

Protecting Workers in the Online Platform Economy: An overview of regulatory and policy developments in the EU

European Risk Observatory
Discussion paper

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This report was commissioned by the European Agency for Safety and Health at Work (EU-OSHA). Its contents, including any opinions and/or conclusions expressed, are those of the authors alone and do not necessarily reflect the views of EU-OSHA.

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Cataloguing data can be found on the cover of this publication.

Luxembourg: Publications Office of the European Union, 2017

ISBN: 978-92-9496-642-1

Doi: 10.2802/918187

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Executive summary

In the digitalised economy, a crucial role is played by online platforms. These platforms — dynamic websites that constitute digital public squares or marketplaces — can impact the economic process in various ways: in production, in terms of products or services themselves, and in (the organisation of) their delivery/provision.

Sometimes, this has an impact on the provision of labour. In particular, online platforms can play a role in:

- the organisation of work in the ‘production process’, for instance by constituting the method of dividing tasks on a project between a team of workers within a company, or by matching a demand for a (digital or manual) work project with a worker who is willing to perform it; as well as in the (organisation of the) delivery/provision/sale of a good or service, for instance by allowing consumers to book and pay a car driver via a smartphone application.

This has given rise to what is widely referred to as ‘online platform work’, which refers to all labour provided through, on or mediated by online platforms, and features a wide array of working arrangements/relationships, such as (versions of) casual work, dependent self-employment, informal work, piecework, home work and crowdwork, in a wide range of sectors. The actual work provided can be digital or manual, in-house or outsourced, high-skilled or low-skilled, on-site or off-site, large- or small-scale, permanent or temporary, all depending on the specific situation. In order to constitute work and to be part of the online platform economy, it must, however, be provided for remuneration, thus excluding genuine ‘sharing’ activities.

This report sets out to describe the potential occupational safety and health (OSH) risks that have been identified in relation to online platform work, to highlight the challenges for current regulatory approaches on OSH and to present examples of different approaches that are under way or being developed to meet these challenges. Given this, this report does not pretend to give a verdict on whether online platform work is ‘good’ or ‘bad’ and indeed it mentions, as well as the potential risks, the potential benefits, such as reducing the extent of undeclared work.

▪ Regulatory challenges posed by online platform work and OSH implications thereof

While there is evidence that some online platform work has transferred transactions that were otherwise conducted in the shadow economy to the formal sector, and consequently within the regulator’s purview, the regulation of the activities of online platforms has generally not been straightforward. This is because of dynamics of the sector, the apparent rule-avoiding behaviour of many online platforms, and the perception — encouraged by some of the online platforms — that, because their activities represent an entirely new business model resulting from rapid technological change, they should not be treated in the same way as any existing economic activities. Furthermore, this difficulty results in no small part from the fact that some aspects of online platform working do not fit easily into pre-established regulatory categories.

This latter consideration applies particularly to employment law: not only specific OSH legislation, but also legislation that has an impact on OSH, such as that which defines the concepts of ‘employee’, ‘employer’ and ‘self-employed’. Online platform work may give rise to a range of both pre-existing and new OSH risks, both physical and psycho-social. The fact that online platform workers have many similarities with both temporary workers and agency workers means that they are probably exposed to the same OSH risks, with studies consistently showing higher injury rates among workers in these categories. Furthermore, preventive measures for OSH tend to be more comprehensive and more effective in workplaces with more workers; lone workers or home workers are generally recognised as being more exposed to OSH risks. Furthermore, online platform workers tend to be younger, which is a recognised independent risk factor for occupational injury, and are less likely to undergo OSH training. In addition, platform work, through the use of inter-worker competition and rating mechanisms, encourages a rapid pace of work without breaks, which may induce accidents. Pay being not continuous but per assignment adds such time pressure. The lack of appropriate training further increases the risk of accidents, and several key activities typically carried out by online platform workers are in occupations

that are considered particularly dangerous, such as construction and transport. Digital online platform work carries risks such as permanent exposure to electromagnetic fields, visual fatigue and musculoskeletal problems. Psycho-social risks include isolation, stress, technostress, technology addiction, information overload, burn-out, postural disorders and cyber-bullying. All online platform work can increase the risk of stress through continuous evaluation and rating of performance, competitive mechanisms for allocating work, uncertain payment and blurring of work–life boundaries. Finally, job insecurity, known to contribute to poor overall health among atypical workers, is characteristic of online platform work.

These risks would make it all the more important for OSH regulations to apply to online platform work, but this application is highly uncertain. The application of OSH rules and employment law in general is challenged, as the involvement of online platforms in the organisation and provision of (digital and manual) labour tends to complicate the classification and regulation of the responsibilities as regards the work in question. The almost inevitably triangular (or multilateral) nature of the arrangements, their often temporary nature, the sometimes relatively high measure of autonomy of the worker in terms of working place and time, the at times informal (citizen-to-citizen) nature of some of the activities and the absence of a common workplace all challenge the application of the concept of the standard, permanent, binary employment relationship. These challenges, however, do not seem to be unique to the online platform economy. The past few decades have seen an increase in the use of ‘non-standard’ forms of work, such as casual work, on-call work, temporary agency work, informal work and dependent self-employment. Many of the working arrangements set up by the online platforms coincide with, or closely resemble, these forms of atypical work or a mixture thereof, sometimes with the only difference that they make use of a digital tool.

The often precarious position of online platform workers, allied with the specific features of online platform work, tends to hamper the collective organisation of workers, and thus the defence of their rights and interest, as well as the development of social dialogue. Most workers on online platforms do not know each other, there is a high turn-over of workers, set working patterns may be lacking, workers may not consider that the work they provide for/on/via the online platform is their primary professional activity, and putting workers in direct competition with each other — through individual ratings and competitive methods of work allocation — is an operational feature of many online platforms. These factors are not conducive to the solidarity and collaboration needed for effective unionisation — and the fact that they may be considered ‘self-employed’ might legally even exclude such unionisation.

▪ **National regulatory/policy options in relation to online platform work**

In response to these challenges, several policy/regulatory approaches have been identified from a review of the current developments in the Member States.

A first approach is to ‘simply’ apply existing regulations to online platform work. In many countries, this would entail a case-by-case determination of whether the online platform worker is an employee or self-employed, or in some countries falls in a third category in between. Depending on the (flexibility of the) test applicable to determine labour status, this may already include many online platform workers in the category of employee, or in an intermediate category, meaning that (most) employment and OSH rules would apply — at least in legal terms. This would seem to be the case in several EU Member States, such as Ireland, the Netherlands, Sweden and the United Kingdom. Active enforcement by the competent authorities (including OSH inspections at home) and access to courts for workers are necessary for this approach to be effective, however, not least considering the systematic rule-avoiding behaviour of some online platforms. On the other hand, in other Member States such as Belgium and Denmark, the approach of applying the current legal provisions will usually lead to online platform workers being classified as ‘self-employed’, leaving most employment law inapplicable.

A second approach is to take specific action to narrow the group of persons that will be considered ‘self-employed’, through the addition of an intermediate ‘(independent) worker’ category or a rebuttable presumption of employment. The United Kingdom already has such an intermediate category of ‘worker’, and Belgium and the Netherlands feature a rebuttable presumption of employment. The reports and analyses concerning the status of online platform workers in these countries, however, show that these mechanisms do not necessarily resolve the categorisation difficulties, and that, in the end, a case-by-

case assessment (by courts) is still necessary, with the legal uncertainty that this entails. None of the studied countries has yet adopted any of these mechanisms specifically in response/relation to online platform work. It should be noted that this approach could also be adopted organically, most notably by courts, as they can adapt the tests of (self-) employment — which they have often themselves developed — to the specific features of online platform work, for instance by placing less emphasis on ownership of key assets of the business (such as cars in the context of passenger transport) and more emphasis on *de facto* control mechanisms (such as rating and pricing systems operated by the platforms).

A third approach is to decouple the application of existing regulations from the status of employment, thus potentially making employment (for instance concerning minimum wages and social security) and OSH rules applicable also to the self-employed. Here again the United Kingdom's 1974 Health and Safety at Work Act provides an example of 'decoupling' where the OSH provisions extend to the protection of third parties, and not only employers and their employees.

Finally, a fourth approach is to provide specific (OSH and/or other employment) protection for online platform workers, regardless of their employment status. This has been the approach in France, with the Act of 8 August 2016 on work, modernisation of social dialogue and securing of career paths, which provides (i) that independent workers in an economically and technically dependent relationship with an online platform can benefit from insurance for accidents at work which is the responsibility of the online platform in question, (ii) that these workers equally have a right to continuing professional training, for which the online platform is responsible, and should at their request be provided with a validation of their working experience with the platform, by the online platform, (iii) that these workers have the right to constitute a trade union, to be a member of a union and to have a union represent their interests and (iv) that they have the right to take collective action in defence of their interests.

▪ EU approaches to online platform work

Considering the transnational nature of the online platform economy and its regulatory challenges, it is natural that the EU Institutions have also become engaged in the discussion.

The European Commission has set out the conditions under which it considers that an employment relationship exists in line with EU labour law, for the purposes of applying EU labour law. It considers that the Court of Justice of the European Union's (CJEU's) definition of 'worker' as applied in the context of the free movement of workers also guides the application of EU labour law, entailing that 'the essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration'. Whether an employment relationship exists or not has to be established on the basis of a case-by-case assessment, considering the reality of the relationship, looking cumulatively at the existence of a subordination link, the nature of work and the presence of remuneration.

The Commission is furthermore considering proposing two legislative measures in the context of the European Pillar of Social Rights that may affect online platform workers' social and employment rights. Firstly, the Access to Social Security initiative may entail a new EU Directive ensuring (i) similar social protection rights for similar work regardless of employment status and (ii) the transferability of acquired social protection rights. Secondly, the Written Statement Directive may be revised to reinforce the rights already contained in that Directive about the information the worker is entitled to receive in their employment contract by applying them to all workers irrespective of their employment status. In addition, the revised Directive may define core labour standards for all workers, particularly for the protection of atypical, casual forms of employment, such as the right to a maximum duration of probation where a probation period is laid down, the right to reference hours within which working hours may vary under very flexible contracts to allow some predictability of working time, the right to a contract with a minimum number of hours set at the average level of hours worked during a preceding period of a certain duration for very flexible contracts, the right to request a new form of employment (and the employer's obligation to reply), the right to training, the right to a reasonable notice period in case of dismissal/early termination of contract, the right to adequate redress in case of unfair dismissal or unlawful termination of contract and, finally, the right to access to effective and impartial dispute resolution in case of dismissal and unfair treatment.

The European Parliament's position, in general terms, has been that fair working conditions and adequate legal and social protection should be ensured for all workers in the collaborative economy, regardless of their status. Specifically in response to the European Pillar of Social Rights, the Parliament has called on the Commission to broaden the Written Statement Directive to cover all forms of employment, and for this new Framework Directive on decent working conditions also to include relevant existing minimum standards to be ensured in certain specific relationships, including 'for work intermediated by digital platforms and other instances of dependent self-employment, a clear distinction — for the purpose of EU law and without prejudice to national law — between those genuinely self-employed and those in an employment relationship, taking into account ILO Recommendation No 198, according to which the fulfilment of several indicators is sufficient to determine an employment relationship; the status and basic responsibilities of the platform, the client and the person performing the work should thus be clarified; minimum standards of collaboration rules should also be introduced with full and comprehensive information to the service provider on their rights and obligations, entitlements, associated level of social protection and the identity of employer; those employed as well as those genuinely self-employed who are engaged through online platforms should have analogous rights as in the rest of the economy and be protected through participation in social security and health insurance schemes; Member States should ensure proper surveillance of the terms and conditions of the employment relationship or service contract, preventing abuses of dominant positions by the platforms'.

The Parliament has furthermore pointed out that the right to healthy and safe working conditions also involves protection against workplace risks as well as limitations on working time and provisions on minimum rest periods and annual leave. It has urged the Member States to fully implement the relevant legislation, to apply their national law on (self-)employment based on the primacy of facts and to enforce it accordingly, to invest in labour inspections and to consider updating the regulatory framework to stay abreast of technological developments. It has also requested the Commission to examine how far the Directive on Temporary Agency Work is applicable to specific online platforms, considering that many intermediating online platforms are structurally similar to temporary work agencies.

Finally, in an important case pending at the CJEU, the nature of the activities of the online platform company Uber are being examined. The central question is whether Uber's activities can be classified as 'information society services' under EU law, in which case market access should be granted and restrictions on its operation should have been notified and can be accepted only in limited circumstances, or they instead constitute 'transport services', which fall outside the scope of the EU rules in question and can therefore in principle be freely regulated by the Member States. The Advocate General, Maciej Szpunar, has advised the CJEU to hold that Uber is engaged in transport services. While the opinion (and the case) is not directly relevant to the question of employment status, it contains many interesting observations in this regard, particularly concerning the measure of control exercised by the online platform. The highly anticipated ruling will certainly shed more light on these issues, not only in relation to one of the online platform economy's most contested companies. Even this judgment will not settle all issues, however, with both the EU and most of its Member States only starting to develop specific regulation and policy in relation to the many employment questions connected to the online platform economy.

PART 1. GENERAL DISCUSSION: THE PLATFORM ECONOMY AND OSH

This first part provides a general discussion of the online platform economy and occupational safety and health (OSH). This includes, firstly, a brief treatment of the definition of the online platform economy and its differences from, and commonalities with, related concepts. Secondly, it entails an overview of the various regulatory and policy challenges that the online platform economy entails. Thirdly and finally, the range of possible implications for OSH will be set out. This first part therefore sets out the general background, against which the national regulatory and policy responses studied in the second part, and the EU developments discussed in the third part, will have to be placed.

1 Definitions: the online platform economy and related concepts

For a phenomenon that is subject to such significant amounts of general media attention, political discussion and specialised academic treatment from a variety of disciplinary perspectives, a remarkable amount of uncertainty still surrounds the concepts of the 'online platform economy' and 'online platform work'. This is mainly due to the conceptual confusion that results from a lack of systematic definition of and distinction between several related concepts, which include, *inter alia*, the 'digital economy', 'sharing economy', 'collaborative economy', 'gig economy', 'crowdwork', 'piecework' and 'gig work'. This conceptual hodgepodge, commented on by many authors,¹ is highly unproductive. Careful definition of and distinction between the differences and commonalities between these various terms is necessary for any meaningful discussion, let alone the development of effective policy responses. The following section offers descriptions and definitions of these terms, if not to propose a conclusive answer to the many conceptual questions, then to make clear what is understood by them for the purposes of the present study, in order to construct a coherent framework of analysis and demarcation of the inquiry.

The digitalisation of society and the digital economy

The starting point and overarching development that would seem to at least partially envelop all other relevant concepts and phenomena is that of the **digitalisation of society and the economy**. This refers to the central place occupied by digitally codified information in society and the economy, which as a whole becomes organised as a network to accommodate this widespread digitalised information.² The extent to which digitalisation and its consequences constitute a 'revolution' akin to the invention of electricity, and thus give rise to genuinely uncharted territory in terms of societal, political and regulatory questions, is open for discussion. On the one hand, digitalisation in its various manifestations is currently being perceived as becoming increasingly 'disruptive' of more traditional societal and economic structures, and is therefore demanding our attention perhaps more than ever. Being facilitated by rapid technological progress and the introduction of novel digital elements into citizens' daily lives, such as smartphones with permanent internet connection and the rise of social media, digitalisation is certainly bringing about many new and radical changes. Further transformations are being predicted in the context of 'Big Data',³ and artificial intelligence, leading some to project that we are on the cusp of a fundamentally altered world. However, at the same time, this development can be seen as rooted in the 'set of technological, economic and social trends that emerged during the last two decades of the 20th

¹ For a concise overview of the conceptual contradictions, see C. Codagnone and B. Martens, 'Scoping the sharing economy: Origins, definitions, impact and regulatory issues', Institute for Prospective Technological Studies Digital Economy Working Paper 1 (2016), available at: <https://ec.europa.eu/jrc/sites/jrcsh/files/JRC100369.pdf>

² G. Valenduc and P. Vendramin, 'Digitalisation, between disruption and evolution', 23(2) *Transfer* (2017), pp. 121-134.

³ 'Big Data' refers to the merging of colossal masses of directly exploitable commercial, personal and geographic data. See C. Degryse, 'Digitalisation of the economy and its impact on labour markets', ETUI Working Paper 2 (2016), p. 7.

century',⁴ and it has been pointed out that some of the consequences it has had, for instance in terms of labour relations, are actually very close to old, industrial-era phenomena.⁵

The **digital society** is the society that is characterised by the above-described process of digitalisation, with digital networks and applications being made central to the organisation of public services and the public space. Similarly, the **digital economy** is the economy that is characterised by the above-described process of digitalisation. It comprises both the digital adaptation of traditional companies, sectors and industries, either as a necessity to continue to operate or as a more pro-active strategy to seize new opportunities offered by these developments, and the 'digital natives', which are companies that 'came into existence with and as a result of the new technologies'.⁶ The EU has developed a Digital Economy and Society Index, which measures Member States' digitalisation on the basis of a number of indicators, such as the deployment of broadband infrastructure and its quality, citizens' basic digital skills, citizens' internet use, the integration of digital technology by businesses and the provision of digital public services.⁷

Digitalisation has multi-faceted consequences and impacts on society, the economy and business processes, which are furthermore highly variable, context-specific and mixed. Sometimes digitalisation concerns entirely novel features; sometimes it concerns the adaptation of existing features. This applies to **production processes, products and services** themselves, as well as (the organisation of) their **sale/provision/delivery**. Sometimes digitalisation affects an entire value chain; sometimes only parts of it.

- New digital manufacturing/production processes, such as 3D printing,⁸ can affect the business model of otherwise 'analogue' products and services, as well as new (digital) products and services. In a broad sense, this includes the digitalisation of work organisation and the labour performed in the production process, for instance in the form of telework.
- New digital products and services emerge that are specific to this environment, such as smartglasses and smartwatches, social media consulting, and the development of smartphone applications. Some of these inherently digital products and services may, however, be produced or sold in an 'analogue' way.
- Finally, the (organisation of the) provision, sale or delivery method of a product or service may become digitalised. This includes the online ordering or purchasing of products and services, or the online organisation of their delivery. These products and services may be of an otherwise 'analogue' nature, or digital in themselves.

Online platforms and the online platform economy

Within digitalised societies and economies, a crucial role is played by **online platforms**. These can be conceived as digital 'locations': online spaces where users can obtain information or interact socially or economically. They are, in a way, the digital version of public squares, social clubs or marketplaces.

There is no consensus on a single definition of online platforms, and a clear-cut definition would probably be too narrow, or conversely apply to a very wide range of Internet services.⁹ According to the European Commission's rather wide understanding, it comprises, *inter alia*, search engines, social media, e-

⁴ G. Valenduc and P. Vendramin, 'Digitalisation, between disruption and evolution', 23(2) *Transfer* (2017), p. 122.

⁵ B. Fabo, J. Karanovic and K. Dukova, 'In search of an adequate European policy response to the platform economy', 23(2) *Transfer* (2017), pp. 163-175.

⁶ C. Degryse, 'Digitalisation of the economy and its impact on labour markets', ETUI Working Paper 2 (2016), p. 17.

⁷ See: <https://ec.europa.eu/digital-single-market/en/desi>.

⁸ J. Junte, '3D printing and additive manufacturing: The implications for OSH', OSHA Discussion Paper, available at: <https://osha.europa.eu/en/tools-and-publications/publications/3d-printing-new-industrial-revolution/view>.

⁹ B. Martens, 'An economic policy perspective on online platforms', JRC/IPTS Digital Economy Working Paper 5 (2016), available at: <https://ec.europa.eu/jrc/sites/default/files/JRC101501.pdf>.

commerce platforms, app stores, price comparison websites and ad networks.¹⁰ To distinguish an online platform from a ‘mere’ website, it seems that a certain dynamic element would have to be involved, in that users can generate content and that there can be interaction or otherwise exchange of some kind, rather than just a static presentation of information.

Accordingly, the **online platform economy** could be understood as the entire economy comprising, involving and resulting from these digital platforms. Specifically, as is the case with digitalisation generally, online platforms can:

- be used in the production process (e.g. to organise work among a team of workers);
- constitute the product or service itself (e.g. social media, search engine or online encyclopaedia); and/or
- be the method of (organising the) provision, sale and delivery of goods and services (e.g. e-commerce websites, transport apps, food delivery apps).

The online platform economy is thus best understood as a part of the broader digital economy, characterised by the role played by online platforms in various parts of the economic ‘value chain’.

Collaborative and sharing economy

That third application of the online platform economy, specifically (the organisation of) the provision of services via online platforms, can be considered to comprise the activities that are sometimes categorised under the heading of the ‘**collaborative economy**’.

The European Commission defines the collaborative economy as ‘business models where activities are facilitated by collaborative platforms that create an open marketplace for the temporary usage of goods or services often provided by private individuals. The collaborative economy involves three categories of actors: (i) service providers who share assets, resources, time and/or skills — these can be private individuals offering services on an occasional basis (“peers”) or service providers acting in their professional capacity (“professional services providers”); (ii) users of these; and (iii) intermediaries that connect — via an online platform — providers with users and that facilitate transactions between them (“collaborative platforms”). Collaborative economy transactions generally do not involve a change of ownership and can be carried out for profit or not-for-profit.’¹¹

To the extent that the ‘collaborative economy’ would necessarily include an online platform, this definition seems too narrow for its label. It would be more precise and accurate to speak consistently of ‘**online collaborative economy**’ if the use of online platforms is considered an integral part of the phenomenon. After all, similar ‘collaborative’ activities continue to exist even without the involvement of online platforms, or any technology whatsoever.

