and the platform as an employment contract when the salary, subordination and dependency criteria are met.[6]

To consider these workers as self-employed presents a fundamental problem in terms of the legal definition. One important legal criterion is regularity of the self-employed activity. However, most of these platform workers do not carry out this activity regularly. The Supreme Court has specified the main indicator of regularity to be annual earnings equal to or higher than the minimum wage (*salario mínimo interprofesional* – SMI).[7]

Yet, according to recent research published by the International Labour Office (ILO), such work does not constitute the primary source of income for the majority of these platform workers: just 32 per cent of those surveyed in the ILO report on digital platforms declared this work to be their main source of income (Berg et al., 2018, p. 83). Other studies back up these figures, estimating that some 60 per cent of respondents earn less than 25 per cent of their total income from platforms and almost 70 per cent have other jobs outside the platform economy (Todolí Signes, Sánchez Ocaña and Kruithof Ausina, 2019, p. 116). This data clearly reinforces the idea that such platform activities are carried out in addition to a primary occupation and thus do not meet the regularity criterion imposed by Spanish law. This means that platform workers cannot be included in the legal category of self-employment.

The immediate consequence of this situation is that platform workers are excluded from the social security system. This is so, on the one hand, when the platforms refuse to recognize the existence of an employment contract and, on the other hand, when the concerned workers do not qualify, under the legislation in force, for the self-employed scheme, owing to a lack of regularity of the activity carried out under these conditions. According to ILO survey data, "overall, only six out of ten respondents were covered by health insurance, only

5. See the following rulings: Labour Court (Juzgado de lo Social) No. 39 of Madrid, ruling of 3 September 2018, and Labour Court No. 17 of Madrid, ruling of 11 January 2019.

6. See the following rulings: Labour Court No. 33 of Madrid, ruling of 11 February 2019; Labour Court No. 1 of Gijón, ruling of 20 February 2019; Labour Court No. 1 of Madrid, rulings of 3 March 2019 and 4 March 2019; Labour Court No. 31 of Barcelona, ruling of 11 June 2019; Labour Court No. 19 of Madrid, ruling of 22 July 2019; Labour Court of Valencia, ruling of 10 June 2019.

7. See Supreme Court ruling (STS) of 20 March 2007 (Appeal No. 5006/2005). See also Rodríguez Bravo de la Laguna (2019, p. 42); Sierra Benitez (2017, p. 154); Ginès i Fabrellas and Gálvez Durán (2016, p. 13).

35 per cent had a pension or retirement plan, 37 per cent benefited from some form of social insurance, and 29 per cent received government assistance" (Berg et al., 2018, p. 60). Moreover, according to the same study, this coverage usually stemmed from the respondent's main job or that of another family member.

Another controversial factor is the lack of any provision permitting workers with a part-time self-employed activity to join the scheme for self-employed workers. Under Spanish law, self-employed workers contribute on a minimum or maximum basis according to their income. In spite of this, the current system is not fit for purpose in the context of the new economic model, as the number of hours worked via a platform depends on the number of orders, and this information cannot be known in advance. The law currently applied to self-employment, albeit a positive one, does not allow a worker to register and pay social security contributions for a part-time self-employed activity, unlike in the general scheme. Self-employed workers are therefore obliged to pay full monthly contributions.

Finally, as previously mentioned, the TRADE category cannot incorporate workers who provide services to several different digital platforms, since the rules require them to be economically dependent on one principal supplier. Given that they cannot be included in the TRADE category, neither can platform workers benefit from the associated social protection system (Rodriguez González, 2018, p. 114).

Proposals to resolve this problem include the creation of a special form of employment relationship (González Ortega, 2017, p. 123; Todolí Signes, 2017, p. 64) or, within the RETA framework, the creation of a special scheme under article 11 of the LGSS (Hernández Bejarano, 2016, p. 18).

Following this examination of the situation of platform workers from a mandatory social security coverage standpoint, we will now look at the role played by private social protection. This is done bearing in mind that private social security, as is the case in most European countries, is only used to complement mandatory state schemes.

Private social protection and platform workers

Personal or company pension plans are the most common private social protection instruments. Attempts to promote the uptake of private individual insurance to complement public collective insurance have been constant, but not particularly successful. There are multiple reasons for this. These include a historically generous state system, boasting a relatively high income replacement rate for those who have worked for many years; a widespread perception of the financial soundness of the state-backed public pension system (regardless of the debate

currently surrounding the subject); misgivings about the cost-effectiveness of private systems owing to the public's perception of them as generating low returns and high management costs; and, critically, the low savings capacity of the majority of workers in the Spanish labour market. This final factor probably best explains why private social protection has never taken off in Spain.

Private social protection mechanisms are available to employees and self-employed workers alike. The company schemes set up by employers are promoted to employees, although only a minority of people currently have access to one of these schemes. Individuals are also free to supplement state social protection with private insurance taken out on an individual basis.

For self-employed workers, the state system enables them to manage, up to a point, the level of protection they receive by letting them freely determine the scope of the contribution base. This, combined with the high cost of contributions in the self-employed scheme, discourages these workers from taking out private insurance – it is more cost-effective for the self-employed to increase their public contributions than contribute to a private scheme.

These factors, which are common to many countries, impact platform workers particularly heavily, which makes it easy to understand why private measures are necessary to ensure the social protection of workers in this type of job. Here we are talking mainly about individuals on low incomes, with irregular and sporadic working relationships and few or no expectations of a professional career. They often lack an employer since they are refused employee status – and even if they do have one, the relationship appears far from stable. The idea of devoting some of their earnings to improving their level of social protection is entirely unrealistic for the majority of these workers, as is any hope of forging a permanent relationship with a platform that would provide them with a pension scheme. As a result, private social protection is of little significance to Spain's platform workers.

Nonetheless, it is important to note that the platforms, being keen to defend their self-employment-based economic model, have turned to certain types of private social protection. This strategy has been adopted, for example, by the meal-delivery platform Deliveroo, which is certainly the company that has made the most progress to date in this area. This company, like all those in the sector, highlights the incompatibility of its economic model with salaried employment, given that all of its distribution agents are self-employed workers. Deliveroo offers its couriers private civil liability insurance covering damage caused to third parties during the provision of its services. This shows that the platform has assumed responsibility, through an insurance policy taken out with an external provider, for some of the risks inherent in being an employer, without however explicitly recognizing that these risks are inherent to its activity (COTEC, 2018, p. 30).

In Spain, Deliveroo has modified its strategy in response to evolving case law. It has recognized that its couriers show the company a level of commitment that justifies according them, subject to a legal amendment, TRADE status, which should theoretically permit a higher level of protection than ordinary freelancers. This classification could prove both advantageous and detrimental to these workers, since it implies an exclusive or preferential working arrangement with a single platform – however, one of the specific demands made by couriers is the right to be registered with several platforms simultaneously, in order to supplement their income.

Delivery rider associations have been created in Spain along the lines of professional associations, as opposed to traditional trade unions and other employee representation mechanisms. The RidersXderechos platform is probably the most visible and active collective of this type in the country. This platform, alongside other trade unions representing this field of work, is starting to consider these workers as employees whose contractual relationship may well have been misclassified. This means that these workers should enjoy the same representation mechanisms as employees, including when it comes to trade unions – the ultimate collective. These professional associations, however, are established as groups of non-unionized self-employed workers, thus differing from trade unions in their legal status and modes of action.

The platforms, through their business association Adigital, maintain good relations with these courier bodies – so much so that some trade unions and worker collectives accuse the latter of being akin to, so-called, company unions or "yellow" unions for self-employed workers. Deliveroo sought their input when adapting its global company policy to the Spanish context, using the "professional interest agreement" for TRADEs set out in the Self-Employed Workers' Statute.[8]

The first agreement of this type was signed in Madrid in 2018 between Deliveroo and the ASORiders association.[9] In 2019, the same company signed a similar agreement in Barcelona with the *Asociación Autónoma de Riders* (AAR).[10] In both cases, private insurance offers a protection mechanism to these workers, who are

8. According to article 13 of the Self-Employed Workers' Statute (Law 20/2007 of 11 July, *Boletín Oficial del Estado*, 12 July 2007), professional interest agreements can be drawn up between associations or trade unions representing economically dependent self-employed workers (TRADEs) and the companies for which they work. This is a specific system of collective bargaining, recognized by law, which is intended as a means of self-regulating the mutual interests of TRADEs and their client company. These agreements can establish the terms – mode, time and place – on which specified work is to be performed, as well as other general conditions of the contract. For further details, see Cruz Villalón (2008, pp. 375–421), Martínez Girón and Arufe Varela (2017, pp. 405–426) and Roqueta Buj (2012, pp. 13–30). There are several different professional interest agreements, for example in the haulage sector (*Diario Oficial de Cataluña*, 11 January 2012) and the direct marketing sector. The agreement for delivery riders can be consulted on the Deliveroo website.

still considered autonomous self-employed. The agreements include cover under a general hospitalization policy, which offers riders a daily indemnity of EUR 50 for a fixed period of 60 days. It also includes civil liability insurance in the event of damage caused to a third party.[11]

The agreements also set out the platform's commitment to offering training, through a third-party provider, in road safety and business skills, as well as financial support for the purchase of equipment (for example, a safety kit containing high-visibility gloves and vest, helmet and bike lights).