More importantly, to the extent that it includes not-for-profit activities, the definition on the other hand seems too wide for its label, in that it does not coincide with the general understanding of the term ‘economic’ (as well as ‘business model’ and ‘marketplace’, which are also included in the definition), and is bound to lead to confusion. It is true that, on a purely theoretical level, ‘economy’ could be understood as a model to organise the use of resources including without monetary transactions, but this does not seem to coincide with the common definition of ‘economic’, which most would associate with some element of commerciality/monetary transaction/profit-making. If not-for-profit activities are to be included, it would be more appropriate to speak of a ‘**collaborative society**’.

Indeed, online platforms can of course also be used for such non-economic purposes, between citizens in a not-for-profit, cooperative way. They can serve to bring together citizens with an offer and citizens with a demand, without payment altogether, with payment of a symbolic amount or, possibly, cost-sharing. Couch-surfing is an example, whereby free temporary accommodation is offered by citizens to

¹⁰ European Commission, ‘Online platforms, accompanying the document Communication on Online Platforms and the Digital Single Market’, SWD(2016) 172, p. 1.

¹¹ European Commission, ‘A European agenda for the collaborative economy’, COM(2016) 356 final.

other citizens in their homes, via an online platform.¹² Carpooling through Blablacar, for instance, is another.¹³ These citizen-to-citizen sharing initiatives are clearly not new in themselves, but in the digital society they are facilitated by online platforms, which potentially allow more users to be connected to each other in easier ways. This peer-to-peer sharing of goods, services and facilities, organised through online platforms, is what would be characteristic of an online 'collaborative society', or alternatively '**sharing society**'. They are *not* to be included in the concept of (online) 'collaborative economy', for the above-mentioned reasons. The often-heard term (online) 'sharing economy' is for the same reasons an inappropriate name, a contradiction in terms (oxymoron) that should best be abandoned.

Accordingly, the online collaborative economy can be understood to comprise a particular subset of economic activities (often temporary service provision by non-professionals) within the broader online platform economy, which is in turn situated in the overarching digital economy. It should be carefully distinguished from genuine sharing and not-for-profit activity by citizens, which are not of an 'economic' nature, and as such should be excluded from the concepts of the online collaborative economy, the online platform economy and the digital economy as a whole.

The gig economy, on-demand economy, online platform work and various forms of atypical work

Online platforms can have an impact on the work performed in the economic 'value chain'. As mentioned above, online platforms can play a role in

- the organisation of work in the 'production process', for instance by constituting the method of dividing tasks on a project between a team of workers and facilitating the ensuing collaboration within a company, or by matching a demand for a work project with a worker who is willing to perform it (these can be digital tasks or manual jobs, high-skilled or low-skilled, alike); as well as in
- the (organisation of) the delivery/provision/sale of a good or service, for instance by allowing consumers to book and pay a taxi driver/car driver via a smartphone application.

It is in relation to this specific manifestation of the online platform economy, which involves the **provision of labour** in some way, that some of the most politically controversial issues seem to have arisen, and the impact of the online platform economy on OSH can be expected to be most pronounced there, as discussed in section 3 below.

As will be discussed in more detail in section 2 below on regulatory and policy challenges, the involvement of online platforms in the organisation and provision of (digital and manual) labour tends to complicate the classification and regulation of the responsibilities as regards the work in question. The almost inevitably triangular (or multilateral) nature of the arrangements, their often temporary nature, the sometimes relatively high measure of autonomy of the worker in terms of working place and time, the at times informal (citizen-to-citizen) nature of some of the activities and the absence of a common workplace all challenge the application of the concept of the standard, permanent, binary employment relationship.

These challenges presented by 'atypical employment/working relationships' do not seem to be unique to the online platform economy, or even the digital economy, in a conceptual sense. Partially because of the development of labour markets and society, partially because of the economic crisis (and labour market policy responses thereto), and facilitated by the digitalisation of society and the economy, the past few decades have seen an increase in the use of non-standard forms of employment and work, such as **casual work**, **on-call work**, **temporary agency work**, **informal work** and **dependent self-**

¹² <https://www.couchsurfing.com/>. The hosts are obliged to offer their couch entirely free of charge. Couchsurfing International does recommend 'that a guest show their appreciation by cooking a meal, taking the host out, bringing a small gift or offering some other gesture'.

¹³ <https://www.blablacar.com/>. Drivers can set a price for a seat in their car only within a limited discretionary margin of the price set by Blablacar. The aim is to prevent drivers making a profit from carpooling, and the price margins are therefore set at a level that compensates for the fuel use and wear and tear of the car.

employment.¹⁴ Many of the working arrangements set up by the online platforms coincide with, or closely resemble, these forms of atypical work or a mixture thereof, sometimes with the only difference that they make use of a digital tool. **Gig work** (working not on a continuous basis but in the form of one-off assignments) could, for instance, be seen as a form of casual or on-call work. It can comprise work performed on demand through an online platform but also other types of freelance-type activities, digitally facilitated or not.

This broader development, including all types and causes of non-standardisation of work, is sometimes referred to as the '**on-demand economy**' or the '**gig economy**'. While some tend to conflate these terms with the concept of the (online) platform economy, it would seem appropriate to distinguish them, while recognising their partial overlap. In terms of labour relations and conditions, the gig economy/on-demand economy would be conceived of as significantly broader than the (online) platform economy, 'involving all sorts of contingent employment relationships',¹⁵ as a 'labor trend in which more [workers] are making more of their livelihoods through some form of freelance or contract work'.¹⁶ At the same time, the online platform economy is significantly broader than the gig economy or on-demand economy in another sense, in that it does not exclusively comprise online platform activities related to or having an impact on the provision of labour, and indeed not only work in the form of 'gigs' or 'on demand'.

What is sometimes overlooked is that online platform working arrangements can at times resemble very old working arrangements, presented in a new digital 'jacket', such as **piecework** (a type of employment in which a worker is paid a fixed piece rate for each unit produced or action performed regardless of time), which was very common under the guild system before the 18th century as well as in the Industrial era, and **putting-out work/homework**, a form of subcontracting widely used in early times of industrialisation whereby work is contracted by a central agent to subcontractors who complete work in off-site facilities either in their own homes or in workshops.¹⁷ This putting-out/home work closely resembles certain aspects of **crowdwork**. Crowdwork can be defined as '*the organizing of outsourcing of tasks to a large pool of workers*', potentially provided to a large pool of customers/employers, through online platforms.¹⁸ In addition to home work, it has been noted that 'crowdwork shares many similarities with other forms of non-standard employment such as temporary work, part-time work or temporary agency work. In addition to the casual and unstable nature of the work, crowdwork as well as other work in the "on-demand economy", is often portrayed as additional income for secondary earners, and thus, not real work, or work that merits traditional labour protections'.¹⁹

While therefore, as stated, all these forms of atypical work are not unique to labour provided through online platforms, it should be recognised that the features of online platform work:

- are particularly suited to various forms of atypical work and thus operate as a catalyst for it;
- often result in a mixture of various types of atypical employment (triangularity resembling temporary agency work, digitalisation leading to autonomy in workplace and time and thus to potentially dependent self-employment, crowd-sourcing leading to a casual, on-call nature of the working arrangement, etc.).

Thus, on balance, it seems fair to say that 'it is important not to overstate, and at the same time not to underestimate, the magnitude of the problem. The [online platform] economy may be revolutionary in some respects [...], but in the current context the challenges it creates are not unlike those we have

¹⁴ Eurofound, *New Forms of Employment* (Luxembourg, Publications Office of the European Union, 2015).

¹⁵ B. Rogers, 'Employment rights in the platform economy: Getting back to basics', 10 *Harvard Law and Policy Review* (2016), p. 480.

¹⁶ E. Hong, 'Making it work: A closer look at the gig economy', *Pac Standard*, 23 October 2015.

¹⁷ M. Risak and J. Warter, 'Legal strategies towards fair employment conditions in the virtual sweatshop', Conference Paper presented at the Regulating for Decent Work 2015 Conference, Geneva, available at: http://www.rdw2015.org/uploads/submission/full_paper/373/crowdwork_law_RisakWarter.pdf.

¹⁸ See J. Prassl and M. Risak, 'Uber, Taskrabbit, & co: Platforms as employers? Rethinking the legal analysis of crowdwork', *Comparative Labour Law and Policy Journal* (forthcoming), available at: <http://labourlawresearch.net/papers/uber-taskrabbit-co-platforms-employers-rethinking-legal-analysis-crowdwork>. See also V. De Stefano, 'The rise of the "just-in-time workforce": On-demand work, crowdwork and labour protection in the "gig-economy"', ILO Conditions of Work and Employment Series 71 (2016), p. 1.

¹⁹ J. Berg, 'Income security in the on-demand economy: Findings and policy lessons from a survey of crowdworkers', ILO Conditions of Work and Employment Series 74 (2016), p. 1.

already been struggling with for many years [...]. These challenges certainly require discussion, and justify debates regarding the best way to address the new problems, but there is no reason to see them as paradigm-shifting'.²⁰

As will be discussed in section 2 below, because some of the 'old wine' is presented in 'new bottles', and because of the increased variety, complexity and scale of the atypical working arrangements it facilitates, online platform work has presented challenges to regulators, who are unsure of whether or not the existing rules apply/ought to apply in these cases, and in what way. This lack of regulatory control and uncertainty could be argued to have led, in some cases of online platform work, to rather extreme forms of atypicality.

Conclusion: the online (labour) platform economy and online platform work

In the digitalised economy, which is embedded in — and facilitated by — a digitalised society, a crucial role is played by online platforms. These platforms, understood as dynamic websites that constitute digital 'public squares' or 'marketplaces', can affect all stages of the economic 'value chain' in various ways: in the production process, in terms of products or services themselves, and in the (organisation of the) delivery/provision of products and services.

Sometimes, this has an impact on the provision of labour. In particular, online platforms can play a role in:

- the organisation of work in the 'production process', for instance by constituting the method of dividing tasks on a project between a team of workers and facilitating the ensuing collaboration within a company, or by matching a demand for a work project with a worker who is willing to perform it (digital or manual jobs, at all skill levels); as well as in
- the (organisation of) the delivery/provision/sale of a good or service, for instance by allowing consumers to book and pay a taxi-driver/car-driver via a smartphone application.

This gives rise to what could be called '**online (labour) platform work**', which includes all labour provided through, on or mediated by online platforms, and which features a wide array of standard and non-standard working arrangements/relationships, such as (versions of) casual work, dependent self-employment, informal work, piecework, home work and crowdwork, in a wide range of sectors. The actual work provided can be digital or manual, in-house or outsourced, high- or low-skilled, on- or off-site, large- or small-scale, permanent or temporary, all depending on the specific situation. It is this **online platform work** that is central in the possible OSH implications of the online platform economy, and this will therefore constitute the focus on the present study.

²⁰ G. Davidov, 'The status of Uber drivers: A purposive approach', *Spanish Labour Law and Employment Relations Journal* (2017), forthcoming.

2 The regulation of online platform work

Factors complicating the regulation of the online platform economy

As becomes immediately clear from only a quick glance at the media coverage, political debates and academic research alike, online platform companies have generally proven difficult to regulate, for a variety of reasons.

Firstly, the online platform sector is highly dynamic, with new businesses being created every single day, and others disappearing or being quickly integrated into other digital businesses. The online platform economy is thus, from a regulatory perspective, a **moving target**. This dynamism (or volatility) is partially due to the relatively low entry-barrier to the creation of a new online platform and thus the realisation of a new business idea, which is as easy as creating a dynamic website (or having it created for you), partially due to a ‘combination of new industrial revolution and gold rush’,²¹ partially due to socio-cultural factors such as the influence of Generation Y (millennials)²² and partially due to changed labour-market and economic conditions since the 2008 economic crisis.

Secondly, the approach of most of the online platform companies has been to ‘grow first and ask compliance-related questions later’,²³ which has been labelled a **‘fait accompli strategy’**.²⁴ Instead of first ensuring official permission to operate through following the existing administrative procedures, online platform companies have often simply rolled out their activities and gained market share without asking, confronting regulators with a *de facto* situation that proves much more difficult to change. In particular, this strategy (i) has prevented these companies from being subjected to existing regulations from the get-go, which would have made it harder for them to argue later that they should be exempted from these regulations later; (ii) has allowed the companies to acquire wealth and influence, helping them to obtain desired political results (which are often to be exempted from regulation); and (iii) has allowed these companies to first gain users (customers, clients, employers, workers, etc.) who have become reliant on them and who may now therefore act in their political support.

Thirdly, the activities of online platform companies have been presented as **‘new’ and ‘unprecedented’**, as novel features emerging from rapid technological change and a new type of economy, to support the argument that they should not be treated similarly to any existing economic activities. For regulators, it has proven difficult to sort ‘the old’ from ‘the new’, compounded by the fact that the emergence of the online platform economy coincides with many related, yet different, trends and concepts, which — as discussed in the previous section — are often conflated and confused. Regulators may also fear negative political consequences in appearing unwelcoming of these ‘new’ developments, which are on the one hand presented as holding great economic promise and on the other hand presented as part of the communitarian idea of a ‘sharing society’ (even if this is incorrect as explained in section 1 above).

Fourthly, many online platform companies have taken **deliberate, pro-active steps to try and render existing regulations inapplicable**, where possible. These companies argue that they are simple intermediaries, digital ‘bulletin boards’, that merely serve to bring people together, and that it is those people that they bring together that engage in the real economic activity in question — not the online platforms themselves. This line permeates the communications and human resources (HR) strategies of many online platforms, which seek to have this mentioned explicitly in the agreements/contracts that they conclude with users, where it is often stated that there is no employment relationship between the platform and the user, that workers are independent contractors, and that the platform as intermediary can incur no liability for anything related to the transaction between the users it has connected with each other. This assertive approach makes it harder for regulators to intervene and requalify the status,

²¹ C. Degryse, ‘Digitalisation of the economy and its impact on labour markets’, ETUI Working Paper 2 (2016), p. 8.

²² L. Bluekens, ‘Is de deeleconomie goed voor iedereen?’, *NPO Focus*, available at: <https://www.npofocus.nl/artikel/7450/is-de-deeleconomie-goed-voor-iedereen>.

²³ V. Jain, ‘Investors must confront the on-demand economy’s legal problems’, *Techcrunch*, 12 January 2015, available at: <https://techcrunch.com/2015/01/12/investors-must-confront-the-on-demand-economys-huge-legal-problem/>.

²⁴ C. Degryse, ‘Digitalisation of the economy and its impact on labour markets’, ETUI Working Paper 2 (2016), p. 15.

obligations and rights of these companies and their workers. It is also highly dependent on intervention by the judiciary, while bringing a court case is not often a realistic option for online platform workers.

Fifthly, it should be recognised that some of the online platform companies' activities do **objectively pose difficulties in relation to the pre-established regulatory categories**. For instance, because of the increased variety, complexity and scale of the atypical working arrangements it facilitates, online platform work presents a particularly difficult set of questions in terms of employment law, as will be discussed further below. Regulators (in a broad sense, including courts) may be genuinely unsure of whether or not the existing rules apply/ought to apply in some of these cases, and in what way. Furthermore, there is an enormous heterogeneity in the online platforms and their activities, in terms of the way they are organised, the sectors they affect/belong to, their scale and scope, the type of users they target, etc. This makes it difficult to apply a one-size-fits-all approach, and seems to argue for case-by-case assessment and treatment, implying a much higher burden for regulators. Moreover, some online platform companies' activities are by their nature **transnational**, and therefore pose complicated questions about conflict of laws and may warrant transnational policy responses instead of, or in addition to, national ones.

On a final note, it should be pointed out that, in addition to regulatory challenges, the online labour platform economy might also present some **regulatory opportunities**. In some sectors, the online labour platform economy 'transfers transactions that were probably conducted in the **shadow economy** to the formal sector'.²⁵ Indeed, it would seem that online platform companies increase the visibility and institutionalisation of many odd-jobs and informal transactions that before, in all likelihood, took place 'off the books' and can thereby facilitate at least the declaration of these activities to the competent authorities — even if the question about which regulations to apply, and to whom, remains open.

Regulatory and policy challenges of online platform work

The regulatory challenges or questions raised by the online platform economy are manifold and 'span the entire map of the legal world, including work, tax, safety and health, quality and consumer protection, intellectual property, zoning, and anti-discrimination'.²⁶ For some of these areas it is easier than for others (at least in theory) to extend the application of existing regulations. A particularly contested area is that of **labour/employment/social law, including OSH**, which is the particular concern of the present study.

First and foremost, as already mentioned further above, the involvement of online platforms in the organisation and provision of (digital and manual) labour tends to complicate the classification and regulation of the responsibilities as regards the work in question. The almost inevitably triangular (or even multilateral) nature of the arrangements, their often temporary nature, the sometimes relatively high measure of autonomy of the worker in terms of working place and time, the at times informal (citizen-to-citizen) nature of some of the activities and the lack of a common workplace seem to **challenge the application of the concept of the standard, permanent, binary employment relationship**. In many jurisdictions, the lack of an employment relationship means that the platform worker will be considered self-employed, often rendering labour law and OSH regulations inapplicable.

Secondly, these same features of online platform work tend to **hamper the collective organisation of workers, and thus the development of social dialogue as a regulatory alternative**. Most workers on online platforms do not know each other, there is a high turn-over of workers, set working patterns may be lacking, workers may not consider the work they provide for/on/via the online platform their primary professional activity, and putting workers in direct competition with each other — through individual ratings and the competitive method of work allocation — is an operational feature of many online platforms. These factors are not conducive to the solidarity and collaboration needed for effective

²⁵ E. Dagino, 'Labour and labour law in the time of the on-demand economy', 6 *Revista Derecho Social y Empresa* (2016), p. 8; see also I. Maselli et al., 'Five things we need to know about the on-demand economy', CEPS Essay 21 (2016).

²⁶ O. Lobel, 'The law of the platform', Legal Studies Research Paper Series 212 (2016), p. 23.

unionisation,²⁷ and the fact that they may be qualified as ‘self-employed’ may mean that such unionisation is legally excluded.

This section will briefly examine the three features of online labour platform work that could be considered most problematic from an employment/OSH perspective.

- **(i) Triangularity of the (employment?) relationship**

In most cases, the fact that work is provided on/via an online platform introduces a triangular aspect into the relationship between the work provider and the work recipient. This is different only when the online platform is not an independent entity, but instead a work organisation tool used within a company for the division of work in an in-house setting, or when the work is commissioned by the platform itself as the end-user. Apart from these situations, **online platform work will feature (at least) three parties in every transaction:** (i) the person/entity who wants some kind of work performed for them, (ii) the person/entity who provides that work as requested and (iii) the online platform company that brings these two together.

This is, in principle, not very different from work provided through **work agencies**. Having previously been outlawed or strictly controlled in most EU Member States, its use was well established by the early 2000s.²⁸ The main difference may be seen to lie in the fact that, in most cases, the online platform worker is not physically integrated into the company that commissions the work, but instead performs the assignment from home, without ever meeting anyone from the company that the assignment is for. This, however, would constitute a challenge related to the mobile aspect of online platform work, rather than being an issue of triangularity. Some (or all) of the commissioning companies’ regular workers may also work exclusively off-site. Another difference may be argued to lie in that some of the assignments typically posted on online platforms are extremely small scale (‘micro-tasks’), such as the translation of a single sentence,²⁹ which one would not imagine being the type of work-assignment commissioned in a ‘traditional’ work agency. This, however, would be related to the challenge of the work being (hyper-)temporary, not to the issue of triangularity as such.

At EU level, temporary agency work is regulated by Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work.³⁰ The Directive applies only to situations where workers ‘have a contract of employment or employment relationship with a temporary-work agency who are assigned to user undertakings to work temporarily under their supervision and direction’.³¹ When the Directive applies, this in principle means that temporary agency workers have to be treated equally to other workers in the user undertaking, as regards basic working and employment conditions.

It is clear that the application of this Directive to online platform work is not straightforward. Firstly, although the notion of ‘temporary work agency’, defined as ‘any natural or legal person who, in compliance with national law, concludes contracts of employment or employment relationships with temporary agency workers in order to assign them to user undertakings to work there temporarily under their supervision and direction’,³² could arguably comprise online platforms, many persons who assign work via online platforms would be difficult to qualify as ‘user undertakings’, since they act as **private persons**.

A second issue lies in the requirement of ‘**a contract of employment or employment relationship**’ (as defined by national law), which most platforms will deny having with the platform workers, who are instead qualified as independent contractors/self-employed. In many jurisdictions, however, this

²⁷ See also M. Graham et al., ‘Digital labour and development: Impacts of global digital labour platforms and the gig economy on worker livelihoods’, 23 *Transfer* (2017), p. 155.

²⁸ Z. Adams and S. Deakin, ‘Institutional solutions to precariousness and inequality in labour markets’, Centre for Business Research, University of Cambridge Working Paper 463 (2014), p. 14.

²⁹ See K. Milland, ‘Slave to the keyboard: The broken promises of the gig economy’, 23 *Transfer* (2017), pp. 229-231.

³⁰ OJ L 327, 5.12.2008, pp. 9-14.

³¹ Article 1(1) of Directive 2008/104/EC.

³² Article 3(1)(b) of Directive 2008/104/EC.

question is one that has to be determined objectively by reference to the reality of the working arrangement, and accordingly misqualifications can be corrected by courts, as has happened with many online platform workers in both the USA and Europe. Within that assessment, triangularity itself should not exclude the possible existence of an employment relationship between the platform and the worker, otherwise 'traditional' temporary agency work could not exist either.

As will be discussed also in subsection c below, factors that can be expected to play a role are (i) the level of (potential) control exercised by the platform over the worker (in terms of how, when and where the work is provided), (ii) the (method of) salary/payment and the commission taken by the online platform and (iii) the duration of the relationship between the platform worker and the platform. The more 'disinterested' and 'disengaged' the intermediation by the platform is, and the shorter the overall duration of the relationship between the platform and the platform worker, the less likely it is that there is an employment relationship. In that case, it remains to be seen whether there is a potential employment relationship between the person/entity who wants some kind of work performed for them and the person/entity who provides that work as requested. While there may be instances where such an employment relationship could be found to exist, in the majority of actual cases the one-off, 'contracting' nature of the working arrangement, and the often private nature of the commissioning party, would seem to exclude it.

- (ii) **Temporary (task-based?) nature**

The second complicating element in terms of the regulation of online labour platform work is the fact that the work provided often appears to be of a temporary nature. This regulatory challenge should, however, be nuanced.

First of all, in principle, temporariness does not exclude the existence of an employment relationship. **Fixed-term work** may still be qualified as a non-standard form of employment, but it is a feature of most contemporary labour markets and operates relatively stable within a regulatory framework. At EU level, Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP³³ applies to workers 'having an employment contract or relationship entered into directly between an employer and a worker where the end of the employment contract or relationship is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event'.³⁴ These workers are entitled to treatment equal to permanent workers in the company where they are temporarily employed. While the application of this Directive itself to online platform workers is, once again, not straightforward, because of the need of an 'employment contract or relationship' (between the platform and the platform worker), **the fact that the work is temporary and/or on a task basis clearly does not in itself rule out the existence of such a relationship.**

Furthermore, it is important to distinguish between the temporary nature of the relationship between the platform and the platform worker (or, alternatively, the platform worker and person/entity requesting the work) and the temporary nature of the tasks performed. Of course, if the duration of the work is considered only in relation to a single assignment, it can be extremely short (e.g. a single taxi-ride, the translation of a single sentence). Although the standard understanding of fixed-term work can comprise task-based work, it might be an untenable stretch to qualify every separate micro-task as a separate fixed-term employment relationship. However, while depending on the circumstances there may be the possibility for the platform worker to only ever provide one single micro-task as the full extent of their 'online platform work career', most platform working arrangements (the **umbrella relationship**) are designed to last significantly longer — perhaps indefinitely, thus resembling an open-ended contract without any fixed hours, much like a zero-hours contract.

The fact that many online platform working arrangements could potentially be considered analogous to zero-hours, on-call or casual employment in terms of their temporary and intermittent nature does not,

³³ OJ L 175, 10.7.1999, pp. 43-48.

³⁴ Clause 3(1) Directive 2008/104/EC.

however, resolve (all) the problems of labour law and OSH application, which have also arisen in the context of those other non-standard forms of employment.³⁵

- **(iii) Autonomous working**

The third main challenge from a labour law/OSH perspective, is the fact that online platform work features a relatively high degree of autonomy for the platform worker, in terms of **when and where to provide the work**. This autonomy is what makes online platform work most resemble self-employment, and furthermore complicates the application of labour and OSH rules in practical terms.

Whether the online platform work is digital or manual, it will generally **not be performed on premises provided by the online platform**. The online platform company may, in fact, have no premises whatsoever. The work assignment and coordination takes place online, via a website, smartphone application or other digital tool. The work itself is then performed at the premises of the person/entity commissioning the work (e.g. a person's home for cleaning services), on the road (e.g. delivery services) or at a place entirely of the workers' choosing (e.g. anywhere, on their laptop, for digital tasks). This is, in itself, not unique to online platform work. Many 'traditional' companies providing these same services (delivery, home maintenance, transport) operate in similar ways, and they too may not have any premises and instead assign work remotely (via phone or the internet). The more 'traditional' companies may, however, provide the necessary equipment for the worker to perform their tasks, and so have some common 'collection point', while online platforms will generally require platform workers to work with their own equipment (e.g. their own car, their own tools). While not conclusive in itself, the worker's own investment in terms of materials may be another feature that under traditional regulatory categories points to self-employment rather than employment. The lack of a fixed workplace may not be unique to online platform work, but it does pose obvious challenges from a perspective of the application and enforcement of many OSH rules, even where an employment relationship is found to exist. How can the employer ensure the safety of places over which he or she has no influence? And how can labour inspectorates enforce these rules?

Similar considerations apply as regards working hours. In theory, online platform workers have full control over the hours they work, as they can **log on and off whenever they want**, especially between tasks. In practice, however, this autonomy may be much more constrained. First of all, to ensure their efficient operation, some online platforms oblige or strongly incentivise platform workers to have a certain amount/timing of online presence. Accounts may be deactivated because of 'prolonged' inactivity. Secondly, within the framework of a task, the worker is under pressure to complete the task within the agreed timeframe or sooner, in order to maintain high ratings and thus ensure future work, or even to be able to obtain payment for the task itself, and therefore may work in an excessive burst without taking breaks or nightly rest. Thirdly, in the case of digital tasks, the global dimension of online platform work means that the worker may have to adapt to the time zones of (various) international clients, potentially causing a highly disrupted working/resting pattern. Fourthly, if online platform work is the worker's main source of income, they will be incentivised to accept as many tasks as possible, especially where pay is low, leading to excessive working hours. Whether or not working time regulations apply to online platform workers again will in most jurisdictions depend on whether or not there is an employment relationship. Autonomous workers who can determine the organisation of their own working time are not necessarily excluded from being in an employed relationship, however, as EU Directive 2003/88/EC on the organisation of working time³⁶ shows. While the Directive does allow many exceptions in the terms of working time limits for such autonomous workers, it does apply to them (Article 17(1)(a)).

Regulatory and policy options in relation to online platform work

Several different policy options exist to respond to the above-mentioned regulatory challenges in the context of online platform work, and non-standard forms of employment more generally. An exhaustive

³⁵ See V. De Stefano, 'The rise of the "just-in-time workforce": On-demand work, crowdwork and labour protection in the "gig-economy"', ILO Conditions of Work and Employment Series 71 (2016), pp. 6-9.

³⁶ OJ L 299, 18.11.2003, pp. 9-19.

discussion is not within the scope of this research, but a brief discussion is nevertheless also necessary to provide a background of the overview of national policy and regulatory responses as discussed in Part 2 of this study.

▪ (i) **Application/extension of existing regulations to online platform work**

A first approach is to **apply/extend existing regulations to online platform work**, possibly by a wide interpretation of the concept of employment relationship. This is, in essence, a ‘baseline’ or ‘status quo’ approach, followed in most EU Member States either in the absence of a defined policy approach or as a deliberate decision. Currently, as will also be discussed in Part 2 concerning individual EU Member States, there is a significant amount of litigation before national courts concerning the employment status of online platform workers. As a more pro-active regulatory strategy, jurisdictions could support such litigation by individuals and complement it by litigation by public authorities such as labour inspectorates, tax authorities and social security offices.

In its most conservative version, the approach would be limited to **filtering out of the online platform economy those practices that, regardless of the companies’ assertions, in reality squarely fall within the pre-existing regulatory categories** and to have the rules applied to them accordingly. In a more expansive approach, this would entail **relaxing and adapting some of the pre-existing criteria that determine the existence of an employment relationship, to include online platform working arrangements** that currently fall just outside the pre-existing categories but are considered sufficiently similar to merit their inclusion. This has happened often in the past when, in dealing with new challenges posed by new ways of working, the definition of ‘employee’ has been expanded accordingly.³⁷

Nerinckx has usefully provided an overview of factors that are applicable in most EU jurisdictions to determine whether a platform worker is an employee or self-employed (Table 1).³⁸

Table 1: An overview of factors determining whether a platform worker is an employee or self-employed

Factor	Elements indicating employee status	Elements indicating self-employed status
Agreement	<ul style="list-style-type: none"> ▪ Fixed remuneration ▪ Guaranteed remuneration in case of illness, holiday, etc. ▪ Expenses refunded ▪ Non-competition or exclusivity clause ▪ Training clause 	<ul style="list-style-type: none"> ▪ Payment after invoice ▪ Payment per performance ▪ No guaranteed remuneration (i.e. not paid when no services are performed) ▪ Costs/expenses borne by the service provider ▪ Commitment to attain a certain result regarding the agreed work
Work organisation	<ul style="list-style-type: none"> ▪ Precise and detailed description of tasks and the way they are to be performed ▪ Working materials and equipment provided by the platform ▪ Exclusivity ▪ Presenting oneself as a part of the platform towards third parties 	<ul style="list-style-type: none"> ▪ Work organised freely ▪ Workplace freely chosen ▪ Own working materials and equipment ▪ Possibility of recruiting own staff with a view to performing the agreed services ▪ Possibility of having a replacement perform the work ▪ Possibility of working for several companies/platforms ▪ Extensive liability

³⁷ A. Tolodi-Signes, ‘The “gig-economy”: Employee, self-employed or the need for a special employment regulation?’, 23 *Transfer* (2017), p. 197.

³⁸ S. Nerinckx, ‘The “Uberization” of the labour market: Some thoughts from an employment law perspective on the collaborative economy’, 17 *Springer: ERA Forum* (2016), p. 261.

Factor	Elements indicating employee status	Elements indicating self-employed status
Working time organisation	<ul style="list-style-type: none"> ▪ Working hours imposed by the platform (check-in and -out obligations; daily timesheets) ▪ Holiday period (number and timing) imposed ▪ Obligation to justify absences 	<ul style="list-style-type: none"> ▪ Working hours chosen by the service provider ▪ Holiday period (number and timing) freely chosen by the service provider (for platforms such as Helping, TaskRabbit, Zaarly, etc. based on services to be provided)
Possibility of exercising hierarchical supervision	<ul style="list-style-type: none"> ▪ Possibility of precise and detailed instructions by the platform ▪ Possibility of supervision of the performance of the work and of compliance; reporting duties during performance or afterwards ▪ Internal disciplinary sanctions following control by hierarchical superior 	<ul style="list-style-type: none"> ▪ Only general directives of an economic nature are given by the employer/client ▪ Reporting only afterwards on the results ▪ Responsibility and decision-making power in respect of the financial means ▪ Personal and considerable investment in the company and participation in the profits and losses of the company

It is clear that these factors will give rise to a complex case-by-case assessment of every online platform working arrangement, and that much will depend on the relative weight attached to the various criteria.

It has been argued that these traditional conditions may be ill suited to capture the inherent features of online platform work and should therefore be adapted or eliminated as criteria to determine the status of platform workers,³⁹ and that a **purposive approach** should be taken.⁴⁰ An important underlying principle of the assessment of employee or self-employed status is the anti-domination principle: 'basic employment duties deter economic and social practices that undermine workers' individual dignity and equal social standing; such duties also prohibit excessive concentrations of wealth or power, encouraging more egalitarian and democratic political economy. Control and economic dependence are therefore not important in themselves, but as signals that workers are suffering domination'.⁴¹ This approach could be implemented by courts, where workers would be presumptively classified as employees 'where they are subject to dyadic domination via a putative employer's economic power or its power over their work; and where workers have so few skills that they are subject to structural domination in the market'.⁴² The approach could also be taken by legislatures, adapting existing criteria in legislation to reflect this purposive approach.

Another version of this approach to adapting existing employment law to better include online platform work therein would be to **shift the focus from the worker to the employer**,⁴³ adopting a functional concept of the latter, to determine the respective responsibilities of the various parties involved in an online platform working arrangement depending on the context. The five main functions of an employer are conceived as (i) inception and termination of the employment relationship (all powers of the employer

³⁹ A. Baylos Grau, 'La "huida" des derecho des trabajo', *Jacobinmag*, 19 September 2000, discussed by A. Tolodi-Signes, 'The "gig-economy": Employee, self-employed or the need for a special employment regulation?', *23 Transfer* (2017), pp. 193-205.

⁴⁰ See A. Baylos Grau, 'La "huida" des derecho des trabajo', *Jacobinmag*, 19 September 2000, discussed by A. Tolodi-Signes, 'The "gig-economy": Employee, self-employed or the need for a special employment regulation?', *23 Transfer* (2017), p. 199; B. Rogers, 'Employment rights in the platform economy: Getting back to basics', *10 Harvard Law and Policy Review* (2016), pp. 479-520; G. Davidov, 'The status of Uber drivers: A purposive approach', *Spanish Labour Law and Employment Relations Journal* (2017), forthcoming.

⁴¹ B. Rogers, 'Employment rights in the platform economy: Getting back to basics', *10 Harvard Law and Policy Review* (2016), p. 483.

⁴² *Ibid.*, p. 512.

⁴³ As proposed by J. Prassl and M. Risak, 'Uber, Taskrabbit, & co: Platforms as employers? Rethinking the legal analysis of crowdwork', *Comparative Labour Law and Policy Journal* (forthcoming), on the basis of P. Davies and M. Freedland, 'The complexities of the employing enterprise' in G. Davidov and B. Langile (eds), *Boundaries and Frontiers of Labour Law* (Oxford, Hart Publishing, 2006) p. 274.

over the very existence of its relationship with the employee, from the ‘power of selection’ to the right to dismiss), (ii) receiving labour and its fruits (duties owed by the employee to the employer, specifically to provide his or her labour and the results thereof), (iii) providing work and pay (employer’s obligations towards its employees, e.g. the payment of wages), (iv) managing the enterprise-internal market (control over all factors of production, up to and including the power to require both what is to be done and how) and (v) managing the enterprise-external market (economic activity in return for potential profit, while also being exposed to any losses that may result from the enterprise).⁴⁴ In some cases, this focus on the employer rather than the worker may lead otherwise difficult-to-classify platform work constructions to fall squarely within the concept of an employment relationship.⁴⁵ In other cases, functions may sometimes be jointly exercised by platforms, customers and potentially even the crowdworker him- or herself.⁴⁶ To accommodate these different work arrangements, the proposal would be to ensure that the exercise of one or more employer functions triggers the concomitant regulatory responsibilities, limited, however, to the relevant domain or domains. Employment law obligations may therefore be spread across multiple legal entities. Thus, the party responsible for providing work and pay may be responsible for compliance with minimum wages, while a different party is responsible for the inception and termination of the employment relationship and thus will have to ensure compliance with dismissal regulations. The party receiving labour and its fruits may be the appropriate party to ensure compliance with OSH standards.

Finally, it has been proposed to **adapt legal provisions concerning temporary agency work** to encompass online platform work.⁴⁷ Just like in a placement model of temporary agency work, the intermediary profits from the establishment of a relationship pursuant to which the individual performs tasks for the benefit of a final user (either an individual or, more frequently, a firm), and the intermediary continues to play a significant role throughout the relationship (and future, potentially different, relationships with other individuals or firms).⁴⁸ Online platform work could therefore be included as it is, or alternatively the legal provisions on temporary agency work could be adapted to specifically include it.

- **(ii) Devising a new category, between employment and self-employment**

A second approach is to devise a new category, somewhere between the employment relationship and self-employment, to capture online platform workers and other people engaged in highly casual work. In the USA particularly, there has been a call for the introduction of a new **‘independent worker’ status**.⁴⁹ Advocates of that midway approach tend to call for legislative intervention to regulate

⁴⁴ Ibid.

⁴⁵ For instance, as the analysis of Prassl and Risak demonstrates, the online platform Uber very clearly exercises the full range of employer functions. ‘Analysed thus, despite its heavy [sic] reliance on modern technology, it is little different from a traditional, unitary employer — with its drivers to be classified as employees. Given the range of functions exercised, the platform should therefore be responsible for the full suite of employment rights in each jurisdiction it operates: from minimum wage and working time laws to collective bargaining.’ See J. Prassl and M. Risak, ‘Uber, Taskrabbit, & co: Platforms as employers? Rethinking the legal analysis of crowdwork’, *Comparative Labour Law and Policy Journal* (forthcoming), p. 22.

⁴⁶ Prassl and Risak give the example of the online platform TaskRabbit, whose ‘operation is [...] a prime example of how different employer functions are exercised by more than one entity — whether platforms, clients, or even individual workers themselves.’ J. Prassl and M. Risak, ‘Uber, Taskrabbit, & co: Platforms as employers? Rethinking the legal analysis of crowdwork’, *Comparative Labour Law and Policy Journal* (forthcoming), p. 25.

⁴⁷ L. Ratti, ‘Online platforms and crowdwork in Europe: A two-step approach to expanding agency work provisions?’, 38 *Comparative Labour Law and Policy Journal* (2017), p. 477; B. Gomes, ‘Le crowdworking: Essai sur la qualification du travail par intermédiation numérique’, 7 *Revue de Droit du Travail* (2016), p. 464; EU-OSHA, *Online Labour Exchanges, or ‘Crowdsourcing’: Implications for Occupational Health and Safety* (2015), available at: <https://osha.europa.eu/en/tools-and-publications/seminars/focal-points-seminar-review-articles-future-work>.

⁴⁸ L. Ratti, ‘Online platforms and crowdwork in Europe: A two-step approach to expanding agency work provisions?’, 38 *Comparative Labour Law and Policy Journal* (2017), p. 489.

⁴⁹ S. Harris and A. Krueger, *A Proposal for Modernizing Labour Laws for Twenty-First Century Work: The ‘Independent Worker’* (Hamilton Project, 2015), available at: http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf.

relationships that do not easily fit into the employed/self-employed dichotomy.⁵⁰ These independent workers 'would occupy a middle ground between the existing categories of employee and independent contractor; the latter typically are workers who provide goods and services to multiple businesses without the expectation of a lasting work relationship'.⁵¹ The idea would be that, based on a set of governing principles to guide the assignment of benefits and protections to independent workers, businesses would provide certain benefits and protections that employees currently receive without fully assuming the legal costs and risks of becoming an employer. Many jurisdictions (such as the UK) already have such a third category, and this approach would entail the expansion thereof. In particular, it has been argued that such expansion is necessary because

in most countries the law requires some degree of subordination even for this intermediate group (or at least this is how legislation has been interpreted). This means that the intermediate group is much smaller than it should be, with many dependent workers still left outside the scope of (even partial) protection. Secondly, workers in the intermediate group usually receive only very minimal protections, especially related to social security and sometimes the ability to bargain collectively. In fact, large parts of labour law should apply when a worker is dependent on one client (who should be considered an employer for such purposes).⁵²

▪ (iii) Decoupling the application of existing regulations from employment

A third approach is to **decouple the application of existing regulations from the concept of employment relationship**, and apply these more universally, including to the self-employed. This approach would essentially, in relation at least to some benefits and protections, abolish the binary divide between employment and self-employment. In particular, some have argued for the introduction of minimum pay standards for all (e.g. in the form of minimum fees for the self-employed).⁵³

The EU is currently exploring an obligation to adhere to social security schemes for all who perform work, regardless in what capacity. The Access to Social Security initiative⁵⁴ aims to tackle the problem that up to half of people in non-standard work and self-employment across the EU are at risk of not having sufficient access to social protection and/or employment services. The gap in protection is linked to the labour law status of people in non-standard employment and due to the growing number of transitions between and combinations of dependent employment and self-employment, causing problems of accessibility and transferability. One option for the potential action would be an EU Directive with provisions ensuring (i) similar social protection rights for similar work and (ii) the transferability of acquired social protection rights. Furthermore, the EU is considering adopting a measure defining core labour standards for all workers, particularly for the protection of atypical, casual forms of employment such as on-call work and zero-hours contracts. These proposals will be further discussed in Part 3 of this study.

▪ (iv) Introducing new, sector-specific regulatory regimes for online platform work

A fourth approach is to **introduce new, sector-specific regulatory regimes for online platform work** in its various manifestations. In many jurisdictions, there already exists a 'special labour law' for different professions, adapted to the specific features and necessities of that profession, which could also be

⁵⁰ See also L. Ratti, 'Online platforms and crowdwork in Europe: A two-step approach to expanding agency work provisions?', 38 *Comparative Labour Law and Policy Journal* (2017), p. 453.

⁵¹ S. Harris and A. Krueger, *A Proposal for Modernizing Labour Laws for Twenty-First Century Work: The 'Independent Worker'* (Hamilton Project, 2015).

⁵² For a discussion, see: G. Davidov, 'Setting labour law's coverage: Between universalism and selectivity', 43 *Oxford Journal of Legal Studies* (2014), pp. 559-560.

⁵³ E. Grosheide and M. Barenberg, 'Minimum fees for the self-employed: A European response to the "Uber-ized" economy?', 22 *Columbia Journal of European Law* (2016), p. 193.

⁵⁴ European Commission, Commission Work Programme 2017 — Delivering a Europe that protects, empowers and defends, COM(2016) 710 final, point 11 of the annex.

introduced for online and offline platform work.⁵⁵ It has been proposed that these regulations should imply the following: (i) the workers' freedom to establish their own working schedules and work hours, while employers should be allowed to set a maximum, and regulation should establish an overall maximum (regardless of whether they are worked for the same platform or others); (ii) the workers' freedom to work for several platforms; (iii) the workers' limited liability for damages, including damage involving clients and to the platform's reputation; and (iv) minimum wage.⁵⁶ Specific provisions concerning OSH could also be included in this sector-specific regulation of online platform work, distinguishing between digital work and manual work. As will be discussed in Part 2 of this study, France has adopted a somewhat similar approach.

Conclusion: Regulatory challenges and options in relation to online platform work

While there is a potential for online platform work to transfer transactions that were conducted in the shadow economy to the formal sector, the regulation of the activities of online platforms has generally not been straightforward. This is because of dynamics of the sector, the rule-avoiding behaviour of many online platforms and the narrative — fostered by the online platforms — that their activities are 'new' and 'unprecedented' features emerging from rapid technological change that should not be treated similarly to any existing economic activities. Furthermore, not in the least, this difficulty results from the fact that some aspects of online platform working do not fit easily into pre-established regulatory categories.