In 2018, in the context of an altercation with Spain's labour inspectorate, which was demanding social security contributions from Deliveroo for workers that should have been classed as employees rather than self-employed, the company offered these workers, by way of a unilateral improvement to their contract terms, private insurance cover, free of charge. This insurance should provide:

- In the event of absence from work, a guarantee of 75 per cent of gross daily income (up to a maximum of EUR 50 per day for a period of up to 30 days), provided that the worker has been with the platform for at least two months; otherwise, a fixed daily allowance of EUR 25 for six days.
- Medical and hospitalization insurance up to a ceiling of EUR 12,500, comprising of the reimbursement of medical expenses up to EUR 7,500; up to two months' hospitalization coverage, at a rate of EUR 50 per day; and EUR 2,000 for necessary dental treatment.
- Compensation of up to EUR 50,000 in the event of permanent incapacity.
- Compensation for other forms of injury incurred at work (loss of sight, hearing or limbs), according to the assessed amounts.
- Civil liability insurance providing coverage up to EUR 5 million.

The coverage applies to any injuries that arise while providing services on behalf of the platform, with services taken as commencing when the app is first connected on a given day and ending an hour after the app is disconnected. Both the courier, who has been directly commissioned, and a designated replacement, if the former is unable to carry out the service (a possibility expressly provided for by the platform), can benefit from this coverage. Likewise, the insurance remains valid even when the courier is registered with several apps simultaneously, so long as the accident occurred while providing a Deliveroo service. It does not,

9. This agreement can be consulted here (In Spanish). It was signed on 16 July 2018, initially for one year with the possibility of extension until it is superseded by a new agreement. The text regulates the working conditions of the riders in question.

10. The Asociación Autónoma de Riders (AAR) was founded in Barcelona in 2019 to serve as an intermediary on the national stage between all couriers and all digital platforms with a view to collectively enhancing their working conditions and offering greater security to their partners through professional interest agreements. A typical agreement can be consulted here. In Spanish.

11. The agreement can be consulted here. In Spanish.

however, cover couriers' vehicles, which must continue to be insured at their own expense.

In parallel with this insurance model devised by Deliveroo, Uber also concluded an insurance agreement with a specific insurance company, which entailed agreeing better-than-market conditions for insurance policies that the company's drivers are obliged to take out.[12]

The existence of private insurance in Spain's social security model for self-employed workers does not preclude the need for state protection. As such, these individuals must ensure they keep up to date with their obligations and contributions within the public system. Only for certain specific professions (such as architects) can mutual funds act as a substitute for the social security scheme for self-employed autonomous workers.

Addressing labour law avoidance

The legal debate continues to focus on the legal nature of the relationship between workers and platforms. The challenge is not so much how to classify the services provided by these workers, but instead to identify the most appropriate social security system for them to join. Employment status is only discussed with a view to determining affiliation, either, to the employees' general scheme or the RETA for workers who are self-employed and autonomous.

Indeed, the first consequence of the contract model used by the majority of platforms is the exclusion of workers from the general scheme. This occurs even if the decision to opt for one type of service contract over another is taken for other reasons; for instance, for reasons linked to flexibility, availability or cost-effectiveness. Without question, reducing social security costs is a key factor behind platforms' systematic use of self-employment, but it may not be the only one. The platforms argue that the reason the employment contract does not meet their needs is its lack of flexibility regarding casual labour, and not its impact on how workers fit into the social security system.

The fact that the legal debate is centred on social security can also be explained by the significant role played by actors other than the workers and platforms themselves. The labour inspectorate, for example, lay behind the action taken against the platforms, denouncing their workers' exclusion from the general scheme and imposing penalties. In turn, the platforms have often gone to court to challenge the decisions of the labour inspectorate. Trade unions have also initiated numerous actions, using the powers invested in them under employment law to file complaints with the labour administration and the

12. On 1 June 2018, Uber launched its Partner Protection programme underwritten by insurance provider AXA. This safeguards certain drivers and couriers from financial expenses that could prove life-changing. For information, see here.

courts. Naturally, workers are also asking their platforms to grant them employee status and thus permit their regularization in the social security system.

For workers, there is a strong incentive to denounce a platform if the framework of the relationship is considered inappropriate. First, if a worker is found to have been falsely classified as self-employed, any decision to "lay-off" the worker from the company becomes a case of dismissal, with an associated right to compensation; this is also usually accompanied by payment of the difference between the remuneration received and that due under the applicable collective agreement. Second, such action also enables any contributions made as a self-employed worker to be recovered from the social security fund, while the company is forced to pay the associated employee contributions. In such cases, it is possible to obtain a financial adjustment (not generally very high owing to the low levels of income in question), a repayment of costs, and a recognition of contribution periods.

Spanish case law is characterized by several features. First of all, it is important to underline that whether or not an employment relationship exists is determined on a case-by-case basis. As there are no rules, shared standards of behaviour across the various platforms, or specific regulations on industrial relations and labour in this sector, the courts have had to decide in each instance if there is a real employment relationship.

The platforms operating in Spain (for example, Deliveroo, Glovo, Take Eat Easy) are at the origin of most of the judicial rulings. The modus operandi of the delivery platforms Deliveroo and Glovo has led most courts to conclude that an employment relationship exists between these two platforms and their couriers.

The latest rulings on Deliveroo couriers centre on the identification of employment criteria, as set out in article 1 of the Workers' Statute. Several employment tribunals have therefore ruled that this is a case of workers who voluntarily and personally carry out work on behalf of others in exchange for remuneration; work that is managed and organized by another person – in this case, the digital platform. These are the criteria that characterize employment under article 1 of the Workers' Statute.

Spain's courts have based their rulings on extensive Supreme Court case law relating to the nature of an employment relationship between two parties.[13] Thus, following the National High Court's lead, the judges of first instance have found that the platform in question had concluded service contracts with transporters, thereby denying the salaried nature of their services. As such, the

13. See Supreme Court rulings (STS) of 24 January 2018 (Appeal No. 3394/2015); 8 February 2018 (Appeal No. 3389/2015); and 4 February 2020 (Appeal No. 3008/2017). Each of these rulings is based on the criteria of subordination and "*ajenidad*" (the existence of an employment relationship) being met; see González Ortega (2017, pp. 85–123), Alameda Castillo (2019, p. 26), and Paramo Montero (2019, p. 27).

first legal principle applied by the Spanish courts is that of *nomen juris*, which disregards any nomenclature assigned by the contract parties and examines the content of the contract in order to determine its true nature.[14] To do this, Spain's courts gathered evidence with which to establish if the relationship between the parties meets the relevant criteria to qualify as one of employment.

First, it was found that these couriers provide their services on a personal and voluntary basis, in exchange for payment.[15] Additionally, that the contract is concluded *intuitu personae*; in other words, "the worker is not free to designate another person as a replacement without the employer's approval".[16]

Second, payment "is linked directly to the services provided and independent of any profits made by the employer".[17]

Third, regarding the question of whether there is an employment relationship *(ajenidad)* or the work is being performed "on another's behalf", when it comes to Deliveroo's couriers, "the fruits of their labour are transferred to the employer *ab initio* by virtue of the contract and the employer commits to paying their wages regardless of whether profits are made, in such a way that the financial risk is shouldered exclusively by the employer".[18] In addition, the price of the service is set by the company that owns the platform, with the worker unable to negotiate any other type of fee or a share of the profits, contrary to the position of most self-employed workers. As such, the worker receives a fixed fee (EUR 3.38) for the service rendered, and must process two orders per hour.[19] The company, as well as fixing the price of the service, invoices customers, with the worker unable to receive any payment directly from a customer, except for a tip.

From another perspective, Deliveroo workers own the vehicles they use. However, in the opinion of the judges, this does not prevent the relationship with the platform being reclassified as an employment contract. Indeed, the piece of equipment most critical to carrying out the job is the application (app), which is controlled and provided by the platform, and the couriers play no part in the commercial relationship between the platform and its customers (restaurants or private individuals).[20] This interpretation is consistent with case law relating to workers who provide transport services using their own vehicle.[21] Moreover,

14. See Supreme Court rulings (STS) of 8 February 2018 (rcud. 3,389/2015); 20 March 2007 (rcud. 747/2006); 7 November 2007 (rcud. 2,224/2006); 12 December 2007 (rcud. 2,673/2006); and 22 July 2008 (rcud. 3,334/2007).
15. See first instance rulings: Labour Court of Valencia, ruling (SJS) of 1 June 2018 (Appeal No. 633/2017), and Labour Court No. 19 of Madrid, ruling (SJS) of 22 July 2019 (No. 188/2019).
16. Labour Court of Valencia, ruling (SJS) of 1 June 2018 (Appeal No. 633/2017), and Labour Court No. 19 of Madrid, ruling (SJS) of 22 July 2019 (No. 188/2019).
17. Labour Court of Valencia, ruling (SJS) of 1 June 2018 (Appeal No. 633/2017).
18. Labour Court of Valencia, ruling (SJS) of 1 June 2018 (Appeal No. 633/2017).
19. Labour Court of Valencia, ruling (SJS) of 1 June 2018 (Appeal No. 633/2017).

Deliveroo riders receive branded material from the company, such as the backpacks in which they carry the food.