The application of existing regulation, such as employment law and OSH, is particularly challenged by the almost inevitably triangular (or multilateral) nature of the online platform work arrangements, their often temporary nature and the sometimes relatively high measure of autonomy of the worker especially in terms of working place and time. While these challenges are not unique to the online platform economy, as the past few decades have seen a general increase in the use of non-standard forms of work (such as casual work, on-call work, temporary agency work, informal work and dependent self-employment), these traits make it difficult to apply the concept of the standard, permanent, binary employment relationship, upon which many jurisdictions make the application of employment/OSH rules conditional. A further challenge is that social dialogue is often not available as a regulatory alternative, as the traits of online platform work (individuality, turn-over, varied working patterns, competitive mechanisms) are not conducive to unionisation.

There are several policy/regulatory options in response to these challenges. A first approach is to 'simply' apply existing regulations to online platform work, entailing a case-by-case determination of whether the online platform worker is an employee, self-employed or 'something' in between. Depending on the (flexibility of the) test applicable to determine labour status, this may already include many online platform workers in the category of employee, or in an intermediate category, meaning that (most) employment and OSH rules would apply — at least in legal terms. A second approach is to take specific action to narrow the group of persons that will be considered 'self-employed', through the addition of an intermediate '(independent) worker' category or a rebuttable presumption of employment. A third approach is to decouple the application of existing regulations from employment, thus making employment and OSH rules applicable also to the self-employed. A fourth approach is to provide specific (OSH and/or other employment) protection for online platform workers, regardless of their employment status.

⁵⁵ A. Baylos Grau, 'La "huida" des derecho des trabajo', *Jacobinmag*, 19 September 2000, discussed by A. Tolodi-Signes, 'The "gig-economy": Employee, self-employed or the need for a special employment regulation?', 23 *Transfer* (2017), pp. 201-202.

⁵⁶ *Ibid.*, p. 202.

3 OSH implications

The purpose of the present study is not to discuss the OSH implications of online platform work as such — as this exercise has already taken place⁵⁷ — but instead to examine the regulatory responses thereto in EU Member States and the EU as a whole. However, as a general background to that assessment, it would seem appropriate to briefly summarise the findings on how online platform work affects OSH.

As noted by Tran and Sokas, there is little comprehensive empirical information regarding the specific OSH aspects of work performed via online platforms.⁵⁸ In addition, the wide variety of actual activities that can be delivered under the umbrella of online platform work makes it difficult to provide an exhaustive overview. Nevertheless, to the extent that many of the actual activities of online platform work are essentially the same as many pre-existing work activities (cleaning, delivery, transport, graphic design, information technology, or IT, work, etc.), the **safety and health implications are ‘traditional’, and well known**. Furthermore, despite the relative newness of online platform work, the impact of its **precariousness** on OSH has already been rather widely researched, and these projections are partially aided by the comparisons that can be drawn with (the effects of) **other non-standard forms of employment**.

In the following summary of the available findings concerning the OSH implications of online platform work, it seems appropriate to establish some distinctions. First of all, as we have seen, online platform work can consist in almost purely physical work (with the only digital element being the fact that the worker will have to consult the online platform or smartphone application in order to obtain (information about) the work assignment), purely digital work (which obviously still has physical implications) or mixtures of the two. Physical work and digital work will present different OSH challenges, and are thus examined separately. Secondly, it would seem appropriate to distinguish between the more direct effects on workers’ safety and health in terms of the work activities they engage in, on the one hand, and, on the other hand, the more indirect effects that arise from the precariousness of online platform work, particularly the fact that employment law may not be applicable. Finally, the common distinction between physical risks and psycho-social risks is also made here.

Direct effects on OSH of online platform work

▪ (i) **General OSH risks for platform workers**

The fact that online platform workers share many similarities with both temporary workers and agency workers, means that they are probably exposed to the same OSH hazards, and those of non-standard arrangements more generally. **The risks to workers’ safety and health might be significant**. Firstly, studies of work-related injuries have consistently shown higher injury rates among agency workers than standard workers.⁵⁹ A systematic review of international, peer-reviewed studies showed an increased risk of work-related injuries among contingent workers.⁶⁰ In 2006, a study of agency and contract workers reported that nonstandard workers had two times the rate of fatal and nonfatal work-related injuries than standard workers.⁶¹

As regards online platform workers specifically, it should be noted that any physical safety and health risks could be expected to be worse because of the **loss of the protective effect of working in a**

⁵⁷ U. Huws, ‘A review on the future of work: Online labour exchanges, or “crowdsourcing”: Implications for occupational health and safety’, EU OSHA discussion paper, available at: <https://osha.europa.eu/en/tools-and-publications/publications/future-work-crowdsourcing/view>.

⁵⁸ M. Tran and R. Sokas, ‘The gig economy and contingent work: An occupational health assessment’, 59 *Journal of Occupational and Environmental Medicine* (2017), pp. 63–66.

⁵⁹ See J. Howard, ‘Nonstandard work arrangements and worker health and safety’, 60 *American Journal of Industrial Medicine* (2017), pp. 1–10.

⁶⁰ P. Virtanen et al., ‘Labor market trajectories and health: A four-year follow-up study of initially fixed-term employees’, 161 *American Journal of Epidemiology* (2005), pp. 840–846.

⁶¹ F.G. Benavides et al., ‘Associations between temporary employment and occupational injury: What are the mechanisms?’, 63 *Occupational and Environmental Medicine* (2006), pp. 416–421.

public workplace, as most of this work is transacted in private automobiles or homes.⁶² Furthermore, online platform workers tend to be **younger**, which is a well-known independent risk factor for occupational injury.⁶³ In addition, platform work encourages a **rapid pace of work without breaks**,⁶⁴ which may induce accidents. The competitive effect of online platform work and the system of rating means that online platform workers may be working to very tight deadlines. Furthermore, the fact that pay is not continuous but per assignment adds time pressure, especially where the pay is very low, such as with piece-rates for micro-tasks. Finally, the fact that online platform workers will usually be denied the right to paid sick leave leads to **increased illness morbidity**. Working while sick can increase the risk of injury.⁶⁵ In several studies, workers with paid sick leave benefits were 28 % less likely than workers without access to paid sick leave to sustain a work-related injury.⁶⁶

Furthermore, not having access to sick pay creates a psychological burden of ‘not being allowed to fall ill’.⁶⁷ Further psycho-social risks follow from the lack of a common workplace, as most of the tasks will be performed individually, separated from — and often in competition with — fellow workers, which can lead to **isolation** by denying workers face-to-face contact with their colleagues, which forms the basis of both social support and discussion of work concerns.⁶⁸ This lack of a monitored workplace may also mean that a worker can develop **anti-social and/or health-threatening habits** as a means of coping with stress (such as dependence on alcohol or drugs), which would be spotted by the employer in a normal working situation but can escalate rapidly if nobody is aware of them.⁶⁹ Continuous real-time evaluation and rating of worker performance can become an important source of **stress**: workers have to be friendly, efficient and serviceable at all times, which is akin to a ‘constant monitoring system’.⁷⁰ Stress is furthermore induced because ‘the facility to use platforms combined with the availability of a large pool of workers makes the timing of this type of outsourcing extremely compressed’.⁷¹ In addition, the worker must always be on stand-by to accept any potential upcoming jobs, which furthermore blurs work–life boundaries.⁷² In other words: ‘[t]he friendly and flexible “anytime and anyplace” working model can easily turn into an “always and everywhere” trap for some workers — with negative effects on psychological health’.⁷³

⁶² M. Tran and R. Sokas, *Health Vulnerabilities of Informal Workers*, Rockefeller Foundation, May 2013, available at: <https://assets.rockefellerfoundation.org/app/uploads/20130528214745/Health-Vulnerabilities-of-Informal-Workers.pdf>.

⁶³ M. Tran and R. Sokas, ‘The gig economy and contingent work: An occupational health assessment’, 59 *Journal of Occupational and Environmental Medicine* (2017), pp. 63–66.

⁶⁴ U. Huws, ‘A review on the future of work: Online labour exchanges, or “crowdsourcing”: Implications for occupational health and safety’, EU OSHA discussion paper.

⁶⁵ J. Howard, ‘Nonstandard work arrangements and worker health and safety’, 60 *American Journal of Industrial Medicine* (2017), pp. 1–10.

⁶⁶ Asfaw et al., ‘Paid sick leave and nonfatal occupational injuries’, 102 *American Journal of Public Health* (2012), pp. 59–64.

⁶⁷ C. Degryse, ‘Digitalisation of the economy and its impact on labour markets’, ETUI Working Paper 2 (2016), p. 44.

⁶⁸ M. Tran and R. Sokas, ‘The gig economy and contingent work: An occupational health assessment’, 59 *Journal of Occupational and Environmental Medicine* (2017), pp. 63–66; R. Smith et al., *Rights on Demand: Ensuring Workplace Standards and Worker Security in the On-Demand Economy* (New York, NELP, 2015); G. Valenduc and P. Vendramin, ‘Work in the digital economy: Sorting the old from the new’, ETUI Working Paper 3 (2016), p. 40.

⁶⁹ U. Huws, ‘A review on the future of work: Online labour exchanges, or “crowdsourcing”: Implications for occupational health and safety’, EU OSHA discussion paper.

⁷⁰ A. Aloisi, ‘Commoditized workers: Case study research on labor law issues arising from a set of “on-demand/gig-economy” platforms’, 37 *Comparative Labor Law and Policy Journal* (2016), p. 676.

⁷¹ I. Maselli et al., ‘Five things we need to know about the on-demand economy’, CEPS Essays 21 (2016), p. 5.

⁷² U. Huws, ‘A review on the future of work: Online labour exchanges, or “crowdsourcing”: Implications for occupational health and safety’, EU OSHA discussion paper; C. Degryse ‘Digitalisation of the economy and its impact on labour markets’, ETUI Working Paper 2 (2016), pp. 41 and 44; G. Valenduc and P. Vendramin, ‘Work in the digital economy: Sorting the old from the new’, ETUI Working Paper 3 (2016), p. 37; S. Harris and A. Krueger, *A Proposal for Modernizing Labour Laws for Twenty-First Century Work: The ‘Independent Worker’* (Hamilton Project, 2015), p. 13.

⁷³ Eurofound, ‘Foundation Seminar Series 2016: The impact of digitalisation on work’ (2016), available at: https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1650en.pdf.

▪ **(ii) Specific OSH risks for platform workers providing physical (offline) work**

As regards the specific OSH risks of physical work provided through online platforms, it should first be noted that all the risks associated with these activities organised through ‘traditional’ methods apply,⁷⁴ and that in addition these tend to be **elevated because of the specific nature of online platform work**. Since online platform workers are less likely to have received professional **training** for the activities they engage in, the risk of accident increases. Furthermore, the **time pressure** under which online platform workers operate might further compound this. In addition, the informality and one-off nature of the assignment may imply a **lack of knowledge or understanding of the relevant regulations** by either workers or clients, and a **lack of clarity in work specification**, leading to situations where the worker or client cannot predict what tasks are required or what tools, equipment or materials should be brought or provided.⁷⁵

This is all the more important, because several of the activities that are typically carried out by online platform workers are in **occupations that are dangerous for workers**,⁷⁶ **such as construction and transport**. According to EU-OSHA, ‘more construction workers are killed, injured or suffer ill-health than in any other industry’.⁷⁷ And transport is a similarly dangerous field, even among professional drivers: ‘it is unknown how much more so it will be for non-professional drivers and for other drivers and pedestrians encountering this untrained-drivers-on-a-schedule’.⁷⁸

▪ **(iii) Specific OSH risks for platform workers providing digital (online) work**

Platform workers providing digital (online) work are firstly exposed to all the known hazards related to work with computers, such as **visual fatigue and musculoskeletal problems**. Again, as is the case with physical work, these **risks are elevated** for online platform workers, especially because of the time pressure under which they tend to work. The fact that the work is carried out independently at home, making use of the workers’ own equipment, may furthermore mean that this **equipment does not meet ergonomic criteria**, that the seating and work surfaces do not guarantee correct posture and that other **environmental factors are not optimised for working** (lighting, temperature, humidity, air quality, etc.).⁷⁹ Finally, other potential risks include **technostress, technology addiction, information overload, burn-out, permanent exposure to electromagnetic fields, postural disorders and cyber-bullying**.⁸⁰

⁷⁴ For example, for cleaning activities, the use of household cleaning agents presents a known hazard, and, like other workers providing personal services, crowd workers working offline in people’s homes are placed under pressure to perform emotionally demanding work. U. Huws, ‘A review on the future of work: Online labour exchanges, or “crowdsourcing”: Implications for occupational health and safety’, EU OSHA discussion paper.

⁷⁵ U. Huws, ‘A review on the future of work: Online labour exchanges, or “crowdsourcing”: Implications for occupational health and safety’, EU OSHA discussion paper.

⁷⁶ U. Huws, ‘A review on the future of work: Online labour exchanges, or “crowdsourcing”: Implications for occupational health and safety’, EU OSHA discussion paper.

⁷⁷ European Agency for Safety and Health at Work, ‘Actions to improve safety and health in construction’, 7 *Magazine of the European Agency for Safety and Health at Work* (2004).

⁷⁸ M. Tran and R. Sokas, ‘The gig economy and contingent work: An occupational health assessment’, 59 *Journal of Occupational and Environmental Medicine* (2017), pp. 63-66.

⁷⁹ U. Huws, ‘A review on the future of work: Online labour exchanges, or “crowdsourcing”: Implications for occupational health and safety’, EU OSHA discussion paper.

⁸⁰ G. Valenduc and P. Vendramin, ‘Work in the digital economy: Sorting the old from the new’, ETUI Working Paper 3 (2016), p. 36; J. Popma, ‘The Janus face of the “new ways of work”: Rise, risks and regulation of nomadic work’, ETUI Working Paper 7 (2013); P. D’Cruz et al., ‘The workplace bullying–organizational change interface: Emerging challenges for human resource management’, 25 *International Journal of Human Resource Management* (2014), pp. 1434-1459.

Indirect effects on OSH of online platform work due to uncertain applicability of employment rules

▪ (i) Inapplicability of OSH regulation

As has been discussed above, the nature of online platform work makes it difficult to apply all labour laws and OSH regulations (including rules on working time) in a straightforward manner. The lack of a fixed, physical workplace under the control of the online platform makes it perhaps understandable that online platform companies are not subject to the same OSH obligations, and similarly it is understandable that OSH inspections will not take place at people's homes to the same degree as in a 'traditional' company, but it does not negate the ensuing risks. It means that, **for many of the known risks inherent in the activities provided by workers through online platforms, the appropriate preventive measures do exist, but they do not apply/are not applied.** Instead, the cost of insurance and ensuring safety and health is externalised to the workers, who may not have the resources, access or knowledge to provide a level of protection equivalent to what they would have had under a standard employment relationship, and surveillance of these standards is lacking. It is thus very likely that, because of the uncertain applicability of OSH regulations, **all the risks associated with the work activities carried out will be realised more often.** This situation is further aggravated by the fact that, for the same reasons, **occupational health care** may not be available to the online platform worker.

▪ (ii) Income/job insecurity

Job insecurity, known to contribute to poor overall health among contingent workers, is conspicuous among online platform workers.⁸¹ Their working relationship with the online platform can usually be **ended without notice** or any form of dismissal protection, and, even when the relationship is active, there is no **guarantee of minimum pay**, since this is dependent on performing an assignment. Precariousness therefore defines this type of work, with many workers 'unclear from one day, or even one hour, to the next, whether they will have work, and if so, what that will consist of, or when, or even if they will be paid (in some cases no payment may be received at all because the work is deemed unacceptable by the client)'.⁸² In terms of psychological impact, as Tran and Sokas point out, the role of choice is likely to be important: a study of a large sample of women with temporary jobs showed that psychological distress and somatic complaints were more common among those who were involuntarily performing temporary jobs than among those workers who preferred temporary work.⁸³ Research has shown that **insufficient work is a principal concern of online platform workers,** the majority of whom expressed a desire for more hours, in either crowdwork or non-crowdwork activities.⁸⁴ Such underemployment and intermittency of work require daily or even hourly job searches, with the added stress and excess working time that ensues.

⁸¹ M. Tran and R. Sokas, 'The gig economy and contingent work: An occupational health assessment', 59 *Journal of Occupational and Environmental Medicine* (2017), pp. 63–66; K.J. Cummings and K. Kreiss, 'Contingent workers and contingent health: Risks of a modern economy', 299 *Journal of the American Medical Association* (2008), pp. 448–450; J. Benach and C. Muntaner, 'Precarious employment and health: Developing a research agenda', 61 *Journal of Epidemiology and Community Health* (2007), pp. 276–277.

⁸² U. Huws, 'A review on the future of work: Online labour exchanges, or "crowdsourcing": Implications for occupational health and safety', EU OSHA discussion paper.

⁸³ M. Tran and R. Sokas, 'The gig economy and contingent work: An occupational health assessment', 59 *Journal of Occupational and Environmental Medicine* (2017), pp. 63–66, referring to C.E. Connelly and D.G. Gallagher, 'Emerging trends in contingent work research', 30 *Journal of Management* (2004), pp. 959–983.

⁸⁴ J. Berg, 'Income security in the on-demand economy: Findings and policy lessons from a survey of crowdworkers', ILO Conditions of Work and Employment series 74 (2006), p. 20.

Conclusion: OSH risks connected to online platform work

Online platform work poses a range of both pre-existing and new OSH risks, both physical and psycho-social.

The fact that online platform workers have many similarities to both temporary workers and agency workers means that they are probably exposed to the same OSH risks, with studies consistently showing higher injury rates among non-standard workers. Furthermore, any physical safety and health risks could be expected to be worse because of the loss of the protective effect of working in a common workplace, which may furthermore mean that the work equipment and environment fail ergonomic standards. Furthermore, online platform workers tend to be younger, which is a well-known independent risk factor for occupational injury.

In addition, platform work, through the use of inter-worker competition and rating mechanisms, encourages a rapid pace of work without breaks, which may induce accidents. Pay not being continuous but per assignment adds time pressure. The lack of appropriate training further increases the risk of accidents, and on top of this several key activities typically carried out by online platform workers are in occupations that are notoriously dangerous, such as construction and transport. Digital online platform work carries risks such as permanent exposure to electromagnetic fields, visual fatigue and musculoskeletal problems. Psycho-social risks include isolation, stress, technostress, technology addiction, information overload, burn-out, postural disorders and cyber-bullying.

All online platform work can induce stress through continuous evaluation and rating of performance, competitive mechanisms for allocating work, uncertain payment and blurring of work–life boundaries. Job insecurity, known to contribute to poor overall health among atypical workers, is characteristic of online platform work. The precarious position of online platform workers is further aggravated by the fact that health surveillance will often be lacking, as will occupational health care, and the specific features of online platform work tend to hamper the collective organisation of workers, and thus the defence of their rights and interest, as well as the development of social dialogue.

**PART 2. NATIONAL REGULATION AND POLICY
RESPONSES IN RELATION TO THE ONLINE PLATFORM
ECONOMY**

In this second part, an overview of national regulation and policy responses in relation to the online platform economy will be provided.⁸⁵ This will include (i) national legislation and case law, (ii) social partner initiatives and (iii) national policies, where relevant. As it is beyond the scope of this study to provide an exhaustive overview of all developments related to the online platform economy in all EU Member States, a selection has been made that includes the most relevant developments, on the basis of the information available to the author. Accordingly, not every single EU Member States will be discussed individually, but instead there will be a specific focus on the Member States where the most relevant developments seem to have taken place in relation to the online platform economy.

France

a) Introduction

France has been at the forefront in dealing with the digital economy, as well as specifically the emerging online platform economy, and their impact on working conditions, through several policy and legislative initiatives.

For several years, labour market regulation and its reform have been a central concern of the French government. Digitalisation in general has received specific attention in this respect,⁸⁶ with certain new rights being introduced for employees such as the '**right to disconnect**' (*droit à la déconnexion*),⁸⁷ allowing them to switch off their mobile devices in their free time, and the creation of an '**individual activity account**' (*compte personnel d'activité*),⁸⁸ whereby everyone above 16 years will have access to training rights regardless of work status and situation. This account could be developed into an online points-based system centralising various different employment and social security rights.

The government has also commissioned several specific reports on position of workers in the online platform economy. Importantly, this has led to the adoption of the **Act of 8 August 2016 on work, modernisation of social dialogue and securing of career paths** (*Loi n° 2016-1088 du 8 août 2016 relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels*), discussed below, which creates social responsibility for digital platforms and aims to provide independent workers on online platforms with minimum social rights.

b) Studies concerning the position of workers in the online platform economy

In a report prepared for the employment minister in 2008 ('Le travailleur économiquement dépendant: Quelle protection?'),⁸⁹ it was argued that an **intermediary category** of independent workers should be added to the current binary system of French labour law, which distinguishes only between 'employed' and 'self-employed'. While the former are governed by the labour code, the latter involve a contract under civil or commercial law. The distinguishing factor between these categories is the subordination of the person providing the work to the one requesting it. It is the *Cour de Cassation* that has further developed the concrete notion of subordination in its case law, and courts will examine the reality of the working arrangement to make their determination on a case-by-case basis. Under the current system, an economically dependent self-employed person would be either a disguised employee (*faux travailleur*

⁸⁵ Developments up until August 2017 have been included. The analysis relies partially on the responses by national OSH officials to a survey organised through the EU Labour Inspection Network & Exchange System.

⁸⁶ See the influential report by M. Mettling, 'Transformation numérique et vie au travail' (Digital transformation and work life), September 2015, available at: <http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/154000646.pdf>.

⁸⁷ Article L.2242-8 Labour Code, from 1 January 2017. Employees should no longer receive work emails after working hours. While this applies to all companies, only those with more than 50 employees are obliged to enter into negotiations with the employees to this effect. There are no sanctions laid down, but proof of work emails being sent after hours will facilitate employees' claims in cases of work-related illness and harassment.

⁸⁸ See 'Le compte personnel d'activité (CPA)', available at: <http://www.gouvernement.fr/compte-personnel-activite-cpa>.

⁸⁹ H. Antonmattei and J. Sciberras, 'Le travailleur économiquement dépendant: Quelle protection?' (What protection for financially dependent workers?), November 2008, available at: <http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/084000694.pdf>.

indépendant), which would render the labour code and its protection applicable, or a genuinely self-employed person, which would leave labour law inapplicable. To mitigate the stark opposition of these legal positions, the intermediary category was proposed, whereby the independent worker would benefit from a limited range of rights such as sick leave and dismissal protection.

On 6 January 2016, the **National Council of Digitalisation** (*Conseil national du numérique*) handed its report on **new trajectories for digital work** ('Travail, emploi, numérique: Les nouvelles trajectoires')⁹⁰ to the employment minister Myriam El Khomri. The report deals specifically with the online platform economy. It underlines the existence of a great variety of platform mediation services. All those models are directly relevant to the labour status of the workers concerned, and, in certain cases, the economic dependence characterised by a strong subordination to the platform makes these workers a particular category that has little in common with other independent workers. The report notes that these workers are doubly deprived of protection, since, as they are not 'employees', they cannot rely on the legal protection offered by the labour code, but, as they are not really independent, they cannot benefit from the economic protection that that would offer them either. The Council therefore recommends clarification of the legal situation of these workers and that effective protection be ensured.

As regards the impact of digitalisation on social dialogue and the position of trade unions on the subject, a report of February 2016 entitled 'Economie numérique et dialogue social: Thématiques de revendications, représentations et stratégies des partenaires sociaux devant les mutations de la en France' by the **Centre Henri Aigueperse — UNSA Education**⁹¹ indicates that there is no single response to the digital economy. Some unions in some sectors see it as a threat and others see it as an opportunity. The regulation of these issues is decentralised, through sectoral social dialogue. The question is whether or not it is possible to have a cross-sectoral social dialogue to address the transversal issues of the digital economy.

c) Act of 8 August 2016 on work, modernisation of social dialogue and securing of career paths

The Act of 8 August 2016 provides:⁹²

- that independent workers in an economically and technically dependent relationship with an online platform can benefit from **insurance for accidents at work**, which is the **responsibility of the online platform** in question;
- that these workers equally have a right to **continuing professional training**, for which the online platform is responsible;
- that they should at their request be provided with a **validation of their working experience** with the platform, by the online platform;
- that they have the **right to constitute a trade union, to be a member of a union and to have a union represent their interests**; and
- that they furthermore have the **right to take collective action** in defence of their interests. Apart from abuses, such collective action **cannot lead them to incur contractual liability, nor can it be used as a reason to discontinue their association with the platform, nor can they be penalised** by the platform in another way for such action.

⁹⁰ National Council of digitalisation, 'Travail, emploi, numérique: Les nouvelles trajectoire' (Work, employment and digital economy: New trajectories), 6 January 2016, available at: <https://cnnumerique.fr/wp-content/uploads/2015/11/CP-CNNum-Remise-rapport-travail-emploi-Version-finale.pdf>.

⁹¹ B. Demas, N. Farvaque and D. Messaoudi, 'Economie numérique et dialogue social: Thématiques de revendications, représentations et stratégies des partenaires sociaux devant les mutations de la filière numérique en France' (Digital economy and social dialogue: Issues of claims, representation and strategies of social partners in light of the changes in the French digital sector), Centre Henri Aigueperse-UNSA, February 2016, available at: <http://www.ires-fr.org/etudes-recherches-ouvrages/etudes-des-organisations-syndicales/item/4417-economie-numerique-et-dialogue-social-thematiques-de-revendications-representations-et-strategies-des-partenaires-sociaux-devant-les-mutations-de-la-filiere-numerique-en-france>.

⁹² Loi n° 2016-1088 du 8 août 2016 relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels, Article 60.

The government has thereby sought to protect online platform workers in their asymmetrical relationship with the online platforms and to render the latter responsible for the workers in certain ways, while favouring the further development of such kinds of activities as it considers can help to regularise undeclared work and thereby become a source of fiscal and social income. **Instead of creating a new category of worker**, which was ultimately considered to bring little to no value in terms of the regulation of these contractual relations, the government has chosen to grant these specific workers **certain minimum social rights** under conditions tailored to the reality of their economic activity.

d) OSH-specific developments

Furthermore, there has been specific discussion in France on the OSH implications of the digital economy and online platform work.⁹³ As the 2015 report on digital transformation and working life already underlined,⁹⁴ digitalisation can constitute a catalyst for improved working conditions as well as a factor for increased occupational psycho-social risks, especially if these risks are insufficiently regulated for, and this therefore needs to be taken into account in the regulation of work as well as social dialogue.

Among the **36 recommendations on collaborative platforms, labour and social protection**, presented in May 2016 by the *Inspection générale des affaires sociales* (IGAS),⁹⁵ one was to commission **further research into working conditions and OSH of online platform workers regardless of their labour status** (employee, self-employed, private individual). The authors find, in particular, that online platform workers are exposed to occupational psycho-social risk factors. The precariousness of the work, the blurring of work–life boundaries, the multi-tasking that obliges the worker to reconcile various different constraints, and an unpredictable, fluctuating income expose the online platform worker to significant occupational stress. This stress is particularly strong where there is a lack of transparency in the booking, payment and rating systems operated by the platform. The rating system does not often allow appeals, which is another source of uncertainty and stress for the worker. Some platforms, such as Uber, do weigh the client's ratings against the comments by the workers, which helps to balance the relationship, but this nevertheless poses its own problems, as the criticism in the USA has shown in regard to instances of discrimination resulting from drivers' ratings of their passengers. In a digital on-demand context, clients transfer stress and pressure to the platform workers from the other side of the computer screen, whereby workers are required to work with an extremely high reactivity and under exceedingly short time constraints, without ever being certain of being asked for another assignment afterwards.

The overall objective of the **third Occupational Health Action Plan 2016-2020** is to put prevention at the core of safety and health at work, in order to improve the health and well-being of people at work, at any age.⁹⁶ One of the priorities of this strategy is to tackle emerging risks, including emerging risks linked to digital technologies. It proposes an action framework to deal with the use of digital tools:

- raising awareness among companies of the necessity to integrate in their risk assessment questions linked to digitalisation (workload, configuration of the digital tools, information load, etc.) and to develop the training of the relevant actors in companies in this respect;
- conceiving collective work spaces and common spaces for teleworkers;

⁹³ See INRS, Technological innovations, new organizations, new challenges for prevention, Conference 29-31 March 2017, available at: <http://www.inrs-innovorg2017.fr/accueil/>; Eurogip, 'Transformation numérique: Impact et enjeux pour l'assurance "accidents du travail/maladies professionnelles"' (Digitalization: Impacts and challenges for the occupational injury and disease insurance), October 2016, available at: http://www.eurogip.fr/images/documents/4413/EUROGIP-121F-Transfo_numerique_ATMP.pdf.

⁹⁴ M. Mettling, 'Transformation numérique et vie au travail' (Digital transformation and work life), September 2015, available at: <http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/154000646.pdf>.

⁹⁵ N. Amar and L. Viossat (IGAS), 'Collaborative platforms, labor and social protection', available at: http://www.igas.gouv.fr/IMG/pdf/Executive_summary.pdf.

⁹⁶ Available at: <http://travail-emploi.gouv.fr/sante-au-travail/plans-de-sante-au-travail/article/plan-de-sante-au-travail-2016-2020-pst-3>.

- addressing these issues at European level, notably in the context of a possible adaptation of the Display Screens Directive⁹⁷.

e) The specific case of Uber

Uber launched its UberPop service, whereby rides can be booked in the cars of private individuals, in Paris in February 2014. It almost immediately encountered heavy criticism from the taxi industry and scrutiny from regulators.

After a civil lawsuit brought by competitors arguing unfair competition was rejected by a national court, the government decided to legislate specifically to ban services like UberPop. The *loi Thévenoud* of 1 October 2014 amends the regulation of passenger transport services in the Transport Code (*code des transports*) and provides in Article L. 3124-13: 'Est puni de deux ans d'emprisonnement et de 300 000 € d'amende le fait d'organiser un système de mise en relation de clients avec des personnes qui se livrent aux activités mentionnées à l'article L. 3120-1 sans être ni des entreprises de transport routier pouvant effectuer les services occasionnels mentionnés au chapitre II du titre Ier du présent livre, ni des taxis, des véhicules motorisés à deux ou trois roues ou des voitures de transport avec chauffeur au sens du présent titre' ('the organisation of a system of bringing together clients with persons who offer [transport services as defined in the Act] without being [a mode of transport allowed to do so under the Act] is punishable by 2 years' imprisonment and a fine of EUR 300,000'). Uber challenged the validity of the law as being contrary to the freedom to conduct a business, but this was rejected by the *Conseil Constitutionnel*.⁹⁸ UberPop suspended its service in France only in July 2015.

In June 2016, the Paris criminal court ordered Uber to pay EUR 800,000, with half of the fine suspended, and found Pierre-Dimitri Gore-Coty, director for Europe, Middle East and Africa, and Thibaud Simphal, the company's manager in France, guilty of deceptive commercial practices and being accomplices in operating an illegal transport service.

In the context of another pending criminal case against Uber at two courts in Lille, **preliminary questions were referred to the CJEU**.⁹⁹ This will be discussed in more detail in Part 3 of the present study.

⁹⁷ Council Directive of 29 May 1990 on the minimum safety and health requirements for work with display screen equipment (fifth individual Directive within the meaning of Article 16 (1) of Directive 87/391/EEC) (90/270/EEC) <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:01990L0270-20070627>

⁹⁸ Décision n° 2015-484 QPC du 22 septembre 2015, available at: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2015/2015-484-qpc/decision-n-2015-484-qpc-du-22-septembre-2015.144387.html>.

⁹⁹ Case C-320/16, *Criminal proceedings against Uber France SAS*, Request for a preliminary ruling from the *Tribunal de grande instance de Lille* (Regional Court, Lille) (France) lodged on 6 June 2016.

Conclusion: Regulation and policy in relation to the online platform economy in France

France has been at the forefront in dealing with the digital economy as well as specifically the emerging online platform economy, and its impact on working conditions, through several policy and legislative initiatives.

In particular, it has adopted *Loi n° 2016-1088 du 8 août 2016 relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels*, Article 60 of which provides:

- that independent workers in an economically and technically dependent relationship with an online platform can benefit from insurance for accidents at work, which is the responsibility of the online platform in question;
- that these workers equally have a right to continuing professional training, for which the online platform is responsible;
- that they should at their request be provided with a validation of their working experience with the platform, by the online platform;
- that they have the right to constitute a trade union, to be a member of a union and to have a union represent their interests; and
- that they furthermore have the right to take collective action in defence of their interests. Apart from abuses, such collective action cannot lead them to incur contractual liability, nor can it be used as a reason to discontinue their association with the platform, nor can they be penalised by the platform in another way for such action.

Furthermore, there has been specific discussion in France on the OSH implications of the digital economy and online platform work. One of the priorities of the third Occupational Health Action Plan 2016-2020 is to tackle emerging risks, including those linked to digital technologies. It proposes an action framework to deal with the use of digital tools:

- raising awareness among companies of the necessity to integrate in their risk assessment questions linked to digitalisation (workload, configuration of the digital tools, information load, etc.) and to develop the training of the relevant actors in companies in this respect;
- conceiving collective work spaces and common spaces for teleworkers;
- addressing these issues at European level, notably in the context of a possible adaptation of the display screens directive.

Finally, as regards the specific case of Uber, France adopted the *loi Thévenoud* of 1 October 2014 amending the Transport Code (*code des transports*), which provides in Article L. 3124-13 that the organisation of a system of bringing together clients with persons who offer transport services without being a mode of transport allowed to do so under the Act is punishable by 2 years' imprisonment and a fine of EUR 300,000. Uber challenged the validity of the law, but the appeal was rejected by the *Conseil Constitutionnel*.

The United Kingdom

a) Introduction

In the UK, discussions about the precariousness of atypical work have dominated political and public discussions for several years now, with the main focus more recently shifting slightly from the issue of so-called 'zero-hours contracts'¹⁰⁰ to the online platform economy (in the UK most often referred to as the 'gig economy'). The Prime Minister, Theresa May, made a political commitment upon taking office to tackle unfair working practices, commissioning the so-called Taylor Review, which is discussed in more detail below.

¹⁰⁰ For a critical discussion, see: A. Adams et al., 'The "zero-hours contract": Regulating casual work, or legitimating precarity?', ELLN Working Paper Series (2015).

The Chartered Institute of Personnel and Development estimates that there are approximately 1.3 million people (4 % of all those in employment) working in the ‘gig economy’ in the UK,¹⁰¹ defined somewhat loosely as ‘people using apps to sell their labour’.¹⁰² The research suggests that a high proportion these workers (58 %) are permanent employees, engaging in online platform economy activities in addition to their more ‘traditional’ employment. The UK online platform economy is expected to grow, with 12 % of UK working-age adults who have not participated in online platform work in the last 12 months saying they are thinking about ‘trying different forms of gig economy activity over the next year’.¹⁰³

As will be discussed below, UK employment law already features a third category of employment relationships, between the status of ‘employee’ and ‘self-employed’. Some have argued that it is difficult to know and apply precisely the dividing line between these three categories and that online platform economy activities are therefore as hard to correctly regulate in the UK as in binary labour law systems. Others have instead argued that the current legal framework is sufficiently flexible to accommodate the online platform economy, demonstrated by the London Employment Tribunal’s judgment reclassifying Uber drivers as ‘workers’ discussed further below, but that the issue instead lies in enforcement, particularly with high court fees and with contractual ‘scare’ clauses preventing employment challenges.¹⁰⁴ In May 2017, the online platform company Deliveroo made changes to its contracts for riders following pressure from the UK parliament, removing the clause in its ‘supplier agreement’ with couriers which stated that they could not challenge their self-employed status at an employment tribunal.¹⁰⁵

b) Legislation

UK employment law does not have the binary distinction between the ‘employed’ and the ‘self-employed’ that some other jurisdictions have, and instead features a **third category of ‘workers’**, comprising people engaged in ‘intermediate’ labour activities, often casual, who do not fulfil the criteria for being an employee, but nevertheless cannot be considered wholly self-employed either.

Section 230 of the **Employment Rights Act 1996** provides:

1. In this Act ‘employee’ means an individual who has entered into works under (or where the employment has ceased, worked under) a contract of employment; 2) In this Act ‘contract of employment’ means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing; 3) In this Act ‘worker’ (except in the phrases ‘shop worker’ and ‘betting worker’) means an individual who has entered into or works under (or, where the employment has ceased, worked under) a) a contract of employment, or b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

¹⁰¹ CIPD, ‘To gig or not to gig? Stories from the modern economy’ (March 2017), available at: <https://www.cipd.co.uk/knowledge/work/trends/gig-economy-report>.

¹⁰² Department for Business, Energy & Industrial Strategy, *Good Work: The Taylor Review of Modern Working Practices*, 11 July 2017, available at: <https://www.gov.uk/government/publications/good-work-the-taylor-review-of-modern-working-practices>, p. 25.

¹⁰³ Ibid.

¹⁰⁴ As the House of Commons notes, these clauses are probably unenforceable, ‘but to an average worker with little or no understanding of employment law, the intended deterrent effect is clear’. See House of Commons Work and Pensions Committee, *Self-employment and the Gig Economy*, 13th Report of Sessions 2016-17, available at: https://publications.parliament.uk/pa/cm201617/cmselect/cmworpen/847/847.pdf_p.11.

¹⁰⁵ See <https://www.theguardian.com/business/2017/may/11/deliveroo-bows-to-pressure-to-change-contracts-for-british-couriers>.

However, even with the intermediate category of ‘worker’ being available, it can be difficult to establish which category is applicable in individual cases. Courts have therefore established a range of tests and factors to decide on an individual’s employment status. These include:

- the control test, establishing the degree of control exercised by the employer, where courts inquire about the extent of the supervision;
- the integration test, establishing to what extent the work provided is integrated into the core activities of the business;
- the economic reality test, considering whether the individual is in business on his or her own account, looking at a range of factors such as payment methods, supply of equipment, working and holiday time arrangements, financial risk and whether the individual can provide a substitute to carry out the work or instead is required to do the work him- or herself;
- the mutuality of obligation test, considering if there are ongoing contractual obligations to provide and perform work.

Employees benefit from the full range of employment protections, which do not apply to the genuinely self-employed. The intermediate status of ‘worker’ instead provides a set of baseline rights, such as the National Minimum Wage, and is therefore less protective than ‘employee’ status but more protective than being self-employed. Workers are in particular entitled to basic safety and health rights, the National Minimum Wage, working time rights, data protection rights and time off for family emergencies. Employees have all these rights, as well as a right to, in particular, statutory sick pay, maternity leave, minimum notice periods, (accrued incrementally) maternity pay, paternity leave, parental leave, protection against unfair dismissal and the right to a permanent contract.¹⁰⁶

As regards OSH, the Health and Safety Executive (HSE) enforces parts of the Working Time Regulations 1998 including the maximum weekly working time limit and night work limits, as well as the Health and Safety at Work Act 1974 (the Act). The Act obliges employers to ensure the health, safety and welfare at work of all people providing work there, including independent contractors. Thus, in terms of these basic safety and health requirements, the nature of the employment arrangement does not change what the employer must do. An employer has a duty to manage workplace risks and should treat workers on non-standard contracts no differently from other workers.¹⁰⁷

c) Policy initiatives

On 1 May 2017, the House of Commons Work and Pensions Committee published a report on self-employment and the ‘gig economy’ — defined as:

a wide range of different types and models of work. A common feature of many of these is a reliance on intermediary digital platforms or apps to connect self-employed workers with work. Gig economy companies often operate in industries that have historically relied on self-employed workforces. New technology, however, enables them to operate on a scale which has substantial implications for the nature of work, the sectors in which they operate and the welfare state.¹⁰⁸

The report provides a critical assessment of the online platform economy and the impact on working conditions. It considers, in particular, that:

Companies relying on self-employed workforces frequently promote the idea that flexible employment is contingent on self-employed status. But this is a fiction. Self-employment is genuinely flexible and rewarding for many, but people on employment contracts can

¹⁰⁶ See S. Taylor and A. Emir, *Employment Law: An Introduction* (4th edition, Oxford, OUP, 2015), p. 63.

¹⁰⁷ Department for Business, Energy & Industrial Strategy, *Good work: the Taylor review of modern working practices*, 11 July 2017, available at: <https://www.gov.uk/government/publications/good-work-the-taylor-review-of-modern-working-practices>, p. 58.

¹⁰⁸ House of Commons Work and Pensions Committee, *Self-employment and the Gig Economy*, 13th Report of Sessions 2016-17, available at <https://publications.parliament.uk/pa/cm201617/cmselect/cmworpen/847/847.pdf>, p. 1.

and do work flexibly; flexibility is not the preserve of poorly paid, unstable contractors. Profit, not flexibility, is the motive for using self-employed labour in these cases. Businesses should of course be expected to seek out opportunities and exploit them. It is incumbent on government to close loopholes that incentivise exploitative behaviour by a minority of companies, not least because bogus self-employment passes the burden of safety net support to the welfare state at the same time as reducing tax revenue.

Designating workers as self-employed because their contract offers none of the benefits of employment puts cart before horse. It is clear, though, that this logic has taken hold, enabling companies to propagate a myth of self-employment. This myth frequently fails to stand up in court, but individuals face huge risks in challenging their employment status in that way. Conversely, where there are tax advantages to both workers and businesses in opting for a self-employed contractor arrangement, there is little to stand in the way. It is clear that current ways of categorising workers are creaking under the weight of the changing economy.

The apparent freedom companies enjoy to deny workers the rights that come with employee or worker status fails to protect workers from exploitation and poor working conditions. It also leads to substantial tax losses to the public purse, and potentially increases the strain on the welfare state.

The report makes a concrete proposal to address (some of) these issues:

An assumption of the employment status of ‘worker’ by default, rather than ‘self-employed’ by default, would protect both those workers and the public purse and would put the onus on companies to provide basic safety net standards of rights and benefits to their workers. This assumption would entitle workers to employment rights commensurate with ‘worker’ status. As there is no ‘worker’ status in tax law, tax status would be unaffected. Companies wishing to deviate from this model would need to present the case for doing so, in effect placing the burden of proof of employment status on the company.

In July 2017, the Government published the so-called Taylor Review,¹⁰⁹ which had been announced in October 2016 by the Prime Minister. This independent review into working practices in the modern economy aimed to tackle exploitation, increase clarity on status and rights, and bring the law on employment status up to date with modern working practices. It derives its name from being led by Matthew Taylor, chief executive of the Royal Society of the Arts. The report has made seven key recommendations:

(i) Good work for all

- The review suggests a national strategy to provide good work for all ‘for which government needs to be held accountable’.
- It takes the following into consideration when it talks about ‘good work’: wages, employment quality, education and training, working conditions, work–life balance, and consultative participation and collective representation;
- Everyone should enjoy a ‘baseline’ of protection and be given routes to enable progression at work.