In summary, the fact that these bike couriers do not bear the cost of the food they transport or any accountability towards the end customer has led the courts to determine an absence of financial risk, and therefore an absence of autonomy or independence on the part of these workers, thereby confirming the existence of an employment relationship.[22]

Fourth, regarding the criteria of subordination or dependency – in other words, how reliant the worker is on being managed and organized by the employer – the Spanish courts concluded the existence of these criteria owing to the following factors. First of all, the work is carried out in line with instructions provided by the company (the platform owner), which, by providing its bike couriers with a training video and literature, unilaterally sets the working conditions.[23] Adherence to these instructions, which also incorporate rules of behaviour, is monitored and assessed by the platform,[24] in such a way that it is clear that the platform is not content simply to subcontract the food-delivery service – it is not just a case of an intermediary – but instead that it precisely stipulates how the service must be carried out.[25] This demonstrates a lack of autonomy on the part of the worker in how the service is organized. In addition, it is the company that decides on the field in which its workers shall perform their duties.[26] A worker may choose the time slots in which he or she wishes to work, but only within the confines of the timetable established by the company, which can redefine the service provider's working hours each week.[27] At the beginning of each shift, the worker must go to a designated location to "clock on", returning to the same location at the end of the shift.[28] The company can geolocate its workers at all times, thereby permanently monitoring their whereabouts and itineraries, as well as the time and duration of each delivery.

The Labour Court of Madrid's ruling of 22 July 2019 (No. 188/2019) and the Labour Court of Valencia's ruling of 1 June 2018 (Appeal No. 633/2017) highlight other dependency and subordination indicators. These include the fact that workers cannot organize their own replacements without authorization from the company in the event that they are unable to fulfil an order themselves. Also,

20. Labour Court No. 19 of Madrid, ruling (SJS) of 22 July 2019 (No. 188/2019).
21. Labour Court of Valencia, ruling (SJS) of 1 June 2018 (Appeal No. 633/2017); Labour Court No. 19 of Madrid, ruling (SJS) of 22 July 2019 (No. 188/2019). See Rojo Torrecilla (2017).
22. Labour Court No. 19 of Madrid, ruling (SJS) of 22 July 2019 (No. 188/2019).
23. Labour Court of Valencia, ruling (SJS) of 1 June 2018 (Appeal No. 633/2017).
24. Labour Court No. 19 of Madrid, ruling (SJS) of 22 July 2019 (No. 188/2019).
25. Labour Court No. 19 of Madrid, ruling (SJS) of 22 July 2019 (No. 188/2019).
26. Labour Court of Valencia, ruling (SJS) of 1 June 2018 (Appeal No. 633/2017).
27. Labour Court of Valencia, ruling (SJS) of 1 June 2018 (Appeal No. 633/2017).
28. Labour Court of Valencia, ruling (SJS) of 1 June 2018 (Appeal No. 633/2017).

a worker's rejection of offers made by the platform or repeated unavailability may lead to the termination of the relationship between the parties, with the worker compelled to give the platform two weeks' notice of any temporary unavailability. All of this is evidence that the worker is embedded within the company's organizational framework.

Finally, the existence or otherwise of a commercial structure is another key factor in determining how autonomous or independent a service provider is. In the Deliveroo case, the judges ruled that the couriers lacked any form of commercial structure through which to perform the service, other than having their own vehicle and mobile phone; meanwhile, the platform owner, via its app, organizes the commercial activity and issues instructions to couriers, therefore providing access to the work.

Judicial rulings differed for the Glovo platform, owing to Glovo couriers' slightly different working conditions. These differences between Glovo and Deliveroo illustrate the ability of platforms to adapt to legislation and alter their practices in response to court rulings.

This said, a Supreme Court ruling of 25 September 2020[29] declared the relationship between Glovo and its couriers to also be one of employment. The Court refused to submit the question to the European Court of Justice for a preliminary ruling, deciding that the criteria typical of an employment contract had been met. The National High Court sustains that Glovo is not a simple service-procurement intermediary between businesses and couriers, but a company that provides delivery and courier services under conditions it alone imposes and also holds ownership of the principal assets required to carry out the activity. The delivery workers do not boast their own autonomous company structure, providing their services within the platform's organizational framework.

As for the actions of the labour administration, it was the labour inspectorate that first exposed this issue of bogus self-employment, and in doing so performed an important service by bringing a large number of these workers into formal employment. In this respect, the adoption of the *Plan director por un trabajo digno 2018-2019-2020* [Master plan for dignified work 2018, 2019 and 2020] (MITES, 2018) is worthy of mention. This text indicates that the category of platform work is sometimes used to conceal irregular business practices that foster insecurity in the labour market; practices designed to reduce costs by violating labour rights. Hence, the suggestion, among a series of other measures, that the labour inspectorate engage in an inspection campaign targeted at platforms and e-commerce over the course of 2018, 2019 and 2020.

29. Supreme Court ruling (STS) of 25 September 2020 (Appeal No. 4746/2019).

Conclusions

The Supreme Court ruling of 25 September 2020 came as something of a shock to platforms as it promotes a particular interpretation of labour law: that of classifying platform workers as salaried employees.

Numerous intermediate solutions have been proposed to ensure that the needs of these workers are met and that they are covered by specific rules that suit their different characteristics. This could come about by way of the so-called "special working relationships" outlined in article 2 of the Workers' Statute, which, without bringing into question their status as salaried employees, would make it possible to regulate the specificities of employees' working relationships with platforms. Yet the Ministry of Labour seems to have rejected this solution. In the draft law that is currently being drawn up, the Government only seeks to regulate the working relationships of couriers, despite the fact that the issue is a much broader one.

The Supreme Court's final ruling of 2020 suggests that platform workers should perhaps be covered by the general social security scheme, intended for employees. Case law has led to improvements in delivery platforms' treatment of workers. This case law has also facilitated the labour inspectorate's efforts to regularize the status of workers attached to other platforms.

If this interpretation were to be confirmed by the European Court of Justice or through legislative action, Spain's bike couriers (riders) would see a radical change in their social security status, given that those who perform this activity on a regular basis currently have access to coverage under the scheme for self-employed workers.

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Social security coverage for platform workers in Switzerland: A middle way?

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Abstract This article compares social security coverage for the self-employed and for employees on digital platforms in Switzerland. It sheds light on the particularities that have acted to slow down the evolution of Swiss social legislation to the new emerging forms of work, and summarizes the solutions provided by case law. These solutions are still being fine-tuned, but lean towards the reclassification of contracts as salaried work. Finally, despite the hesitance of the Swiss authorities to take political steps to encourage these new forms of work, which offer significant economic potential, and while also seeking to prevent the risk of precarity in work, we discuss the options available.

Keywords social security schemes, atypical work, platform workers, self-employed, employee, employment status, Switzerland

Introduction

In Switzerland as elsewhere, the development of digital intermediation work platforms raises new questions that require to adapt long-standing concepts associated with social insurance systems. Schematically speaking, platforms can be classified into three categories (Conseil fédéral, 2017a, pp. 95–97). First, the "sharing economy", which primarily focuses on relations between individuals, is

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still often considered a form of secondary income rather than an indication of work status. However, as in the case of Airbnb, the tendency is that these relationships are becoming more formalized (Zobrist and Grampp, 2015; Bardet, 2019). Second, "microtasking platforms", which form part of the "gig economy", divide labour into small tasks outsourced via appeals to a crowd as "crowdworking", or transfer the work process to platform users as "crowdsourcing" (Berg, 2019). Such platforms are not yet widespread in Switzerland. Finally, there are the platforms of particular interest to this study, the so-called "collaborative" online service platforms, which facilitate intermediation between service providers and customers via apps. They help to lower prices, increase the flexibility of the service offered and encourage customers to become habitual users of the app. They also rely on crowdworking to a certain extent, as their business model is also based on outsourcing services to a large number of people. On the Swiss market, digital platforms are focused inter alia on home services, such as cleaning (Serado.ch, Batmaid.ch), hairdressing (cut-n-brush.ch), personal assistance (NeedHelp.com) and language courses (Italki.com, Preply.com), as well as home meal delivery (Smood.ch, Eats.ch). Nevertheless, owing to its size, the sector that requires the authorities to arbitrate is that of chauffeur-driven cars, where the Uber platform has almost no competitors. The only other market players in French-speaking Switzerland are Driven-now.com and recently established Lymo.com (Garcia, 2019). The latter, launched in 2019 as a passenger transport booking application, claims to be a trip comparator and does not charge any fee for trips undertaken. While platforms are similar in many respects, there is no single business model; there are as many possibilities as there are platforms. First, while some platforms automatically impose terms and conditions on both clients and service providers, others let clients and service providers opt for an employment or service provision contract, or even permit clients to sign an employment contract with the service provider.[1] Second, the same platform may decide to modify the contractual conditions applicable to all or some of its workers via a simple phone message (Hirsiger, 2020). As a result, patterns are not only diverse but evolving, making it considerably more difficult for authorities and individuals to act in the absence of an easily identifiable legal framework.

In this article, to understand the potential for change of Switzerland's social insurance system in the face of the social challenges posed by the digital economy, we first outline its general structure, a daunting challenge given its complexity. We then set out the position of the administrative and judicial

1. For example, Serado.ch invites its users to declare workers as employees, while Batmaid.ch pays the charges itself and Needhlep.com permits service providers and clients to determine the terms of their agreement. UberEats and Smood.ch hire out services, so workers are employees with no guaranteed minimum hours (see section below, on Compliance with legislation on the hiring of services).

authorities on the classification of platform workers. Finally, we compare the social protection regime for the self-employed (the work status preferred by platforms) with that of employees (the work status claimed by platform workers) to better understand the issue at stake under Swiss law when it comes to classifying the status of platform workers.