(ii) Dependent contractors

¹⁰⁹ Department for Business, Energy & Industrial Strategy, *Good Work: The Taylor Review of Modern Working Practices*, 11 July 2017, available at: <https://www.gov.uk/government/publications/good-work-the-taylor-review-of-modern-working-practices>.

- It suggests that people who work for platform-based companies, such as Deliveroo and Uber, be classed as 'dependent contractors'.
- Individuals who prefer flexible working should be allowed to continue but they should be granted fairness at work.
- There should be a clear distinction made between dependent contractors and those who are legitimately self-employed.

(iii) National Living Wage

- The National Living Wage is 'a powerful tool' to raise the financial base line of low-paid workers.
- Strategies must be put in place, particularly for low-paid sectors, to make sure workers do not get stuck on this rate of pay.
- Individuals must feel that they can make progress.

(iv) Cost of employment

- The government should avoid further increasing the 'employment wedge', which is the non-wage costs of employing a person. The review highlights the apprenticeship levy as an expense that companies have raised as an issue.
- The government must provide additional protections for dependent contractors.

(v) Good corporate governance

- The government does not need national regulation to provide good work.
- Companies must practise responsible corporate governance, good management and strong employment relations within the organisation.

(vi) Developing skills

- Everyone should feel they have realistically attainable ways to strengthen their future prospects at work.
- Individuals should also be able to develop their skills through 'formal and informal learning' as well as 'on the job and off the job activities.'

(vii) A healthy workplace

- The UK needs to develop a more pro-active approach to workplace health, which will benefit companies, workers and the wider public interest.

Several of these recommendations are specifically relevant to the online platform economy.

Firstly, the report considers whether the current three-tier approach in UK employment law, distinguishing between independent contractors/self-employed, workers and employees, should be abolished or amended in order to accommodate (the concerns connected to) online platform work. The report concludes that it is helpful to have the 'intermediate worker' category covering casual, independent relationships, with a more limited set of key employment rights applying. It does, however, consider the current approach confusing, and that therefore the government should introduce a new name to refer to the category of people who are eligible for 'worker' rights but who are not employees, namely 'dependent contractors'. The government should furthermore identify a clearer distinction between an 'employee' and a 'dependent contractor':

At present, the way in which the courts have interpreted the definitions of employee and worker has led to a situation where they appear to be broadly the same but with worker being a slightly lower bar. We believe that in developing a new framework now is the time to consider whether this is a situation we want to continue. Our view is that it should not. The status of 'dependent contractor' should have a clearer definition which better reflects the reality of modern working arrangements, properly capturing those more casual employment relationships that are on the increase today — an individual who is not an employee, but neither are they genuinely self-employed. Currently, an individual can have almost every aspect of their work controlled by a business, from rates of pay

to disciplinary action and still not be considered a worker if a genuine right to substitution exists. We do not think this is fair, or reflects many of the opportunities presented in the modern world of work. The key employment protections which are available to 'workers' are there to support anyone who is not genuinely self-employed and it should not be that easy for employers to avoid any responsibilities in this way. We therefore think that it is important for Government to ensure that the absence of a requirement to perform work personally is no longer an automatic barrier to accessing basic employment rights. Ultimately, if it looks and feels like employment, it should have the status and protection of employment. In addition, we believe the principle of 'control' should be of greater importance when determining dependent contractor status, with the legislation outlining what it means in a modern labour market and not simply in terms of the supervision of day-to-day activities. We don't envisage a significant departure from the approach currently taken by the courts where control is often a key factor when deciding if someone is a 'worker' or 'self-employed'. We believe that, if done correctly, placing greater emphasis on control and less emphasis on personal service will result in more people being protected by employment law. While this number is likely to be very small in the overall context of employment levels nationally, we believe it is fairer. It will also make it harder for some employers to hide behind substitution clauses which can only be challenged effectively through the courts.

Secondly, the report deals with the issue of minimum wages for online platform workers. Since the key to the National Minimum Wage legislation is the definition of working time, the report indicates that, if the National Minimum Wage were to apply to online platform workers, it is important that working time be sensibly calculated. The report considers that:

platforms do not place limits on when individuals can log onto the app but no individual should be expecting to be paid for all the time that he or she has the app open (regardless of whether or not they are seeking work). For instance, it would clearly be unreasonable if someone could log onto an app when they know there is no work and expect to be paid. Recent case law has attempted to tackle this, drawing a distinction between simply logging on to an app, and being available and genuinely looking for work. Individuals and companies working in the gig economy have also repeatedly said to us that they value the ability to 'sign on' for work as and when they please. Platforms present individuals with greater freedom over when to work, and what jobs to accept or decline, than most other business models. It is essential we do not lose this. However we have also heard reports of an oversupply of labour at certain times, effectively flooding the market and driving down the hourly rate to below that of the National Minimum Wage. The richness of data available to online platforms is a tremendous asset in developing solutions that can work for both organisations and workers. Such data can, for example, provide individuals with an accurate guide to their potential earnings if they sign on to an online platform at any given time. We believe it could also be used to ensure a fair application of the National Minimum Wage. We considered a range of options, from licensing regimes to market led solutions. However, we were deeply conscious of the need to avoid undermining the National Minimum Wage — a fundamental tool to prevent exploitation. For these reasons we settled on an adaptation of piece rates legislation.

The proposal made is that, building on the existing framework, platforms would be able to compensate workers based on their output (i.e. number of tasks performed), provided they are able to demonstrate that an average individual, working averagely hard, successfully clears the National Minimum Wage (with a 20 % margin of error).

The report considers that, 'if an individual knowingly chooses to work through a platform at times of low demand, then he or she should take some responsibility for this decision'. Where piece rates are currently used, there is a requirement to issue a notice before the start of the pay reference period, explaining what the 'mean hourly output rate' is and stating the rate of sum to be paid to the worker for the performance of the task in question. Platforms have access to a vast amount of data on current demand and work being carried out at any given time, meaning that they could be required to provide real time data in addition to a 'notice', increasing transparency for workers. The report indicates that it

is important to take into consideration that the individual is completely free to choose the time of work, and whether or not to accept individual jobs, which is very different from a situation where, for example, a mobile worker is expected to travel between a fixed number of appointments, for which the National Minimum Wage would clearly apply.

The report has recommended that, over the coming year, the government should:

- develop legislation and guidance that adequately sets out the tests that need to be met to establish employee or dependent contractor status; this should retain the best elements of case law and better reflect the reality of modern-day casual work in terms of the control exercised by employers over their staff;
- reflect the realities of platform work, ensuring that, in developing legislation, legitimate business models that allow maximum flexibility to their dependent contractors are not prevented from operating by updating National Minimum Wage legislation;
- provide maximum clarity on status and rights for all individuals by extending the right to written particulars to all in employment and developing an online tool providing a clear steer on what rights an individual has.

d) The specific case of Uber

In October 2016, a **London employment tribunal upheld the claim brought by two Uber drivers** on behalf of a group 19 Uber workers who argued that they were employed, rather than working for themselves.¹¹⁰ As in other cases, Uber argued that it was a technology firm, not a transport business, and that its drivers were independent self-employed contractors who could choose where and when they worked. The tribunal rejected these arguments, however, remarkably emphatically, stating that: '[t]he notion that Uber in London is a mosaic of 30,000 small businesses linked by a common "platform" is to our minds faintly ridiculous'.¹¹¹ Drivers cannot and do not negotiate with passengers and are offered and accept trips strictly on Uber's conditions. The drivers provide the skilled labour through which the organisation delivers its services and earns its profits. The supposed passenger/driver contract is a pure fiction which bears no relation to the real dealings and relationships between the parties, according to the judges.

The tribunal considered that it was true that Uber drivers are never under any obligation to switch on the app, and that when the app is switched off 'there can be no question of any contractual obligation to provide driving services' as there is 'no umbrella contract'.¹¹² However, the legal analysis was different when the app was switched on. When the driver is within the territory within which he or she is authorised to work, and is able and willing to accept those assignments, the driver is working for Uber under a 'worker' contract.¹¹³ Regardless of the protests of Uber, which resorted to 'fictions, twisted language, and even brand new terminology'¹¹⁴ about the nature of the company and the contractual arrangements between itself, drivers and customers, the tribunal accepted the 'simple case',¹¹⁵ which corresponds to 'basic common sense',¹¹⁶ that 'the organisation runs a transportation business and employs drivers to that end',¹¹⁷ citing the North California District Court, which had held that 'Uber does not simply sell software; it sells rides. Uber is no more a "technology company" than Yellow Cab is a "technology company" because it uses CB radios to dispatch taxi cabs'.¹¹⁸

The tribunal concluded that the claimants were 'employed' as 'workers' by Uber, within the meaning of the **Employment Rights Act 1996, the Working Time Regulations 1998 and the National Minimum**

¹¹⁰ *Aslam & Ors v Uber BV & Ors* [2016] EW Misc B68 (ET) 28 October 2016.

¹¹¹ Para. 90 of the Reasons of the judgment.

¹¹² Para. 85 of the Reasons of the judgment.

¹¹³ Para. 86 of the Reasons of the judgment.

¹¹⁴ Para. 87 of the Reasons of the judgment.

¹¹⁵ Para. 88 of the Reasons of the judgment.

¹¹⁶ Para. 89 of the Reasons of the judgment.

¹¹⁷ Para. 87 of the Reasons of the judgment.

¹¹⁸ *O'Conner-v-Uber Technologies Inc*, Case 3:13-cv-034260EMC, 11 March 2016.

Wage Act. For the purposes of the National Minimum Wage Regulations, the claimants were engaged in ‘unmeasured work’ and their hours of work were to be reckoned in accordance with Regulations 45 and 47 and the accompanying Reasons.

Trade unions hailed the ruling. The GMB union, which took up the case for the drivers, said that it was a ‘monumental victory’ which would have an impact on thousands of workers in other industries ‘where bogus self-employment is rife’.¹¹⁹ It should be pointed out, however, that the judgment applies only to the drivers in question, and other online platform workers, including Uber drivers, will have to take their own individual cases to enforce their own rights. It has been noted that, with fees of up to £1,200 to file a case with employment tribunals, access to justice and enforcement issues are currently more problematic for the situation of online platform workers than their actual legal status as ‘workers’.¹²⁰

The judgment is currently being **appealed at the Employment Appeals Tribunal**.

(e) Other cases

The Uber ‘test case’ was followed by further rulings. In January 2016, courts **found in favour of a courier for CitySprint**.¹²¹ The judge classified CitySprint’s description of its ‘self-employed courier model’ as ‘window dressing’, concluding that the worker was ‘one courier working personally for one organisation at any one time and that any concept of her operating as a [self-employed] business is a sham’.¹²² In February 2017, a court ruled that a plumber engaged on a self-employed basis by **Pimlico Plumbers** should be entitled to ‘worker’ status.¹²³ The plumber was not an ‘employee’ because he was neither guaranteed work nor obliged to accept it, and he had some control over how he carried work out (he could charge a mark-up on materials that he obtained and used on a job). He was, however, subject to a range of controls through the company: he had to wear a uniform, be available for work full-time, and conform to rules and standards. This was judged to be consistent with ‘worker’ status. A **case against Deliveroo** has been brought by the IWGB union at the Central Arbitrations Committee and is currently pending.¹²⁴

¹¹⁹ See <https://www.theguardian.com/technology/2016/oct/28/uber-uk-tribunal-self-employed-status>. It has been estimated that, in the UK, 460,000 people are falsely classified as self-employed.

¹²⁰ ‘Self-employed or employee? Britain wrestles with the gig economy’, *The Economist*, 13 July 2017, available at: <https://www.economist.com/news/britain/21725036-many-labour-market-problems-would-be-solved-simply-enforcing-existing-law-self-employed-or>. See also the trade union IWGB’s response to the Taylor Review: <https://iwgb.org.uk/2017/07/14/breaking-iwgb-response-to-the-taylor-review/>.

¹²¹ For discussion, see House of Commons Work and Pensions Committee, *Self-employment and the Gig Economy*, 13th Report of Sessions 2016-17, available at: <https://publications.parliament.uk/pa/cm201617/cmselect/cmworpen/847/847.pdf>, p. 11.

¹²² *Dewhurst v Citysprint UK Ltd*, Case No 2202512/2016, para. 56 of the judgment.

¹²³ *Pimlico Plumbers Ltd, Charlie Mullins v Gary Smith*, [2017] EWCA Civ 51.

¹²⁴ <http://www.telegraph.co.uk/technology/2017/03/06/tribunal-rule-deliveroo-riders-employment-status/>.

Conclusion: Regulation and policy in relation to the online platform economy in the United Kingdom

In the UK, discussions about the precariousness of atypical work have dominated political and public discussions for several years now, with the main focus more recently shifting slightly from the issue of so-called 'zero-hours contracts' to the online platform economy.

UK employment law does not have the binary distinction between the 'employed' and the 'self-employed' that some other jurisdictions have, and instead features a third category of 'workers', comprising people engaged in 'intermediate' labour activities, often casual, who do not fulfil the criteria for being an employee, but nevertheless cannot be considered wholly self-employed either. Employees benefit from the full range of employment protections, which do not apply to the genuinely self-employed. The intermediate status of 'worker' instead provides a set of baseline rights, such as the National Minimum Wage, and is therefore less protective than 'employee' status but more protective than being self-employed. Workers are in particular entitled to basic safety and health rights, the National Minimum Wage, working time rights, data protection rights and time off for family emergencies.

Regardless of this intermediate category, determining the employment status of online platform workers has not been straightforward. Several policy proposals have therefore been made to improve the situation. Firstly, the House of Commons Work and Pensions Committee has proposed the introduction of an assumption of the employment status of 'worker' by default, rather than 'self-employed' by default, which 'would protect both those workers and the public purse and would put the onus on companies to provide basic safety net standards of rights and benefits to their workers'. Secondly, the Prime Minister, Theresa May, made a political commitment upon taking office to tackle unfair working practices, commissioning the so-called Taylor Review, which has recommended:

- the development of legislation and guidance that adequately sets out the tests that need to be met to establish employee or dependent contractor status; this should retain the best elements of case law and better reflect the reality of modern-day casual work in terms of the control exercised by employers over their staff;
- reflecting the realities of platform work, ensuring that in developing legislation, legitimate business models that allow maximum flexibility to their dependent contractors are not prevented from operating by updating minimum wage legislation;
- provide maximum clarity on status and rights for all individuals by extending the right to written particulars to all in employment and developing an online tool providing a clear steer on what rights an individual has.

Finally, the employment status of online platform workers has been considered by UK courts. Several judgments have been rendered and more are pending. The most high-profile case has been the judgment of October 2016 by a London employment tribunal, upholding the claim brought by two Uber drivers on behalf of a group of 19 Uber workers who argued that they were employed, rather than working for themselves.

Denmark

a) Introduction

The issue of the 'sharing economy' (*deleøkonomi*) is high on the Danish agenda, in terms of both media coverage and the interest of key political actors, including the social partners.¹²⁵ The alternative term 'platform economy' (*platformsøkonomi*) is much less used, despite the fact that the Confederation of

¹²⁵ S. Rasmussen and P. Kongshøj Madsen, 'Denmark' in *Nordic Labour Markets and the Sharing Economy: National Background Reports*, Nordic Council of Ministers, available at: <http://dx.doi.org/10.6027/NA2017-904>.

Danish Trade Unions (LO) has tried to encourage the use of this more neutral, alternative term.¹²⁶ Trade unions generally have been critical, while employer's organisations have not expressed very strong views, apart from those in the taxi and hotel sectors. The Danish Government has announced a white paper, which will analyse both the merits and the dangers of the sharing economy and the need for regulation.¹²⁷

There are numerous online platform companies active in Denmark. The ones that have attracted most attention are Uber and Airbnb, but others include Meploy, whereby firms and private individuals can hire other private individuals (not professionals) to carry out certain tasks for payment; AHandyHand.dk and DenLilleTjeneste.dk, offering jobs ranging from 'handyman-like' tasks, babysitting and cleaning to computer assistance; Happytown.dk, providing more stable after-school jobs for young people; and Lejdet.dk, organising the hiring out of personal belongings in addition to jobs performed by both professionals and private individuals (photography, different types of therapy, baby-sitting, cleaning, teaching, plumbing etc.).¹²⁸ A common feature of all these online platforms is that the platform takes a certain amount of money as a commission for matching the online worker and the job, or a fee for having a profile on the platform.

Apart from the specific case of Uber, dealt with further below in more detail, no specific legislative initiatives or collective agreements have been undertaken to address the online platform economy (and its impact on labour/OSH rules). It should, however, be noted that a Nordic Future Group has been created, looking at the specific issue of OSH protection in the digital economy, in which Finland, Iceland, Sweden, Norway and Denmark participate.¹²⁹ While the general conclusions of the group are therefore relevant for all these countries, they will be dealt with in the current section on Denmark.

b) Legislation

The provisions of the **Danish Working Environment Act** apply to work for an employer. To determine whether a particular economic activity is to be considered as 'work for an employer' or 'work by a self-employed person', the Danish Working Environment Authority's Guideline F.3.4 indicates that the following need to be considered:

- whether or not the persons are subject to instruction and checks during their work;
- whether or not the persons are obliged to make their labour available;
- whether or not the employer provides a work space, machinery, tools, materials or other necessary equipment for carrying out the work;
- whether or not the employer bears the risk for the achieved result.

In special cases of doubt, some weight may be given to whether or not a person receives remuneration for the work done, but this consideration can only in very exceptional circumstances be given added significance.

Many activities in the online platform economy will not satisfy these general criteria. The Danish Working Environment Act does not specifically regulate online platform economy activities. This means that many online platform workers will qualify as self-employed. In that case, the Danish Working Environment Act only partially applies, in particular the rules that regulate the performance of the work, work with technical equipment and work with substances and materials.

It should be noted that, in Denmark, most terms and conditions of employment are laid down in collective agreements or individual employment contracts, as part of the so-called 'Danish Model', in which the state refrains from intervening in the regulation of pay and working conditions as long as the parties themselves are able to resolve issues in a responsible manner.

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ Nordic Future Group, 'Diversity of the future workforce and work tasks: Challenges to OSH' (2013), on file with the author.

For the online platform workers that would fall within the scope of the Working Environment Act, it may be relevant that teleworking activity is regulated. As a general rule, also in teleworking situations it remains the responsibility of the employer to ensure safe and healthy working conditions in cooperation with the employee. However, in these situations, the application of Danish Working Environment Act is moderated, e.g. some of the rules on the design and fitting out of the work site apply only when the telework is of a certain minimum duration. It should also be noted that, while it is possible for the Danish Working Environment Authority to inspect teleworking activities, it is only on rare occasions that the Danish Working Environment Authority will visit the homes of employees to do so.

c) Social partner initiatives¹³⁰

The Confederation of Danish Trade Unions (LO) has conducted two surveys among its members and potential members concerning their perception of the online platform economy.¹³¹ The results reveal a significant uncertainty in the assessment of the sharing economy, but also a tendency towards an increasingly sceptical attitude among the LO membership.¹³² The trade union organising salaried workers (HK) has conducted a survey among its members about their attitudes towards seeking employment using digital platforms such as Upwork.¹³³ Around half of the members would never consider this option. Their major worry was the lack of basic in-work benefits such as sickness pay, paid holidays and training.

In its position on the platform economy, LO highlights a concern about a lack of implementation of existing legislation, for instance with respect to safety at work, often due to the fact the existing legislation is not adapted to the use of digital platforms, as well as a lack of basic rights for employees such as sickness pay and paid holidays, related to the unclear status of the persons as either employees or self-employed. LO proposes both better implementation of existing legislation and a number of new initiatives, including the need for trade unions to integrate the employers and employees of the platform economy into the organised labour market.

HK, which organises salaried workers, has recruited new personnel and trained its employees in order to offer better assistance to members, if they ask for advice in relation to work through a Danish or foreign platform. Along similar lines the Danish Confederation of Professional Associations (*Akademikerne*) has stated that the unions clearly have a role to play in ensuring the rights of the new independent workers. Together the two unions have announced that they will establish a task force of experts, which will come up with concrete solutions to some of the many challenges that follow in the wake of the platform economy. The task force will consist of leading representatives of IT companies, platform companies, trade unions, employers and researchers.

In reply to a hearing concerning the Commission Communication on the sharing economy from 16 June 2016, the Confederation of Danish Employers (DA) stated that existing regulation is sufficient to cope with the challenges of the sharing economy, when it comes to employment relations. The Confederation of Danish Enterprise (*Dansk Erhverv*) has published an analysis of the concept of the 'sharing economy' and a survey on the use of mainly Uber and Airbnb. It has on a number of occasions expressed a positive attitude towards activities in the 'sharing economy', but at the same time pointed to the need for fair competition including compliance with national tax laws. The most critical voices towards activities

¹³⁰ This section draws heavily on the information and insights presented by J. Dølvik and K. Jesnes, *Nordic Labour Markets and the Sharing Economy: Report from a Pilot Project*, Nordic Council of Ministers, *TemaNord* 2017:508, available at: <https://norden.diva-portal.org/smash/get/diva2:1072087/FULLTEXT02.pdf> and S. Rasmussen and P. Kongshøj Madsen, 'Denmark' in *Nordic Labour Markets and the Sharing Economy: National Background Reports*, Nordic Council of Ministers, available at: <http://dx.doi.org/10.6027/NA2017-904>.

¹³¹ LO, *Plattformsøkonomi: Lovgivningsmæssige udfordringer og fagbevægelsens løsningsforslag* (Copenhagen, 2016), LO, *Notat om samhandlingsøkonomien* (Oslo, 2016), both reported by J. Dølvik and K. Jesnes, *Nordic Labour Markets and the Sharing Economy: Report from a Pilot Project*, Nordic Council of Ministers, *TemaNord* 2017:508, available at: <https://norden.diva-portal.org/smash/get/diva2:1072087/FULLTEXT02.pdf>.