A segmented and rigid public insurance system backed by private companies

Historically speaking, social protection in Switzerland has been primarily a private matter (Dupont, 2019a, pp. 193–207). As the Federal Constitution clearly states,[2] "all persons are responsible for themselves". Articles 111 to 117 of the Constitution give the Swiss Confederation the necessary powers to create and implement social security, "in addition to personal responsibility".[3] The 26 cantons (member states) of Switzerland have only residual competence in this area, essentially limited to the implementation of certain specific aspects.[4]

To implement the constitutional mandates, however, there is no social security code, no "integrated" unitary system, but rather various social insurance schemes offering protection against the economic consequences of social risks such as unemployment, old age, sickness, accident, disability or maternity.[5] Numerous different laws may cover any covered contingency. It is therefore very difficult to summarize the functioning of the different schemes without misrepresenting them. Since 2003, a law[6] guarantees the coherence of the system as a whole.

Although it uses a pooling mechanism originally developed for the private insurance business, social insurance is the result of state protection (Brulhart, 2017, p. 11). It was created by law, and the State provides a framework that leaves virtually no room for contractual freedom. Responsibility for implementing social insurance lies either with public law bodies, created by the various laws, or with private law entities delegated by the State with strictly regulated activities. With most schemes,[7] contributions are proportional to income and are set to cover benefits according to an immediate redistribution of

2. See articles 5a and 6 of the Federal Constitution of the Swiss Confederation (*Constitution fédérale de la Confédération suisse* – Cst.), Systematic Compilation of Federal Law (*Recueil systématique du droit fédéral* – RS 101).
3. See art. 41 Cst.
4. The cantons are mainly responsible for supplementary benefits and health insurance.
5. These include unemployment insurance (RS 837.0), pension insurance (RS 831.10 and 831.40), health insurance (RS 832.10), accident insurance (RS 832.20) and disability insurance (RS 831.20). For more details, see Greber et al. (2010, pp. 26–27).
6. Federal Act on the general part of social insurance law (*Loi fédérale sur la partie générale du droit des assurances sociales* – LPGA, RS 830.1).
7. With the exception of health insurance and accident insurance.

the capital received,[8] more rarely by capitalization[9] or by distribution of the covered capital.[10] Employees generally contribute more consistently than do the self-employed, but at a lower cost due to a joint contribution system involving the employer.[11]

This system, which was set up after the Second World War, is facing multiple difficulties, including rising health-care costs, declining average birth rate, increasing average life expectancy, and declining capital market returns. As a result, the viability of the main insurance programmes is no longer guaranteed, regardless of their financing mode. This is particularly true of old age and survivors' insurance, health insurance and of pension funds (Dupont, 2019b, pp. 121–140). These problems are compounded by societal developments and structural labour market changes resulting, in particular, from the emergence of digital platforms. On the one hand, these entail greater labour market flexibility, which translates into job splitting and the proliferation of so-called non-standard jobs and atypical work. On the other hand, the digital platform business model aims to escape the constraints of wage employment. Finally, digital platforms shift the notion of gainful employment towards exchange-based activities, which are not considered by law as professional activities and whose income is not subject to social contributions. The end result is an overall weakening of the social protection system, which manifests through a decrease in solidarity, a decrease in the level of protection in terms of coverage (and thus an increase in precarity), and finally a decrease in contributions (Dupont, 2019c). As a result, a major reform seems increasingly inevitable. Nevertheless, the actions taken to date remain limited to ensuring the financial viability of the system in the short term (Pärli, 2019).

In this context, the absence of a specific status for platform workers is understandable. At present, their social protection depends on the classification of their status according to the existing binary system. The question thus arises whether platform workers should be classed as self-employed service providers, as defined by their contract, or should they be reclassified as employees? Several authorities, both administrative and judicial, have already taken up this question.

8. This concerns old-age and survivors' insurance, disability insurance, unemployment insurance, health insurance, military insurance, supplementary benefits, loss-of-earnings allowances, family allowances and accident insurance concerning daily allowances, see Gnaegi (2017, p. 225).
9. See below, section on Social security coverage for employees and the self-employed.
10. System used in the payment of disability and survivors' pensions in accident insurance; see Gnaegi (2017, p. 227).
11. See articles 112 and 113 Cst.

Reclassification of contracts as paid work via case law

The notion of employee in administrative law is not necessarily identical to the one given in civil law. On the one hand, it goes far beyond this and may include persons under an agency or service contract.[12] On the other hand, it is not governed by the idea of protecting a party because he or she is economically weak or was not able to freely negotiate a contract.[13] Nevertheless, as we shall see, the analyses of the administrative and judicial authorities in civil matters converge on the essential points.

Litigation in administrative law

In the context of social insurance, the main concern is to ensure the financing of the various schemes and to provide sufficient and sustainable protection for the population as a whole. In the analysis, the public interest therefore generally takes precedence over contractual freedom. This analysis may be initiated directly by the social insurance bodies or it may result from decisions by other administrative authorities (see below).

Affiliation to old age and survivors' insurance and to accident insurance. In the majority of cases, workers' status is classified by the benefit schemes responsible for implementing the old-age, survivors' and disability insurance (*Assurance vieillesse, survivants et invalidité* – AVS/AI) programme. Their decision is particularly important, as it applies not only to the implementation of the AVS/AI, but also, indirectly, to accident insurance, pension fund schemes and unemployment insurance.[14]

This classification sometimes falls to the National Accident Insurance Fund (SUVA),[15] the main accident insurer. As it is legally obliged to insure high-risk occupations, including communication and transport companies, this body is responsible for determining whether a given company falls into one of the

12. See articles 111 and 112 para 2 let. a. Cst. See Rousselle-Ruffieux (2012, pp. 177–209).

13. It is indicative that regular collaboration is involved, i.e. the employee is regularly required to provide his or her services to the same employer. Federal Court (*Tribunal federal* – TF), 9C_213/2016, 17 October 2016, Recital 3.3. and TF, 9C_1062/2010, 5 July 2011, Recital 7.2. See Perrenoud (2018, pp. 25–42, pp. 27–28).

14. See art. 1 of the Ordinance on accident insurance (*Ordonnance sur l'assurance-accidents* – OLAA), art. 2 of the Federal Law on occupational pensions (*Loi fédérale sur la prévoyance professionnelle* – LPP), art. 2 of the Federal law on unemployment insurance (*Loi fédérale sur l'assurance-chômage* – LACI). Greber et al. (2010, p. 109).

15. Most commonly referred to (in German) as the Schweizerische Unfallversicherung – SUVA; or (in French) *Caisse nationale d'assurance en cas d'accidents* – CNA.

categories for which SUVA affiliation is compulsory.[16] Practically speaking, when an application for affiliation is made by a company for which the question arises, the AVS compensation fund prepares a temporary certificate and forwards the file to the SUVA, which classifies the activity and takes a decision regarding the company's affiliation. Consequently, the funds coordinate their assessments to ensure that their decisions are consistent.

When setting the amount of contributions, the authorities have to determine whether the earnings come from gainful wage employment or self-employment (Dunand, 2018, art. 12, N 7-29; Gächter and Meier, 2018). Their analysis is essentially economic. In practice, the main difficulty is that Swiss law does not provide a precise definition of a self-employed entrepreneur, but rather defines it negatively in relation to dependent employment.[17] However, there is no legal presumption in favour of either employment type.[18] To classify a given situation, the funds refer in particular to the guidelines issued by the Federal Social Insurance Office (*Office fédéral des assurances sociales* – OFAS),[19] which specify the criteria to be implemented.[20] Weighting the criteria according to the circumstances lets the authorities take due account of the different ways in which an activity manifests itself in economic life.[21] Where there is more than one business activity, each income is examined separately. The predominance of one activity does not influence the classification of another. A worker can

16. Art. 66 para 1 let. g of the Federal Law on accident insurance (*Loi fédérale sur l'assurance-accidents* – LAA).

17. Art. 12 LPGA: "A person is considered to be self-employed if his or her income is not derived from an activity as a salaried employee".

18. In case of doubt, due to the negative nature of the definition of self-employed, it must first be examined whether wage employment can be confirmed (see Gächter and Meier, 2018, para 39).

19. OFAS, Guidelines on the determining wage in AVS, AI and APG (loss-of-earnings allowances (*assurance perte de gains*) – (*Directives sur le salaire determinant dans l'AVS, AI et APG* – DSD), ch. 1,020, and Guidelines on the contributions of self-employed persons and persons not gainfully employed to the AVS, AI and APG (*Directives sur les cotisations des travailleurs indépendants et des personnes sans activité lucrative dans l'AVS, AI et APG* – DIN), ch. 1,005 and 1,065. In German, the OFAS is called the BSV (*Bundesamt für Sozialversicherungen*).

20. OFAS (DSD (note 19), ch. 1,019–1,038). According to art. 9 of the Federal Law on old-age and survivors' insurance (*Loi fédérale sur l'assurance-vieillesse et survivants* – LAVS), "income from self-employment includes any income from work other than remuneration for work performed in a dependent situation". See also Dunand (2018, art. 12, No. 7–29).

21. If the economic risk is limited to dependency on a given activity, the entrepreneurial risk lies, therefore, in the fact that, if the mandates are revoked, the person is in a situation similar to that of an employee who loses his or her job, which is a typical feature of wage employment (OFAS, DSD (note 19), ch. 1,026). Conversely, the following are not decisive: the legal nature of the relationship between the parties, as well as agreements or arrangements concerning the AVS status of the parties (employee or self-employed) or the legal classification of remuneration. Working hours are not a criterion for social insurance purposes. It is also irrelevant whether an insured person is affiliated to a compensation fund as a self-employed person or whether an employee works simultaneously for several employers (OFAS, DSD (note 19), ch. 1,029-1,038).

therefore be both self-employed and an employee, whether he or she works for different enterprises or even for a single enterprise.

In November 2019, the SUVA ruled in favour of the dependent nature of the activity carried out by drivers on the Uber platform (Badertscher, 2019).[22] Uber is currently appealing against this decision.

According to the SUVA, Uber should be classified as an employer. Indeed, an employer is defined as any person who offers a product or a service and who has an economic interest in the performance of the worker.[23] In order to do so, the employer must create the conditions for the employee to perform the work, whose quality he or she is entitled to measure in return. In the case of Uber, the employee cannot perform the job without the help of the app supplied by Uber B.V., which therefore provides the necessary infrastructure for the job. The driver is not responsible for attracting customers, as designing the offer and advertising are the responsibility of the head office, the sole owner of the brand. Since Uber B.V. collects the fare and pays the driver after deducting the costs incurred, it has an economic interest in the drivers' performance. Uber B.V. decides how the drivers carry out their activity and has the right, in certain cases, to terminate a contract without notice. It is further entitled to disable or restrict access to the driver's app; under Swiss law, this is typically an employer's prerogative (Art. 337 para. 1 of the Code of Obligations (*Code des obligations* – CO)).

The SUVA emphasizes that the classification of the activity does not depend on the nature of the contractual relationship between the parties, but on the factual economic circumstances of the activity actually carried out. Classification of remuneration is analysed, economically speaking, from the perspective of the person receiving it. In this case, it is revealing that regular collaboration is involved, i.e. the employee is regularly required to provide his or her services to the same employer.[24]

The SUVA also assesses the criterion of dependence on the work organization pursuant to the OFAS guidelines. This must be examined in the light of five sub-criteria. The first is the employer's right to give instructions, which is hotly disputed as far as the platform is concerned: in the case at hand, even though drivers are free to hold another job or have considerable leeway in terms of working hours and working time, if turning down orders entails disadvantages, this implies a relationship of dependency. The second sub-criterion is a

22. The SUVA had issued an initial decision, overturned by the Social Security Court *(Sozialversicherungsgericht)* of the canton of Zurich, which doubted the identity of the employing company, without however calling into question the classification of the activity carried out by the drivers (UV.2017.00030, 10 July 2018).

23. Definition deduced by the SUVA from art. 321a CO and art. 7 para 1 LAA.

24. TF, 9C_213/2016, 17 October 2016, Recitals 3.3. and 9C_1062/2010, 5 July 2011, Recital 7.2.

relationship of subordination of the worker. This arises from the guidelines and their implementation, in particular the setting of fares and the possibility for Uber to terminate a contract with immediate effect. The third is integration into a work organization and the existence of an obligation to personally perform the task entrusted: the driver is restricted as far as transmitting orders is concerned and cannot transfer the contract to a third party without Uber's written consent. The fourth sub-criterion is the existence of a non-competition clause, arising from the prohibition on developing a competing service or a similar product. The fifth is the obligation to perform tasks personally: compulsory presence, about which there is no issue since it is inherent to the nature of the service.

In addition, the SUVA assesses the entrepreneurial or economic risk, which is the risk faced by a person who has to bear the risk of losing the economic substance of his or her business. This criterion is subdivided into eight points. The first criterion relates to the fact that the person concerned makes significant investments: in the case at hand, the importance of this criterion is lessened[25] because private use of the car or phone is generally a sufficient reason for their acquisition and therefore cannot be deemed decisive for classification. The second and third criteria cover liability for losses and collection risk: in this case, as the driver cannot influence strategic decisions or the content of marketing measures, he or she does not bear the risk of loss. The fact that no income is guaranteed is irrelevant as it is similar to on-call work, which is a recognized form of employment contract. Payments are mainly made by credit card, and it is therefore up to the credit card issuer to collect the money. Criteria four, five and six deal with acting in one's own name and on one's own behalf, covering the overheads and generating the orders: customer acquisition depends on the reputation of the Uber brand, the driver does not have to find customers, he or she is contacted by users via the app, and they clearly recognize the Uber organization as a service provider. This shows that the driver is not acting in his or her own name, but on behalf of Uber. Finally, criteria seven and eight relate to the absence of staff and business premises and militate in favour of wage employment. The SUVA concluded that the criteria in favour of wage employment predominate.

Compliance with legislation on the hiring of services. In a field other than social insurance, in May 2020, the Geneva Court of Justice (*Cour de justice de Genève*)[26] confirmed the decision of the Cantonal Employment Office (*Office cantonal de*

25. TF, 8C_571/2017, 9 November 2017, on the independence of taxi drivers; TAS ZH, UV.2015.00106, 11 November 2015 and UV.2008.00159, 30 December 2009.
26. Administrative Chamber of the Court of Justice of the Canton of Geneva, ATA/535/2020, 29 May 2020.

l'emploi) of 11 June 2019 ordering Uber Switzerland GmbH to comply with the provisions of the Federal Act on employment services and the hiring of services (*Loi fédérale sur le service de l'emploi et la location de services* – LSE)[27] in conjunction with the UberEats.com meal delivery business. According to this law, "anyone who intends to carry out, on a regular basis and in return for payment, an activity as an employment agent or who hires workers and makes them available to clients for the purpose of carrying out work assignments, must obtain a permit to engage in the hiring out of services for this purpose".[28] In the Court's view, the Uber Eats couriers are in a subordinate relationship with Uber Switzerland GmbH, despite the fact that they are not obliged to log on to the app or accept assignments. Once the couriers receive delivery instructions from the restaurant owners, Uber Switzerland GmbH acts as an intermediary, which is typical of the provision of personnel inherent to the LSE. As a result, Uber Switzerland GmbH should, as the couriers' employer, have registered this activity in the commercial register, applied for an operating licence and complied with the collective agreements. Uber appealed to the Federal Court on 2 July 2020.[29] As the request for a stay was refused, Uber Switzerland GmbH asked the 500 delivery drivers using the Uber Eats application in Geneva to contact the service hire company Chaskis SA, to register as employees.

The issue of undeclared work. On 29 October 2019, the Geneva Department of Security, Employment and Health (*Département genevois de la sécurité, de l'emploi et de la santé*) issued a prohibition decision against Uber Switzerland GmbH (Leroy, 2019). After investigating, the Cantonal Office of Inspection and Labour Relations (*Office cantonal de l'inspection et des relations du travail*) found that Uber was not a delivery service but rather a transport company, subject to the "*Code d'obligations*" (complementary to the Swiss Civil Code) and Geneva legislation on taxis and chauffeur-driven cars.[30] According to the Department, the drivers are undeclared employees whose social security contributions should have been paid since the end of 2014, when Uber was launched in Geneva. Uber has appealed to the Administrative Chamber of the Geneva Court of Justice but

27. LSE, RS 823.11.

28. See art. 12 LSE. The hiring out of services in Switzerland is an activity that is carried out under the authorization of the Cantonal Employment Office. According to art. 26 of the Federal Ordinance on employment services and the hiring of services (*Ordonnance fédérale sur le service de l'emploi et la location de services* – OSE); RS 823.111), a lessor is deemed to be a person who hires out the services of an employee to a lessee company and gives the latter most of the management powers over the employee. This constitutes an employment contract. The remuneration enables the lessor of services to pay the workers' social security charges and salary.

29. Case No.: 2C_575/2020.

30. See art. 28 of the Geneva law of 13 October 2016 on taxis and chauffeur-driven cars (*Loi genevoise du 13 octobre 2016 sur les taxis et les voitures de transport avec chauffeurs* – LTVTC), RS-GE H 1 31.

the Court rejected the appeal and the decision is now final.[31] The Geneva decisions follow the identification of gaps in the payment of contributions, in particular for people who were refused affiliation as self-employed by the benefit programmes and whom Uber does not consider as employees.[32]

Litigation in private labour law

Although this goes beyond the strict framework of social protection, we felt it necessary, before concluding this study, to take stock of the classification which the civil courts have made in labour law.

The Court of Appeal of the Canton of Vaud ruled on Uber's situation on 23 April 2020.[33] Uber had terminated the contract of one of its drivers following poor customer ratings of his driving skills. After sending the driver messages on his smartphone informing him of the lowered rating, Uber applied the contractual notice period of seven days and deactivated the driver's app. The driver challenged the validity of the reason for termination, the notice period applied as well as the notification. Even though Uber had complied with the contractual notice period, the Court held, after reclassifying the service contract as an employment contract, that the termination was unjustified and wrongful, as it was contrary to the provisions of the *Code d'obligations*. Despite the fact that the complaints were serious, as they concerned customer safety, the termination for valid cause was not justified, as Uber had not terminated the contract immediately after issuing the warnings. Thus, Uber failed to prove that the termination flowed from an irreversible loss of trust in the employee. In the absence of a valid reason for immediate termination, Uber should have respected the statutory notice period. In addition, the judges were of the opinion that Uber drivers had virtually no freedom of association.

One interesting aspect of this decision is the use of the rules of international law. After verifying the international character of the case, which involved the Netherlands and Switzerland, the Court of Appeal applied the Lugano Convention[34] to verify its jurisdiction. As the latter provides for special provisions concerning employment relationships, facilitating the employee's access to justice,

31. Court of justice, Administrative, Chamber ATA/1151 2020, 17 November 2020.

32. Report of the Transport Committee of 16 July 2019 on M 2480-A and M 2571, drawn up following motion 2,480.

33. Commercial Court of the Canton of Vaud (*Tribunal de commerce du canton de Vaud* – TC VD), Civil Court of Appeal (*Cour d'appel civile*), HC/2020/535 No. 380, 11 September 2020 (Rasier Operation B.V.c. A). See Wyler and Zandirad (2020).