¹³² *Ibid.*

¹³³ G. Redder, 'Danskerne utrygge ved at tage job på nye digitale platform' (2016), reported by J. Dølvik and K. Jesnes, *Nordic Labour Markets and the Sharing Economy: Report from a Pilot Project*, Nordic Council of Ministers, *TemaNord* 2017:508, available at: <https://norden.diva-portal.org/smash/get/diva2:1072087/FULLTEXT02.pdf>.

in the sharing economy have been employers' organisations that represent businesses that are most directly affected by the online platforms Uber and Airbnb. *Dansk Taxi Råd* (Danish Taxi Council), which organises the majority of taxi companies, has taken a critical attitude towards Uber and at the same time called for modernisation and liberalisation of the complicated laws that at present regulate the taxi business. The main claim is thus that a level playing field should be created, where platform-based services will compete with other providers of transport services on equal terms. Reforms have taken place accordingly, which will be discussed below in more detail. The largest employers' organisation for the hotel, restaurant and tourism sector (HORESTA) has criticised Airbnb for unfair competition and called for tighter monitoring of the taxable incomes from the individuals that rent their homes through Airbnb and for them to be subject to the same obligations as the traditional hotel business.

d) Policy initiatives

In June 2016, an **Industry 4.0 Commission** was established in Denmark with the mandate to bring forward recommendations about digital technologies, robots, etc.¹³⁴ Digital change in this sense relates to many different areas, such as companies and the labour market, legal issues of data protection and labour law, investment in future industries and accompanying infrastructure at a national scale (industrial policy), as well as societal issues such as education, demography and an ageing society.¹³⁵

The **long-term growth strategy** of the Danish Government published in August 2016 includes a tax approach to the 'sharing economy'.¹³⁶ The government will increase the existing basic tax allowance in connection with the rental of second homes and room rental by DKK 10,000. The allowance for rental of holiday homes will in addition be increased by DKK 5,000. The extra allowance is made conditional on the reporting of taxable income to the tax authorities through a rental agency or a digital platform. In addition, the government will examine the possibility of introducing a general basic tax allowance for activities in the sharing economy in order to increase the incentives for participation. Again, this will be conditional on 'automatic' reporting to the tax authorities through a digital platform. In order to support the use of digital reporting platforms, voluntary agreements will be made with actors in the sharing economy and marketing efforts made towards the citizens, digital platforms, etc. Private individuals' use of digital payment also provides a new opportunity to create an easy digital path for reporting to the tax authorities. A dialogue with the financial sector will be initiated in order to mainstream reporting solutions in existing payment services, for instance for payment for services between private individuals. It is indicated that a more comprehensive strategy will be published later.

Furthermore, as mentioned in the introduction, Denmark takes part in the **Nordic Future Group**.¹³⁷ In a recent report, it was observed that:

the group of atypical work has become very heterogeneous. The division of work contracts to only in categories permanent/temporary or full-time/part-time is too narrow. In addition we need to consider, among others, Crowdsourcing, Workforce on demand, Cloud sourcing, Sharing economy, Digital labour, Co-creation, Peer-to-peer networking and Zero hour contracts. This is due to the rapid expansion of major corporate players (e.g. Amazon, Airbnb, Uber) helped by the effective systems for international money transfer, sophisticated use of big data — targeted advertising and general network advantages (size and international spread make it more likely that consumers can find what they want where they want it).

The Nordic Future Group has identified the risks thereof as 'persons left in a position between paid work and entrepreneurship or in a hybrid of these do not have the security provided by an employment

¹³⁴ S. Vogel, 'Addressing digital and technological change through social dialogue', *EurWORK European Observatory of Working Life*, 30 January 2017, available at: <https://www.eurofound.europa.eu/observatories/eurwork/articles/addressing-digital-and-technological-change-through-social-dialogue>.

¹³⁵ Ibid.

¹³⁶ Regeringen, *Et stærkere Danmark: Vækst 2016*, available at: https://www.fm.dk/publikationer/2016/et-staerkere-danmark-vaekst-2016_pp_37-38

¹³⁷ Nordic Future Group, 'Diversity of the future workforce and work tasks: Challenges to OSH' (2013), on file with the author.

contract and relationship, and few of them have occupational health care'. Other identified risks are psycho-social:

linked inter alia to precariousness, unpredictability, work intensity, interaction of impacts from multiple jobs. Organisational ambiguities/gaps relate to insurance coverage, legal and professional liability, coverage by European Directives and national regulations, the legal status of online work exchange platforms and the definition of the employer.

The report also reflects specifically on app-enabled work. It is observed that:

app-jobs in theory are win-win situations as the third party (employer) is apparently irrelevant and the transaction has only a task provider and task performer. It remains unclear if there is an employer-employee relationship in an app-based job. A direct consequence is lack of, or unclear, OSH responsibility for the task. Traditionally the transport company, which has transport as core business, has the OSH responsibility for its drivers at the company. If an app whose core business is not transport, but technology simply connects the freelance driver (task performer) and the customer (task giver) it is unclear who bears the OSH responsibility. Most likely the driver has to take care of it himself, and this may lead to moving the 'risk assessments and control' from the traditional employer to individual drivers. Regardless of the technology platform used the nature of work and its hazards remain fundamentally the same. For e.g. risk for fall-related injuries from heights for a painter employed in a painting company in absence of scaffoldings (or other safety provisions), is the same if a free-lance painter who acquired the job through an App performs the task.

It is furthermore considered that the implications for OSH and society will really depend on how big a share of labour market the 'independent contractors' constitute. It is the newness of the web-based platform (app jobs), and easy access to the labour market that will catalyse the growth of such work arrangements in the labour market. 'Issues of consumer protection, public safety, and taxation are rapidly evolving, while there seems a paucity on the aspects of occupational safety and health concerning App-jobs or sharing economy which needs to be addressed'.

As regards the remote working element of online platform work, the Nordic Future Group's report notes that, while we move from one location to another and work at the same time, the limits (distinction between work and other life) of working may become blurred. Workers are also required to quickly learn new technological innovations and be creative. The risk is that the organisation of work and quick, independent choices have been transferred more from the supervisors to the employees themselves. The negative impacts of this development include unpredictable health effects and increasing strain on employees, both physical and psychological. Changes in the physical locations of working also mean that risk assessments must be carried out on the premises where people work. The work ergonomics of travellers have largely been ignored on trains, where many people work using their computers, tablets, etc. The same lack of ergonomics pertains to other modes of transport and public spaces, such as hotels and libraries. The report notes that:

from the OSH administration's perspective, the consequence of such diversification and polarisation includes the lack of commensurability and difficulties with the setting of common universal standards. The modes of operation of the OSH administration and OSH enforcement, in particular, must become more diversified and be flexible. On the one hand, the OSH administration must make sure that employers have submitted appropriate guidelines, including training, involving hazardous factors at workplaces, such as noise levels and exposure to chemical hazards. The basics must be in order at all workplaces — the place of work must be safe, working must not endanger the mental or physical health of employees, and the terms and conditions of the employment relationship must be in compliance with the law.

These observations have led the Nordic Future Group to pose the following questions for follow-up consideration: how to apply general employment rights in case of unclear contracts, such as the right to payment for work completed, the right to prompt payment, the right OSH training, risk (self-)assessment, working hours, sickness coverage, annual leave, safe and healthy working conditions, preventive occupational health care, the right of free assembly, workers' safety representative, social dialogue and

the applicability of European and national regulations. As the implementation of these rights is closely linked to the definition of an employer–worker relationship, the group asks how to define the employer–worker/producer–buyer relationship to embrace future forms of work, and how to ensure proper working conditions in subcontracting and other value chains.

The group has also concluded that the actions of the OSH administration must be more directed at specific hazardous occupations and small groups of employees. For example, risks involving occupational safety and well-being at work are increasingly targeted at certain professional groups or positions with specific tasks inside various lines of business, or during short periods of time, instead of being sector-specific or broader risks. This means that risk assessments must be targeted more precisely. Questions are how to identify the place of work, how to guarantee and evaluate workers' safety when working while travelling, how to guarantee that the workers are competent enough, have all the skills they need and have time to learn new things while the places of work are transformed, and whether or not employees can manage and monitor their own work.

e) The specific case of Uber

Uber came relatively late to Denmark, in November 2014. Ever since then, it has been the focal point of the debate about the platform economy.¹³⁸ Hours after Uber started operating, the Danish Transport and Construction Agency reported Uber to the police for illegal taxi-driving.¹³⁹ Since then, more than forty Uber drivers have been indicted by Danish police. In **July 2016, a Copenhagen court found six Uber drivers guilty of violating Danish taxi laws** and fined them DKK 2,000 to DKK 6,000 each. In all six cases, the Danish drivers had been using cars that were not approved for taxi services, the Copenhagen City Court held. The drivers had pleaded innocent, arguing they had merely participated in carpooling. The **Eastern High Court upheld this decision in November 2016**.

In March 2017, the Danish government passed a **new Taxi Act**.¹⁴⁰ The Act introduces the following main changes: (i) the current four permits (taxi, limousine, public service and medical transport) are replaced by a single universal licence for commercial passenger transport, (ii) the total limitation on taxi permits is cancelled, so anyone who meets the requirements for driving a taxi can have a licence, (iii) the current municipal boundaries for taxi services are eliminated, so taxi companies can operate across municipalities throughout the country, (iv) the capital requirement for the universal licence is DKK 40,000 for the first car and DKK 20,000 for the licence for each of the additional cars, (v) drivers of other types of commercial passenger transport, such as public service and disability services, now have the opportunity to drive a taxi at times when they do not carry out other occupational passenger transport, (vi) the municipalities can provide taxi services in outlying areas, so that the municipalities pay an amount for taxi companies to serve the outermost regions, and (vii) seat sensor, video surveillance and taximeter requirements are retained. The Act will continue to impose certain requirements concerning the vehicles, and taxi drivers must have a special driving licence.

The changes in legislation will be introduced gradually so that the number limitation is introduced over three years, while the carriers get five years to adapt the cars to the new equipment requirements. The new law will be evaluated after one, three and six years to follow how the market and new technological opportunities develop. These rules were unacceptable to Uber, which has now left Denmark.

¹³⁸ S. Vogel, 'Addressing digital and technological change through social dialogue', *EurWORK European Observatory of Working Life*, 30 January 2017, available at: <https://www.eurofound.europa.eu/observatories/eurwork/articles/addressing-digital-and-technological-change-through-social-dialogue> .

¹³⁹ See <http://www.reuters.com/article/us-uber-denmark-idUSKCN0Z01E8>.

¹⁴⁰ C. Jørgensen and A. Randrup, 'Denmark: Latest working life developments — Q1 2017', *EurWORK European Observatory of Working Life*, 15 May 2017, available at: <https://www.eurofound.europa.eu/observatories/eurwork/articles/denmark-latest-working-life-developments-q1-2017>.

Conclusion: Regulation and policy in relation to the online platform economy in Denmark

The issue of the online platform economy, most often referred to as the sharing economy (*deleøkonomi*), is high on the Danish agenda, in terms of both media coverage and the interest of key political actors, including the social partners. However, not many concrete actions in terms of policy, social dialogue, regulation or case law have (yet) been taken in relation to the employment law questions connected to online platform work.

The provisions of the Danish Working Environment Act apply to work for an employer. For these purposes, it needs to be considered:

- whether or not the person is subject to instruction and checks during their work;
- whether or not the person is obliged to make their labour available;
- whether or not the employer provides a work space, machinery, tools, materials or other necessary equipment for carrying out the work;
- whether or not the employer bears the risk for the achieved result.

In special cases of doubt, some weight may be given to whether or not a person receives remuneration for the work done, but this consideration can only in very exceptional circumstances be given added significance. Given this, many activities in the online platform economy will not satisfy these general criteria and many online platform workers will qualify as self-employed. In that case, the Danish Working Environment Act only partially applies, in particular the rules that regulate the performance of the work, work with technical equipment and work with substances and materials.

The employment and OSH implications have been subject to discussion and analysis, particularly in the context of the Nordic Future Group, which also includes Finland, Iceland, Sweden and Norway. The group has formulated the following questions for follow-up consideration:

- how to apply general employment rights in case of unclear contracts, such as the right to payment for work completed, the right to prompt payment, the right OSH training, risk (self-)assessment, working hours, sickness coverage, annual leave, safe and healthy working conditions, preventive occupational health care, the right of free assembly, workers' safety representative, social dialogue and the applicability of European and national regulations;
- as the implementation of these rights is closely linked to the definition of an employer–worker relationship, how to define the employer–worker/producer–buyer relationship to embrace future forms of work, and how to ensure proper working conditions in subcontracting and other value chains;
- for the purposes of targeted OSH risk assessments, how to identify the place of work, how to guarantee and evaluate workers' safety when working while travelling, how to guarantee that the workers are competent enough, have all the skills they need and have time to learn new things while the places of work are transformed, and whether or not employees can manage and monitor their own work.

While, like in many other Member States, the activities of Uber have received much media and political attention, this has focused mostly on issues unrelated to the employment status and conditions of the drivers. In response to the reformed Taxi Act, Uber has stopped operating in Denmark.

Sweden

a) Introduction

In Sweden, the public/political debate about the online platform economy (often referred to as the 'sharing economy') has mainly focused on issues about taxation and consumer protection.¹⁴¹ Nevertheless, there is an emerging discussion about the impact on the labour market.¹⁴² In this respect, the atypical employment characteristic of the online platform economy has sometimes been presented as a solution to loss of jobs due to digital automation and robotisation, and an economic opportunity for Sweden.¹⁴³ On the other hand, it has also been pointed out that middle-range employees with higher education may be forced into the part of the online platform economy consisting of low-skilled, low-paid, routine micro-work tasks as associated with companies such as Amazon Mechanical Turk, TaskRabbit and TaskRunner.¹⁴⁴ There is some concern about the increasing number of people in Sweden earning an income as self-employed (*egenanställd*) and the consequences for the organisation of social security insurance and benefits.¹⁴⁵

b) Legislation

Sweden does not have any specific regulations concerning the online platform economy.

In general terms, the **Work Environment Act** regulates labour conditions. The definition of 'employee' for the purpose of the application of the Act is broad. When a person declares that he or she is an independent worker or self-employed, that person may still be defined as an employee by the Swedish Work Environment Authority, and the purchaser may be defined as the employer. Whether a person who has undertaken a job is considered an employee, a contractor or self-employed will depend on the circumstances. Factors of importance in this context are (i) whether or not the person doing the work is personally obliged to do it, (ii) who holds the materials, machinery, etc. for the work and (iii) how the remuneration for the work is calculated. An assessment will in each case be made on the basis of a weighing of the circumstances. Even when a person formally appears to be an independent entrepreneur, he or she can be regarded as a worker if the person occupies a dependent position from an organisational and economic perspective.

When it comes to teleworking, which has been linked to the integration of IT in the workplace since the late 1990s (*IT-driven arbetsplats*),¹⁴⁶ the employer has the same responsibility for the employee as if he or she were at the ordinary workplace. The Swedish labour inspectorate, however, does not inspect in employees' homes.

The conditions for temporary agency work are determined by sectoral collective agreements, and the workers have regular employee contracts with their agency.¹⁴⁷

¹⁴¹ B. Rolandsson, J. Petersson and T. Berglund, 'Sweden' in *Nordic Labour Markets and the Sharing Economy: National Background Reports* (2017), available at: <http://dx.doi.org/10.6027/NA2017-904>, p. 12.

¹⁴² Ibid.

¹⁴³ Ibid.; Regeringen, *Om Sverige i framtiden: En antologi om digitaliseringens möjligheter, Delbetänkande av Digitaliseringskommissionen* (Stockholm, Nordstedts Juridik AB, 2015); F. Söderqvist, *Plattformsekonomin och den Svenska partsmodellen* (Unionen, 2016), available at: https://www.unionen.se/sites/default/files/plattformsekonomin_den_svenska_modellen.pdf

¹⁴⁴ Insightla, 'Insightrapport, Den nya Arbetsmarknaden — mot en "gigekonomi" med ökad flexibilitet och matchning', *Report nr 5*, 2015; F. Söderqvist, *Plattformsekonomin och den Svenska partsmodellen* (Unionen, 2016), available at: https://www.unionen.se/sites/default/files/plattformsekonomin_den_svenska_modellen.pdf.

¹⁴⁵ Regeringen, *Om Sverige i framtiden: En antologi om digitaliseringens möjligheter*, 2015, SOU2015:65, available at: <http://www.regeringen.se/rattsdokument/statens-offentliga-utredningar/2015/06/sou-2015652/>; F. Söderqvist, *Plattformsekonomin och den Svenska partsmodellen* (Unionen, 2016), available at: https://www.unionen.se/sites/default/files/plattformsekonomin_den_svenska_modellen.pdf.

¹⁴⁶ Eurofound, *New Forms of Employment* (Luxembourg, Publications Office of the European Union, 2015), p. 81.

¹⁴⁷ K. Håkansson, T. Isidorsson and H. Kantelius, 'Stable flexibility: Strategic long term use of temporary agency workers in Sweden', 9 *International Journal of Action research* (2013); J. Dølvik and K. Jesnes, *Nordic Labour*

Since 1974, the **Swedish Employment Protection Act** has legalised certain forms of temporary contracts, such as on-call contracts (*behovsanställning*), which can be permanent or fixed term, with no guaranteed income, and where the employer does not have to pay for the inactive periods.¹⁴⁸ Access to training and other benefits for these working arrangements are laid down in each individual contract.

Finally, it can be noted that in Sweden many self-employed people pay specific companies to take care of social security fees, without being employed by them.¹⁴⁹

c) Social partner initiatives

Not many concrete initiatives have emerged in the area of collective bargaining concerning the online platform economy. The Swedish employer organisations have generally expressed a liberal approach to the online sharing economy, denying the need for any further regulation and instead stressing the importance of innovation and entrepreneurship.¹⁵⁰ The unions, on the other hand, 'approach the sharing economy as an act of balance between a classic stress on the importance of embracing new technology¹⁵¹ and a concern for members that might become exposed to either unprofessional or unfair competition, threatening both quality and salaries'.¹⁵² The TCO (Swedish Confederation of Professional Employees) has initiated a collaboration with the German union IG Metall, to develop services that allow them and their members to scrutinise different platform owners.¹⁵³ The largest white-collar federation in Sweden, Unionen, has adopted a set of visions for how the platform economy can be incorporated into the Nordic model.¹⁵⁴ It has suggested that the social partners organise platform companies and set up a joint social partner platform defining agreed labour standards and providing authorisation for platforms fulfilling the requirements.¹⁵⁵

d) Policy initiatives¹⁵⁶

The government approach to the online platform economy has been described as 'dominated by a concern for how to regulate and tax these new digital platforms and the business activities they make possible'.¹⁵⁷ The online platform economy is seen in the broader context of digitalisation, and it has been

Markets and the Sharing Economy: Report from a Pilot Project, Nordic Council of Ministers, *TemaNord* 2017:508, p. 26.

¹⁴⁸ Eurofound, *New Forms of Employment* (Luxembourg, Publications Office of the European Union, 2015), p. 61.

¹⁴⁹ J. Dølvik and K. Jesnes, *Nordic Labour Markets and the Sharing Economy: Report from a Pilot Project*, Nordic Council of Ministers, *TemaNord* 2017:508, available at: <https://norden.diva-portal.org/smash/get/diva2:1072087/FULLTEXT02.pdf>, p. 38. Cool Company is developing similar functions, taking on some of the technical employer responsibilities (www.coolcompany.com).

¹⁵⁰ J. Dølvik and K. Jesnes, *Nordic Labour Markets and the Sharing Economy: Report from a Pilot Project*, Nordic Council of Ministers, *TemaNord* 2017:508, available at: <https://norden.diva-portal.org/smash/get/diva2:1072087/FULLTEXT02.pdf>, p. 38.

¹⁵¹ Cf. B. Rolandsson, J. Petersson and T. Berglund, *Sharing Economy in the Nordic Countries: Country Report from Sweden* (University of Gothenburg, Sweden, 2003).

¹⁵² Dølvik and K. Jesnes, *Nordic Labour Markets and the Sharing Economy: Report from a Pilot Project*, Nordic Council of Ministers, *TemaNord* 2017:508, available at: <https://norden.diva-portal.org/smash/get/diva2:1072087/FULLTEXT02.pdf>, p. 64.

¹⁵³ Ibid. See for example faircrowdwork.org.

¹⁵⁴ J. Dølvik and K. Jesnes, *Nordic Labour Markets and the Sharing Economy: Report from a Pilot Project*, Nordic Council of Ministers, *TemaNord* 2017:508, available at: <https://norden.diva-portal.org/smash/get/diva2:1072087/FULLTEXT02.pdf>; F. Söderqvist, *Plattformsekonomin och den Svenska partsmodellen*, (Unionen, 2016), available at: https://www.unionen.se/sites/default/files/plattformsekonomin_den_svenska_modellen.pdf.

¹⁵⁵ J. Dølvik and K. Jesnes, *Nordic Labour Markets and the Sharing Economy: Report from a Pilot Project*, Nordic Council of Ministers, *TemaNord* 2017:508, available at: <https://norden.diva-portal.org/smash/get/diva2:1072087/FULLTEXT02.pdf>, p. 48; F. Söderqvist, *Plattformsekonomin och den Svenska partsmodellen* (Unionen, 2016), available at: https://www.unionen.se/sites/default/files/plattformsekonomin_den_svenska_modellen.pdf.