34. See art. 18 and art. 19 of the Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (*Convention du 30 octobre 2007 concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale*), RS 0.275.12.

the Court began by classifying the contract. It concluded that the contract in question was, in fact, an employment contract and that Uber B.V., established in the Netherlands, was the driver's employer. The choice of law clause was deemed invalid, as it was intended to improperly deprive the employee of the effective possibility of asserting his rights. Finally, the arbitration clause could only be valid under Swiss law[35] if the dispute was arbitrable. However, art. 341 of the *Code d'obligations* stipulates that, during the employment relationship and for one month after its termination, the employee may not waive claims arising from the mandatory legal provisions of art. 361 and art. 362 of the *Code d'obligations*, such as wages, holiday pay or compensation for dismissal. The waiver arising from the choice of an arbitration clause before the aforementioned deadline is therefore null and void. Thus, the arbitration clause could not prevent the employee from acting before the Swiss courts. The Court therefore invalidated the clause.

As Uber B.V. did not appeal against this decision, it has now become final. Consequently, in Switzerland, the relationship of Uber drivers should be considered as wage employment. This is probably a new form of on-call work, a form of precarious employment whose legality was recognized by the Federal Court in 1998,[36] as the law is not in principle opposed to labour market flexibility. In this form of work, the employer calls on the services of the worker when he or she needs them, while the worker undertakes to remain permanently available to the employer. He or she cannot, therefore, refuse a call.[37] The working time during which the worker is on standby, which is the connection time, is remunerated. However, the remuneration may be lower, even if the waiting is done within the company, and the remuneration may be agreed on a flat-rate basis, taking into account the average number of interventions. In the absence of an agreement, this remuneration may be set by an equity court judge, based on the intensity of the work required and the freedom enjoyed by the worker. Even though this classification maintains the platform worker in a precarious situation, it may be more advantageous than self-employed status in terms of social insurance affiliation, provided that the work is truly regular.

Pending a ruling by the Federal Court, the decisions handed down in both administrative and private labour law tend to classify the activity carried out on

35. Federal Law of 18 December 1987 on private international law (*Loi fédérale du 18 décembre 1987 sur le droit international privé* – LDIP), RS 291.

36. Main decisions of the Federal Court (*Arrêts principaux du Tribunal fédéral* – ATF) 125 III 65 and 124 III 249.

37. State Secretariat for Economic Affairs (*Secrétariat d'État à l'Économie* – SECO), Bulletin LACI IC No. 95 ff: "Workers shall suffer neither loss of work nor loss of earnings to be taken into account during periods when they are not called upon to work (art. 11, para. 1, LACI). They are in fact a party to an employment relationship where irregular working hours are considered normal ATF 107 V 59."

behalf of Uber as wage employment. Following the rulings against Uber, the French company Kapten, Uber's main competitor, stopped operating in Switzerland, leaving 350 people without work or compensation, as there is no collective dismissal procedure for self-employed workers (Le Matin, 2019). By way of contrast, the recently established start-up Lymo was launched in April 2019 as a transport booking app. It styles itself as a trip comparator and does not charge fees.[38] It is therefore a new model, which raises new questions, to which the answers given in the Uber cases will not necessarily apply. It is therefore not possible to settle, once and for all, the classification of the activity carried out on behalf of all platforms. This depends to a large extent on the distribution of roles between the platform and the worker, as the former acts as an intermediary who loosens the link between service provider and client to varying degrees. This loosening weakens the case for self-employed contractor status for platform workers, in favour of reclassification as an employment contract. To understand the practical implications of this debate in Swiss social security law, we need to compare the protection offered, respectively, to employees and the self-employed.

Social security coverage for employees and the self-employed

In this section, we will start by analysing the main schemes offering public universal protection, then examine those that are more specifically linked to occupational activity. We will leave aside secondary schemes such as family allowances, supplementary benefits or military service allowances, for which professional status is not decisive.

Schemes offering public universal protection: A feigned neutrality

Old-age and Survivors' Insurance/Disability Insurance (AVS/AI). The AVS/AI, the first pillar of the provision of old-age, survivors' and disability insurance, is aimed at guaranteeing a minimum standard of living for everyone living in Switzerland with regard to old age or disability, or for their survivors in the event of death.[39] It is a pay-as-you-go system where the economically active population pays for current pensioners. Economically active insured persons are obliged to pay

38. For more information on Lymo.

39. See art. 4 para 1, 8 and 9 of the Federal Law on old-age and survivors' insurance (*Loi fédérale sur l'assurance-vieillesse et survivants* – LAVS), art. 17–21 and 27 of the Regulation on old-age and survivors' insurance (*Règlement sur l'assurance-vieillesse et survivants* – RAVS) and art. 1b of the Federal Law on disability insurance (*Loi fédérale sur l'assurance-invalidité* – LAI). See also Greber et al. (2010, p. 263).

contributions as long as they are gainfully employed; non-active persons from age 20 until they reach age 64 for women or age 65 for men.[40] Contributions for employees amount to 10.10 per cent of salary,[41] while those of self-employed persons amount in principle to 9.50 per cent of the determining income,[42] with incomes below 57,400 Swiss francs (CHF) benefiting from a sliding scale.[43] A voluntary contribution system exists for self-employed persons whose monthly income does not exceed CHF 2,300.[44] Insurance is more expensive for the self-employed than for employees, as they must contribute on their own behalf without an employer's joint contribution. However, the self-employed contribute less overall to the financing of such insurance, a factor that could negatively affect the financial equilibrium of the programme if self-employment were to become more widespread.[45]

The minimum AVS pension is CHF 1,195 per month, provided that the person has paid contributions without interruption since age 20. The maximum pension is CHF 2,390 per month for those with an average annual income of at least CHF 86,040 per year over the entire contribution period.[46] In the event of disability, insured persons may be entitled to daily allowances while they are undergoing rehabilitation, then to a disability pension depending on the assessment of the degree of disability.[47] For persons who were gainfully employed full-time without a health impairment, the degree of disability is in principle assessed using the so-called income comparison method,[48] which has the merit of referring to objective data. When assessing the degree of disability of a self-employed person with variable income, the reduction of which, in all likelihood, can be attributed to the health impairment, the so-called extraordinary method is used. This involves comparing the time spent on different activities before and after the health impairment, and is thus a more arbitrary method.

40. See art. 3 LAVS.
41. Representing the combined employee and employer contributions for AVS and AI contributions. The total percentage amounts to 10.6 per cent if the APG (*Loi fédérale sur les allocations pour perte de gain en cas de service, de maternité et de paternité (Loi sur les allocations pour perte de gain* – LAPG, RS 834.1) contribution is added. The APG covers insured workers in the event of an incapacity for work as the result of military service or maternity leave.
42. For the self-employed, 10 per cent if the APG contribution is added.
43. See art. 8 LAVS and art. 21 RAVS; art. 3 LAI and article 1 bis of the Regulation on disability insurance (*Règlement sur l'assurance-invalidité* – RAI).
44. See art. 19 RAVS.
45. See Pärli (2019, § 39–44).
46. See art. 34 para 5 LAVS.
47. See art. 22, 28 and 28a LAI.
48. See art. 28a para 2 LAI, which refers to art. 16 LPGA. See also Greber et al. (2010, pp. 245–246).

Thus, while the AVS/AI seems a priori neutral in terms of benefits, certain aspects of the assessment of benefits actually lead to unequal treatment, to the disadvantage of the self-employed. It should also be borne in mind that the contributions paid by the self-employed depend on their taxable income, which they may be tempted to keep as low as possible for tax reasons. Of course, this type of provision also influences the amount of contributions, hence the subsequent benefits. Another factor is that the income from AVS/AI pensions is insufficient to live on in Switzerland. Consequently, it is necessary to also closely scrutinize occupational pension schemes to arrive at a realistic picture of a person's coverage.[49]

Excursus: The loss of earnings in case of illness. Compulsory health insurance is linked to residence in Switzerland rather than employment. Instead of depending on income, the premiums paid by insured persons are calculated in relation to total health-care costs, broken down on a per capita basis.[50] Thus, no distinction is made between employees and the self-employed as regards health-care coverage, in terms of either costs or coverage.

However, coverage for loss of income in the event of incapacity for work due to illness is not included in compulsory health insurance, but is optional.[51] Moreover, as the law does not impose minimum coverage, the daily allowances offered by providers of health insurance are very low (in French, health insurance is referred to by the acronym LAMal; *Loi sur l'assurance-maladie*). In practice, employers tend to take out private group insurance,[52] i.e. for all their employees, as this frees them from the obligation to pay wages under the *Code des obligations*.[53] This type of private insurance is also available to the self-employed at their own expense. Consequently, the self-employed can take out daily allowance insurance in the event of illness and maternity, either with a LAMal insurer or with an individual insurance company. Such insurance may also offer daily allowances in case of accident. As a result, liability for the loss of earnings coverage lies, in one case, with the employer and, in the other case, with the self-employed.

49. See below, section on Occupational pension schemes.

50. See art. 3 of the Federal Law on health insurance (*Loi fédérale sur l'assurance-maladie* – LAMal). See Dupont (2019b, pp. 127–128).

51. See art. 67–77 LAMal. See Greber et al. (2010, pp. 26–27).

52. Subject to the Federal Law of 2 April 1908 on insurance contracts (*Loi fédérale du 2 avril 1908 sur le contrat d'assurance* – LCA), RS 221.229.1.

53. Art. 324a *Code des obligations*.

Occupational schemes

The social insurance programmes primarily intended for persons in employment are the pension scheme, accident insurance, unemployment insurance,[54] and maternity and paternity leave.[55]

Occupational pension schemes: The problem of non-standard workers. Occupational pension schemes, also known as the second pillar, are supplementary to the AVS/AI and designed to maintain a person's prior standard of living in the event of old age or disability, or the standard of living of their survivors in the event of death.[56] Schematically speaking, the sum of the first and second pillar benefits is supposed to provide an alternative income of about 60 per cent of the person's last salary. The second pillar is based on a capitalization system (Gnaegi, 2017, p. 227); the amount of the pension depends on the contributions paid, which in turn depends on the insured salary.

The second pillar is compulsory for employees and is available on an optional basis to self-employed persons.[57] For example, the self-employed can affiliate with the pension fund of a professional association, affiliate with the Supplementary Institution Foundation *(Fondation institution supplétive)* or affiliate with a traditional insurance company.[58] If a self-employed person employs paid workers, it is possible to affiliate with the same institution as that of their workers.

Regardless of the employee's status and working hours, the threshold for compulsory pension coverage is CHF 21,510 per year, from a single employer. Once this threshold is reached, only a part of the salary, called the coordinated salary and ranging from CHF 25,095 to CHF 86,040, is compulsorily insured. The aim of this regulation is to avoid having to pay contributions on the amounts corresponding to the benefits insured by the first pillar. However, the effect of these provisions is to exclude from this protection "non-standard" jobs or atypical work, such as low-paid work, multiple jobs, on-call work or part-time work, for which income is generally below the threshold for accessing

54. Although it is possible for people who are not in gainful employment or who are self-employed, under certain defined circumstances, to receive unemployment insurance benefits, these are primarily intended for employed persons.

55. See art. 16a-16 g of the Federal Law of 25 September 1952 on allowances for loss of earnings in case of service, maternity and paternity (*Loi fédérale sur les allocations pour perte de gain en cas de service, de maternité et de paternité* – LAPG, RS 834.1). See also footnote 41.

56. See art. 1 of the Federal Law on occupational retirement, survivors' and disability pension plans (*Loi fédérale sur la prévoyance professionnelle vieillesse, survivants et invalidité* – LPP).

57. See art. 4 LPP (it should be noted that Art. 3 LPP has not been implemented to date).

58. See art. 44 LPP.

the second pillar. The rate of contributions applied to this coordinated salary varies from 7 per cent to 18 per cent, depending on the person's age.[59] In principle, this contribution is split equally between the employee and the employer. If the self-employed decide to insure themselves, they must pay the entire contribution.

The second pillar encompasses, on the one hand, compulsory pension provision, i.e. the statutory minimum benefits,[60] and, on the other hand, supplementary pension provision. This allows the employer to opt for a system that goes beyond the statutory minimum benefits and to derogate from a certain number of regulations,[61] in particular by paying more than half of the contributions.

It is in the area of pension provision that legislators offer the most incentives. Indeed, the law allows for insurance of up to ten times the coordinated salary,[62] and the self-employed may deduct their second pillar contributions from their taxable income[63] and those of their employees from their taxable income as a business expense.[64] In this context, it is worth mentioning that the pension savings acquired during the period of employment can be withdrawn in cash during the first year of self-employment.[65] This facility has a number of perverse effects, such as reducing provision in the event of disability.

Occupational pension schemes have been designed for workers with a linear career, whether they are classified as employees or self-employed. However, they constitute an ill-adapted and relatively incomplete system for non-standard jobs. This generally includes platform workers, whose income is low and fragmented; this prevents such workers from building up sufficient entitlements or even accessing them, which remain fragmented overall.

Accident insurance: The privilege of the traditional workforce. The biggest difference in treatment between the self-employed and employees is in the area of accident insurance. For employees, accident insurance is compulsory and automatic. The employer pays the premium for occupational accidents and illnesses in full, whereas employees can only be required to pay premiums

59. See Art. 16 LPP.
60. See art 7 ff LPP.
61. See art. 49 LPP by contrast.
62. See art. 79c LPP. This represents an amount of CHF 609,450.
63. Up to 25 per cent of insurable AVS income.
64. See art. 79c LPP, which refers to art. 8 para 1 and art. 81 of the Federal Law of 11 April 1889 on debt collection and bankruptcy (*Loi fédérale du 11 avril 1889 sur la poursuite pour dettes et la faillite* – LP), RS 281.1; art. 1 para 2 let. b of the Ordinance on Occupational Retirement, Survivors' and Disability Pension Plans (*Ordonnance sur la prévoyance professionnelle vieillesse, survivants et invalidité* – OPP 2).
65. See art. 5 para 1 let. b of the Federal Act of 17 December 1993 on vesting in old-age, survivors' and disability pension plans (*Loi fédérale du 17 décembre 1993 sur le libre passage dans la prévoyance vieillesse, survivants et invalidité* – LFLP), RS 831.42. See Oberson (2013, p. 63).

for non-occupational accidents, if these are covered.[66] Coverage encompasses payment of the costs of treatment arising from an accident and the provision of replacement income, in the form of daily allowances or pensions in the event of disability resulting from the accident.[67]

Non-occupational accident coverage is reserved for employees who work at least eight hours per week for the same employer.[68] For those who do not meet this condition, protection is therefore only partial, and the health insurance will only cover the treatment arising from the accident.

Another weakness of the system is the fragmentation of work into several employment relationships, as it may be difficult to determine which accident insurer is liable. This is especially true for occupational accidents, which would be the case for Uber drivers working for several platforms.

For platform workers, several difficult issues arise in this context, particularly if they work for several platforms. In addition to the question of determining whether the waiting time or the trip to pick up a client should be considered as working time, the fragmented employment relationship is likely to create uncertainty as to the identity of the accident insurer required to provide coverage. This will lead inevitably to, at least, a temporary gap in the worker's social security coverage.

Accident insurance is optional for the self-employed. They pay the full premium, which, like cash benefits, is calculated on the basis of the insured earnings agreed between the insurer and the insured, in principle the actual earnings, but at least CHF 66,690.[69] This amount represents a significant constraint for people with lower incomes.

Unemployment insurance: Lack of coverage. Unemployment insurance provides daily allowances of 70 per cent to 80 per cent of insured earnings for a maximum of 24 months, and allows insured persons to contribute to AVS/AI/APG[70] and be insured against the risk of accident.[71] Although coverage is relatively generous, it is particularly difficult to implement in case of irregular income or on-call work. One form of flexible work was recognized by the Federal Court in 1998, whereby the employer calls on the worker as need be, and

66. See art. 91 LAA.
67. See art. 10 ff LAA.
68. See art. 8 para 2 LAA and art. 13 OLAA.
69. Which represents 45 per cent of the maximum amount of insured earnings, an amount fixed at CHF 148,200 since 1 January 2016 (Frésard-Fellay, Kahil-Wolff and Perrenoud, 2015, p. 332).
70. APG – *Allocations pour perte de gain* (Benefits for loss of income).
71. See art. 22 and 22a, art. 27 LACI; art. 1a para 1 let. b LAA.

the worker undertakes to be permanently available to the employer and cannot refuse the call.[72]

Unemployment insurance is primarily for employees.[73] There is provision in the Constitution for voluntary unemployment insurance,[74] but the self-employed are currently not able to contribute to it.[75] Consequently, the self-employed do not in principle have the option of compensation for the loss of income resulting from the lack of activity due to economic reasons. Tacitly, this means that a self-employed person cannot be out of work, unless he or she is voluntarily – and therefore culpably – out of work or is unfit for work, a situation not covered by unemployment insurance. It is this assumption that is challenged in the case of platform workers because they do not have their own clientele and are economically dependent on the platform(s) for which they work. As a result, they do not appear in unemployment statistics[76] and their economic inactivity is not officially recognized. Moreover, if the independent business activity of the platform worker were to end, the choice of independent status by a former employee who has reached the end of his or her unemployment benefits does not allow, in principle, for social and economic reintegration with the help of unemployment insurance.[77]

Furthermore, it should be noted that this lack of coverage is particularly unjust if a platform ceases to operate, as those concerned cannot be covered by a social plan or collective redundancy. Thus, the self-employed who lose their jobs are left with neither income nor coverage.

Allowances for loss of earnings in case of maternity or paternity. From the perspective of the personal scope of protection, the system of allowances for loss of earnings in the event of maternity is governed by the same conditions as the AVS. As a result, the self-employed are subject thereto in the same way as employees. However, a self-employed woman who becomes a mother must be considered as economically active at the time of childbirth in order to be entitled to maternity benefits. This condition is only met if the mother is self-employed and receives income from this activity for at least five months during the

72. See ATF *(Arrêts principaux du Tribunal federal)* 125 III 65 14 December 2018 and ATF 124 III 249 6 May 1998.

73. Employer-employee contributions are joint and the contributions are 2.2 per cent in total up to an income of CHF 148,200, then 0.5 per cent for higher incomes (see art. 3 LACI).

74. See 114 para 2 let. c. Cst. The legislator's mandate is therefore not yet fulfilled (see Greber et al., 2010, p. 80).

75. See art. 2 LACI determining who is subject to contributions.

76. In Switzerland, only people receiving unemployment benefits are counted as unemployed, not all registered jobseekers.

77. See art. 9a LACI on the maximum duration of the extension of the framework periods.

pregnancy.[78] Failing such income, in particular in case of loss of activity before childbirth due to an accident, pregnancy-related complications or illness, the self-employed woman must have taken out an individual loss of earnings insurance policy providing her with replacement income if she then wants to be entitled to maternity allowance.[79] In addition, the mother must still be considered economically active at the time of giving birth.[80] In the case of transient self-employment, this condition may be more difficult to prove. To some extent, the same difficulties apply to self-employed fathers who are entitled to a paternity allowance as from 1 January 2021.

Conclusion: A middle way?

Overall, coverage in Switzerland for the self-employed is less extensive than for employees. It is also more expensive for the self-employed as the principle of joint contributions is not applicable, and insurance is generally linked to the activity and therefore to the presence of income (Perrenoud, 2018, pp. 39 ff; Witzig, 2016). For employees, the bulk of social protection is provided by accident insurance and occupational pension schemes, which are optional for the self-employed. In this area, freedom of choice and economic freedom are paramount, which corresponds closely to the traditional notion of "self-employed". However, this schema does not meet the needs of platform workers, whose income remains precarious and largely dependent on their own working capacity. It is therefore questionable to include platform workers in the social security system for the self-employed.

Thus far, in the absence of legislative change, the reaction of the authorities has tended towards the inclusion of platform workers in the employees' regime. Yet, if new forms of self-employment were to become more widespread, this could put into question the system's equilibrium from the perspective of both its operation and the cost to society. Moreover, the protection arising from the reclassification of platform workers as employees is hardly satisfactory. Consequently, such inclusion does not necessarily meet the needs of workers or employers, as it does not really allow platform workers to escape from a certain precariousness and will remove the organizational flexibility that is often sought.

Some voices have called for the creation of a specific status,[81] and the government is studying the issue. A third status, in between that of employee and independent, like that available for workers in the United Kingdom, could

78. See art. 16b para 1 let. b and c ch. 2 LAPG.
79. See art. 30 para 1 let. a RAPG.
80. See art. 16b para 1 let. c ch. 2 LAPG.
81. For example, postulates17.4087, 15.3854 and 17.3222 or Doffey (2018).

enable economically dependent workers to benefit from part of the social protection of employees.[82] The Federal Court has opened up this possibility by applying the mandatory provisions of labour law, without however reclassifying contracts, in conjunction with so-called subordination franchises for franchised workers.[83] In this case, the extent of the franchisee's independence is examined according to three criteria. First, legal autonomy to sign contracts. Second, financial autonomy: despite the levying of a fee, the profits must remain with the franchisee. Third, autonomy to manage the business: the instructions on appearance, the content and the quality of the products or services must not influence the way the business is managed, its work is organized and its employees are chosen (Pichonnaz, 2012, pp. 54–57). If, on the contrary, the franchisor has such a hold that the franchisee is deprived of autonomy, the result is subordination, which requires the application by analogy of the imperative rules of labour law. Another avenue has been opened up by the development of *portage salarial* (wage portage) companies, which allow someone covered by such a scheme to be an employee of a wage portage company while retaining his or her independent status vis-à-vis the client company for which he or she works. Technically and legally speaking, a wage portage employee is therefore an employee of the wage portage company while at the same time providing services to the client company. The client is invoiced by the wage portage company, which then pays a salary to the employee and covers the employee and employer's contributions. The wage portage company handles the administrative procedures on behalf of the employee. The activity is carried out under cantonal authorization (issued by the Cantonal Employment Office), or federal authorization (issued by the State Secretariat for Economic Affairs) and regulated by the LSE.[84] However, we need to be particularly cautious at this stage regarding the validity of this legal organization in private law (Magoga-Sabatier, 2019, pp. 73–75; Fuld and Michel, 2012).

The Federal Council has commissioned four of its Departments to prepare a joint report on the need for, and advantages and disadvantages of, greater flexibility in social insurance, and to put forward possible solutions. The aim is to present concrete prospects for flexibility in the field of social insurance by developing a legal framework that preserves the advantages of the distinction between self-employment and wage employment and to create framework conditions that allow innovative business models to emerge. The mandate also includes the establishment of mechanisms to prevent the risk of precarity and the transfer of costs to the community. Finally, it calls for an examination of the

82. Cf. United Kingdom Supreme Court [2021] UKSC 5, 19 February 2021, *Uber B.V. & others* v. *Aslam & others*.
83. ATF 118 II 157, recital 4. and TF 4A_148/2001 of 8 September 2011 recitals 4.2 to 4.4.
84. LSE, RS 823.11.

consequences of an open-ended approach for the parties or the option of introducing protection regulated by an agreement (Conseil fédéral, 2017b, p. 106; Conseil national, 2018). This report, which was due at the end of 2019, is still in preparation. It is therefore still too early to know whether such a statute would offer a satisfactory solution.

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Index for 2021

Index 1. *Index by titles*

Ref.	Title	Issue
1	Accommodating platform work as a new form of work in Dutch social security law: New work, same rules?	No. 3–4
2	China: Towards the introduction of dependency/long-term care insurance	No. 1
3	China's development of a multi-tier pension system	No. 1
4	Extension of social insurance coverage to informal economy workers in China: An administrative and institutional perspective	No. 1
5	From precarity to the denial of social status in the Belgian legal order: The social security rights of platform workers in question	No. 3–4
6	The impact of the Lesotho Child Grant Programme in the lives of children and adults with disabilities: Disaggregated analysis of a community randomized controlled trial	No. 2
7	Lessons from China on different approaches to pension coverage extension	No. 1
8	Minimizing inequality in the financing of Argentina's pension system: Modelling three scenarios	No. 2
9	Pension coverage extension as social innovation in Zambia: Informal economy workers' perceptions and needs	No. 2
10	Pension coverage in Latin America: Trends and inequalities	No. 2
11	Platform work and social security in German law: An international law perspective	No. 3–4
12	Platform work, social protection and flexicurity in Denmark	No. 3–4
13	A shift to libertarian paternalism in old-age income security: Discourses on pension privatization reforms in Lithuania 2016-2018	No. 2
14	Social protection and the platform economy: The anomalous approach of the French legislator	No. 3–4
15	Social protection for digital platform workers in Europe: Introduction	No. 3–4
16	The social protection of platform workers in Romania: Meeting the growing demand for affordable and adequate coverage?	No. 3–4
17	Social security coverage for platform workers in Switzerland: A middle way?	No. 3–4
18	Social security for Spain's platform workers: Self-employed or employee status?	No. 3–4
19	The sustainability of China's Urban Employees' Pension Programme: A case of getting old before getting rich?	No. 1
20	Which social security regime for platform workers in Italy?	No. 3–4

Index 2. *Index by authors*

Author	Ref.	Author	Ref.
Atkins, Salla	9	Kuper, Hannah	6
Borelli, Silvia	20	Lago, Fernando	8
Chen, Tianhong	3	Magoga-Sabatier, Sabrine	17
Chuan, Shi	2	Mesa-Lago, Carmelo	10
Cousins, Mel	19	Metteri, Anna	9
Cruz-Saco, María Amparo	10	Miti, Jairous Joseph	9
Daugareilh, Isabelle	14, 15	Montebovi, Saskia	1
Dupont, Anne-Sylvie	17	Morgon Banks, Lena	6
Durand, Guillermo	8	Palermo, Tia	6
Eichenhofer, Eberhard	11	Pérez Guerrero, María Luisa	18
Geri, Milva	8	Perkiö, Mikko	9
Gil, Mirian	10	Qian, Jiwei	4
Groot, Richard de	6	Rodríguez-Piñero Royo, Miguel	18
Gruat, Jean-Victor	2	Roşioru, Felicia	16
Gualandi, Sofia	20	Turner, John A.	3
He, Xiaobin	7	Wattecamps, Céline	5
Jacqueson, Catherine	12	Wen, Zhuoyi	4
Juska, Arunas	13	Zhao, Litao	7

Index 3. *Index by regions/countries*

Region/Country	Ref.	Region/Country	Ref.
Argentina	8	Italy	20
Belgium	5	Latin America	10
China	2, 3, 4, 7, 19	Lesotho	6
Denmark	12	Netherlands	1
Europe	15	Romania	16
France	14	Spain	18
Germany	11	Switzerland	17
International	13	Zambia	9

Index 4. *Index by keywords*

Keyword	Ref.	Keyword	Ref.
Atypical work	1, 5, 11, 12, 14, 15, 16, 17, 18, 20	Occupational safety	20
Children	6	Old-age benefit	3, 7, 10, 19
Coverage	1, 4, 7, 10, 12, 16	Pension scheme	3, 7, 8, 9, 10, 19
Disability benefit	6	Platform workers	1, 5, 11, 12, 14, 15, 16, 17, 18, 20
Domestic worker	9	Population ageing	19
Economic development	13	Poverty	6
Economic growth	13	Precarious employment	20
Employee	17, 18	Regulation	11
Employment status	17	Self-employed	1, 12, 16, 17, 18
Gaps in coverage	12	Social cohesion	13
Guaranteed income	20	Social contract	13
Income redistribution	8	Social development	6, 13
Informal economy	9	Social insurance	4
Informal employment	4	Social protection	1, 6, 9, 14, 15, 18
Informal workers	4	Social security financing	8, 11, 19
Insured persons rights	5	Social security legislation	1, 5, 11, 12, 14, 15
Labour market	1, 11	Social security planning	2
Legal aspect	11	Social security schemes	3, 7, 9, 13, 16, 17, 18, 20
Long-term care	2	Statistical analysis	8
Occupational accident	20	Taxi driver	9
Occupational disease	20		