¹⁵⁶ See also the discussion on the Nordic Future Group discussed in the section pertaining to Denmark, above.

¹⁵⁷ Regeringskansliet Faktapromemoria, 'En europeisk agenda för delningsekonomin' (2015), Skatteverket, 'Delningsekonomi - Kartläggning och analys av delningsekonominns påverkan på skattesystemet - Regleringsbrevsuppdrag, slutrapport', (2016) Rapport 131 129 651-16/113, 2016-10- 31, as reported by S.

stated that the Swedish government should await EU initiatives concerning taxation and consumer protection before any resolutions are put forward.¹⁵⁸

While a commission set up to investigate questions about the online platform economy initially stated that labour law and social insurance issues were not their main topic,¹⁵⁹ which reflected a more general initial reluctance to associate the online platform debate to labour/social issues in Sweden, in October 2016 **the government initiated a further public inquiry, looking into how legislation about the work environment will be affected by the digital economy.**¹⁶⁰

e) The specific case of Uber

In Sweden, the police conducted several investigations into whether Uber drivers' activities are to be considered 'carpooling' or a 'taxi service'. Several courts held that driving for Uber is the same as participating in a pirate taxi operation, and accordingly several drivers were sentenced for tax evasion.¹⁶¹ **A decision in March 2016 by an appeals court in Stockholm** upheld one of these rulings in lower courts.¹⁶² In May 2016, Uber stopped its activities in Sweden as a result. These verdicts have been welcomed by the Swedish Transport union, seeing it as a confirmation of their view on Uber as untaxed and unfair competition.

Rasmussen et al., 'Nordic labour markets and the sharing economy - National Background Reports', (2017), <http://dx.doi.org/10.6027/NA2017-904>.

¹⁵⁸ S. Rasmussen et al., 'Nordic labour markets and the sharing economy - National Background Reports', (2017), <http://dx.doi.org/10.6027/NA2017-904>.

¹⁵⁹ Ibid.; SOU, 'Digitaliseringens transformerande kraft: Vägval för framtiden' (2015).

¹⁶⁰ B. Rolandsson, 'Sweden', in *Nordic Labour Markets and the Sharing Economy: National Background Reports* (2017), <http://dx.doi.org/10.6027/NA2017-904>, p. 64.

¹⁶¹ 'Uber stopper omstridt tjeneste i Sverige fortsetter i Norge', *Dagens Næringsliv*, 11 May 2016, available at: <https://www.dn.no/grunder/2016/05/11/1444/Uber/uber-stopper-omstridt-tjeneste-i-sverige-fortsetter-i-norge>.

¹⁶² Ibid.

Conclusion: Regulation and policy in relation to the online platform economy in Sweden

In Sweden, the public/political debate about the online platform economy (often referred to as the sharing economy) has mainly focused on issues about taxation and consumer protection, but there is an emerging discussion about the impact on the labour market.

In general terms, the Work Environment Act regulates labour conditions. The definition of 'employee' for the purpose of the application of the Act is broad. Whether a person who has undertaken a job is considered an employee, a contractor or self-employed will depend on the circumstances. Factors of importance in this context are (i) whether or not the person doing the work is personally obliged to do it, (ii) who holds the materials, machinery, etc. for the work and (iii) how the remuneration for the work is calculated. However, an assessment will in each case be made on the basis of a weighing of the circumstances and, even if a person declares that he or she is an independent worker or self-employed, that person may still be redefined as an employee by the Swedish Work Environment Authority, and the purchaser may be redefined as the employer. Furthermore, even when a person formally appears to be an independent entrepreneur on the basis of the legal criteria, he or she can be regarded as a worker if the person occupies a dependent position from an organisational and economic perspective. This potentially allows the inclusion of many online platform workers into the concept of employee.

The government approach to the online platform economy has been described as 'dominated by a concern for how to regulate and tax these new digital platforms and the business activities they make possible'. The online platform economy is seen in the broader context of digitalisation, and it has been stated that the Swedish government should await EU initiatives concerning taxation and consumer protection before any resolutions are put forward. However, in October 2016 the government initiated a public inquiry, looking into how legislation about the work environment will be affected by the digital economy. Sweden is also part of the Nordic Future Group, discussed above in relation to Denmark.

Several courts have held that driving for Uber is the same as participating in a pirate taxi operation, and accordingly several drivers were sentenced for tax evasion, an approach that was upheld in March 2016 by an appeals court in Stockholm. In May 2016, Uber stopped its activities in Sweden as a result. These rulings have not addressed the employment status of Uber drivers, however.

Finland

a) Introduction

It has been reported that the online platform economy (*alustatalous*) is not a leading theme in Finnish labour market debates, but that there are nevertheless some discussions related to non-standard work and the erosion of standard wage labour that are relevant in this context.¹⁶³ Furthermore, the specific case of the online platform company Uber has given rise to court judgments and regulation, as discussed below.

b) Legislation

There is no specific regulation of online platform work in Finland.

According to the **Finnish Employment Contracts Act**, a contract is to be considered as an 'employment contract' where an employee agrees to perform work personally for an employer under the employer's direction and supervision in return for pay or some other remuneration. Employment law, including OSH requirements, does not apply to independent workers who perform work tasks for their clients, and accordingly labour inspection authorities do not have the competence to intervene.

¹⁶³ A. Saloniemi, 'Finland' in *Nordic Labour Markets and the Sharing Economy: National Background Reports*, Nordic Council of Ministers, available at: <http://dx.doi.org/10.6027/NA2017-904>, p. 24.

As regards teleworking, as long as there is an employment relationship, generally the same rules apply whether the work tasks are performed in the employer's premises or somewhere else. The **Occupational Safety and Health Act** is partially applied in teleworking from home; regarding the fulfilment of some of the obligations, the employer's restricted ability to influence the work and working conditions are taken into account. One of these obligations is the analysis and assessment of the risks at work.¹⁶⁴ The labour inspection authority can carry out an inspection in domestic premises if there is a reasonable cause to suspect that the work performed or the working conditions cause danger to an employee's life or obvious harm or risks to an employee's health and when enforcement actions cannot be satisfactorily carried out. However, the labour inspection authority rarely inspects teleworking.

When a worker works in a shared workplace, there is some regulation in the Finnish Occupational Safety and Health Act that applies. Section 49, on the duty of those operating at a **shared workplace** to exercise care provides that:

if one employer exercises the main authority at a workplace and if more employers than one or more self-employed workers than one, working in return for compensation, operate there simultaneously or successively in such a way that the work may affect other employees' safety or health (shared workplace), the employers and self-employed workers at such a workplace shall, taking the nature of the work and activities into consideration, each for their part and together in adequate mutual cooperation and by information ensure that their activities do not endanger the employees' safety and health.

Furthermore, particularly relevant is Section 53, which provides for obligations of self-employed workers at a shared workplace. A self-employed worker at a shared workplace shall follow the provisions of this Act regarding (i) the competence of employees, necessary permissions and minimum ages; (ii) machinery, work equipment, personal protective equipment and other devices as well as statutory initial and periodic inspections of them; and (iii) the handling, storage and marking of dangerous substances. In addition, a self-employed worker shall follow the workplace safety instructions he or she has received from the employer exercising the main authority at the shared workplace. Further provisions on application of the obligations referred to in subsection 1 regarding self-employed workers operating at a shared workplace in different branches and tasks may be given by government decree.

Finally, it should be noted that Finland is one of the few Member States that has ratified the **Home Work Convention** 1996 (No 177 — C177).

c) Policy initiatives¹⁶⁵

The Prime Minister's Office is currently preparing a foresight report for the government. The themes include reconfiguration of work and the future of Finnish labour. Preparation of the most recent foresight report commenced in March 2016 and the work will be completed in two parts, in 2017 and 2018. The purpose of the report is to find answers to broad questions on the future of how we work and to generate information on the meaning of the reconfiguration of work and how Finland can adapt to the changes successfully.

Furthermore, the Ministry of Labour and Economics has established a working group (28.6.2016-30.6.2018) to analyse the need to update the Working Hours Act and Annual Holidays Act. One of the reasons for this is the change in working life and in the ways that work is performed. For instance, the amount of telework has increased, and more and more work is done independently and without the

¹⁶⁴ 'This Act also applies to work which an employee by agreement performs in his or her home or some other place he or she has chosen, in the employer's home or on the employer's assignment in some other person's home or under related conditions. Regarding fulfilment of the obligations laid down in sections 9, 10 and 12 and Chapters 3 and 5 of the Act, the employer's restricted ability to influence the work and working conditions are taken into account. Also in that case the employer shall comply with the provisions of this Act governing the use of machinery, work equipment, personal protective equipment and other devices as well as substances harmful or hazardous to health in the workplace.' (Section 5 — Application of the Act to work done in the employee's or other person's home)

¹⁶⁵ See also the discussion by the Nordic Future Group discussed in the section pertaining to Denmark, above.

supervision of the employer. The number of flexible working hours has increased and more work is performed during what should be free time. Digitalisation has had an obvious impact there.

There are no activities in progress to update the Occupational Safety Act, but there is quite a lot of discussion of how the occupational safety of the self-employed should be ensured and how work in the shared and collaborative economy should be taken into account and its safety ensured. It can be noted that an amendment to the Occupational Safety Act was made during 2013, obliging the employer to take into account the impact of working hours in risk assessment, which is more and more important in digitalised working life.

d) The specific case of Uber

While the online platform economy has not received much attention in Finland generally, it is different for the specific online platform work performed by Uber. Uber arrived in Helsinki in 2013, where from the beginning questions were raised about its legal status.

In the **autumn of 2016, the Court of Appeal stated that driving for Uber without the appropriate taxi licence contravenes Finnish legislation**, confirming earlier rulings from lower courts, leading to the two drivers concerned being fined EUR 12,250 and EUR 2,800. It was reported that another 30 pending cases would be enforced accordingly.¹⁶⁶ Uber suspended its operation in Finland in response.¹⁶⁷

However, at the same time as the Court of Appeal judgment, a new regulatory framework for passenger transportation and private hire was adopted, which loosens the permit conditions for taxi-driving considerably.¹⁶⁸ The new rules will take effect in 2018.¹⁶⁹ Uber has reported that it will relaunch once the new regulatory framework comes into force.¹⁷⁰

¹⁶⁶ See <http://www.reuters.com/article/us-uber-finland-idUSKCN11R16V>.

¹⁶⁷ See <https://www.theguardian.com/technology/2017/jul/06/uber-pop-primary-unlicensed-taxi-service-regulation-helsinki-finland-until-2018>.

¹⁶⁸ A. Saloniemi, 'Finland' in *Nordic Labour Markets and the Sharing Economy: National Background Reports*, Nordic Council of Ministers, available at: <http://dx.doi.org/10.6027/NA2017-904>, p. 26

¹⁶⁹ Remarkably, the new rules require fluent Finnish as a condition for obtaining a taxi licence.

¹⁷⁰ Joel Järvinen, Uber's country manager for Finland, said in a blog post: 'We want to ensure that we do not pose drivers who use our app or our employees any unnecessary issues, especially now that we have a bright future to look forward to. We believe that the best way to do so and focus on the future is to pause UberPop and relaunch in the summer of 2018. While we are looking forward to the reforms coming into effect, we have decided it is best to pause UberPop from 15 August until the new regulations allow a better environment'. J. Järvinen, 'Pressing pause before we relaunch in Finland', 5 July 2017.

Conclusion: Regulation and policy in relation to the online platform economy in Finland

It has been reported that the online platform economy (*alustatalous*) is not a leading theme in Finnish labour market debates, but that there are nevertheless some discussions emerging on this issue.

In particular, the Prime Minister's Office is currently preparing a foresight report for the government, the themes of which include reconfiguration of work and the future of Finnish labour. Furthermore, the Ministry of Labour and Economics has established a working group to analyse the need to update the Working Hours Act and Annual Holidays Act in the light of increased telework and working partially as a result of digitalisation. Finland is also part of the Nordic Future Group, discussed above in relation to Denmark.

As regards the specific case of the online platform company Uber, in the autumn of 2016 the Court of Appeal stated that driving for Uber without the appropriate taxi licence contravened Finnish legislation, confirming earlier rulings from lower courts. Uber suspended its operation in Finland in response. However, at the same time as the Court of Appeal judgment, a new regulatory framework for passenger transportation and private hire was adopted, which loosens the permit conditions for taxi-driving considerably. The new rules will take effect in 2018. Uber has reported that it will relaunch once the new regulatory framework comes into force. These developments have not, however, focused on the employment status of Uber drivers.

The Netherlands

a) Introduction

In the Netherlands, the debate on the online platform economy (*platformeconomie*), alternatively labelled the 'sharing economy' (*deeleconomie*), has been in full swing for some time. Already in 2015, comprehensive reports were published looking at the societal impact of platform economy initiatives and reflecting on the appropriate policy response.¹⁷¹ While labour law/OSH issues have generally not been directly at the heart of these debates, the problems connected to the ambiguous employment status of online platform workers have been pointed out, and these reflections merge with the longer-standing debate about self-employment/disguised employment.

A 2016 survey indicates that, in the Netherlands, almost one in eight survey respondents (the equivalent of around 1.4 million across the whole population) have made money through so-called digital platforms that offer paid services and/or products such as Werkspot, Marktplaats, Refreshments Over or Amazon Mechanical Turk.¹⁷² It is noteworthy that Marktplaats (a buying and selling platform akin to Ebay) and generally the sale of products are included in these data. For 6 % of respondents, this online platform work or activity is the only or main source of income. The largest group, 42 %, say that it represents less than half their income.

¹⁷¹ See ShareNL and TNO, '*Innoveren in de deeleconomie*', available at: <https://www.rijksoverheid.nl/documenten/rapporten/2015/11/01/innoveren-in-de-deeleconomie>, and '*Digitale Platforms: Een analytisch kader voor het identificeren en evalueren van beleidsopties*', available at: <https://www.rijksoverheid.nl/documenten/rapporten/2015/11/09/digitale-platforms-een-analytisch-kader-voor-het-identificeren-en-evalueren-van-beleidsopties>. See also K. Frenken et al., *Eerlijk delen: Waarborgen van publieke belangen in de deeleconomie en de kluseconomie* (Den Haag, Rathenau Instituut, 2017), available at: https://www.rtlz.nl/sites/default/files/content/documents/2017/05/31/Rapport_Eerlijk_delen_Rathenau_Instituut_2017_-_pdf.

¹⁷² U. Huws and S. Joyce, *Crowd Working Survey* (June 2016), available at: http://www.uni-europa.org/wp-content/uploads/2016/06/crowd_working_survey_Netherlands.pdf.

b) Legislation¹⁷³

'Employees' (*werknemers*) work under a contract of employment. Characteristically they provide work for a certain amount of time for an employer, who determines how the work is to be conducted. They are therefore in a position of subordination, and they are dependent on the employer for their income. To this position a number of statutory rights are attached, which can be complemented by rights laid down in collective agreements. The statutory rights include the minimum wage,¹⁷⁴ sick pay, payment when there is a temporary lack of work, protection in case of dismissal, the application of working time and OSH regulations,¹⁷⁵ and social security protections.

In the case of self-employment, the basis of the relationship is one of equal contracting parties that negotiate the conditions of the work to be carried out, such as the payment and the working hours. As freedom of contract is central to this arrangement, the self-employed do not have the same rights as employees. While they are entitled to a reasonable remuneration,¹⁷⁶ they are not entitled to the timely payment thereof, or to payment in case of illness. They lack protection against dismissal, and they are expected to arrange their social security provisions for themselves. Since 2015, self-employed people can arrange a voluntary pension for the self-employed, determining their contribution and the duration of payment. Since May 2016, agreements between the self-employed and their customers are in accordance with so-called model agreements (*modelovereenkomsten*), which are used by the tax authorities to determine if the agreement fulfils the conditions of self-employment. If it appears that the agreement was in fact one of disguised employment, the employer and employee will be obliged to pay the applicable social security contributions and taxes.

Dutch employment law features a **presumption of employment**, which applies when self-employed people can show that they have worked on a weekly basis for an employer for a period of 3 months, or for a minimum of 20 hours per month.¹⁷⁷ Still, the judge will examine the reality of the working arrangement on a **case-by-case basis**, and this has led to rather differing results in a string of cases brought by 'on-demand' couriers for the Dutch postal service in the 'offline economy'. In further steps to tackle the problem of disguised employment, on 1 July 2015 the **Law on Sham Employment Constructions** (*Wet aanpak schijnconstructies*) entered into force. However, the determination of the nature of the employment relationship has remained unchanged, with the presumption of employment, and case-by-case assessment of the reality of the agreement, still applicable.

It is noteworthy that further protection is available for the self-employed in precarious, dependent conditions, for instance where they have low bargaining power, are dependent on a single 'contractor' or client, and have little autonomy in their work. A particular problem is that these individuals will not be in a position to include the social security/other costs and risks related to self-employment in their tariffs. For these reasons, Dutch employment law features the legal institution of '**fictive employment**', whereby self-employed people will be able to rely on the minimum wage and social security provisions. A condition is, however, that the activity in question is not additional to another, main, economic activity, which it often is for platform economy workers.

Even if the system is not strictly speaking binary as it is in many other EU Member States, the situation at present is still considered unsatisfactory to capture the complexities of various forms of working arrangements that are somewhere between employment and self-employment. A 2015 interdepartmental policy report therefore recommended the introduction of a more gradual system,

¹⁷³ The following discussion relies heavily on the comprehensive treatment of Dutch employment law and the online platform economy by S. Klosse, 'Flexibele Arbeid, Gebalanceerde Bescherming', in M. Kremer et al., *Voor de zekerheid: De toekomst van flexibel werkenden en de moderne organisatie van arbeid* (Den Haag, Wetenschappelijke Raad voor het Regeringsbeleid, 2017), p. 213.

¹⁷⁴ Wet minimumloon en minimumvakantiebijslag (Wml) resp. Art. 7:616/7:625 Burgelijk Wetboek (bw), Art. 7:629. bw and Art. 7:628 bw.

¹⁷⁵ Arbeidstijdenwet and Arbeidsomstandighedenwet.

¹⁷⁶ Art. 7:405 bw.

¹⁷⁷ Art. 7:610b bw.

whereby the level of protection increases incrementally with the level of dependency the worker has vis-à-vis the contractor/client/employer.¹⁷⁸

c) Policy initiatives

The government has included its policy response to the online platform economy in its more general reflection on ‘**future-proof legislation**’.¹⁷⁹ This approach entails that new laws and regulations need to be considered in the light of possible future innovation and change, as well as whether or not current rules are already adequate to accommodate such expected changes. The principle of ‘**technological neutrality**’ means that, when there are great uncertainties about the direction of technological development, the best policy approach is to ensure that the rules are not overly specific to a specific technology, but able to accommodate many different types and variations, through rules laying down general principles of broad application. A second, more radical option that is being considered is to introduce a so-called **right to challenge** (RTC), which allows businesses and citizens to fulfil legal conditions ‘in principle’ or ‘in spirit’, without necessarily complying with all the prescriptions (also described as ‘conditional self-regulation’). Accepted alternative solutions can be published, so that others can rely on them.

As mentioned, there have been several important policy reports concerning the impact of the online platform economy on society, examining the best possible avenues to facilitate innovation and at the same time protect the public interest.¹⁸⁰ A recent study by the **Rathenau Instituut** has looked in detail at a number of different platform economy activities, their impact on the public interest and the available policy responses.¹⁸¹ Of particular relevance is the case study on the impact of Helping on the status of employee/self-employed in the Netherlands, which demonstrates the difficulties that arise in this context.¹⁸²

Helping is an online platform through which private individuals can contract domestic cleaners. The company was established in Germany in 2014 and then quickly expanded to other EU Member States, including the Netherlands. In the Netherlands, the domestic cleaning market (cleaning of private homes) exists in parallel with the professional cleaning market (cleaning in businesses). Helping does not operate on the professional market. Booking, communication and payment takes place through the platform. The cleaners have been approved by Helping through a selection process, which includes an interview and a background check. In 2016, Helping had 700 cleaners in the Netherlands and featured 250 to 300 bookings a day. The hourly tariff ranges from EUR 13.90 to EUR 14.90, of which Helping charges 20 % for its service (meaning that the cleaner earns at least EUR 11.12 per hour). This is well above the minimum wage of EUR 8.96, but much lower than the hourly rate of a professional cleaning company (EUR 25 per hour). Helping argues that it helps to transfer domestic cleaning activities from undeclared work to regular work, and creates new jobs.

In the Netherlands, the labour status of domestic cleaners has been a long-time subject of debate. Since 2007, the Regulation of Domestic Services (*Regeling dienstverlening aan huis*) regulates their situation,

¹⁷⁸ Ministerie van Financien, ‘IBO Zelfstandigen zonder personeel’ (2015), pp. 73-74, available at: <https://www.rijksoverheid.nl/documenten/rapporten/2015/10/02/eindrapport-ibo-zelfstandigen-zonder-personeel>.

¹⁷⁹ Ministerie van Economische Zaken, ‘Werken aan toekomstbestendige wetgeving: Digitale platformen en de deeleconomie, waaronder particuliere verhuur aan toeristen (Airbnb)’ (2015) DGBI-R&I / 15166286, and Ministerie van Economische Zaken, ‘Werken aan toekomstbestendige wetgeving en een toekomstbestendig wetgevingsproces’ (2016), DGBI-R&I / 16098216.

¹⁸⁰ See ShareNL and TNO, ‘*Innoveren in de deeleconomie*’, available at: <https://www.rijksoverheid.nl/documenten/rapporten/2015/11/01/innoveren-in-de-deeleconomie>, and ‘*Digitale Platforms: Een analytisch kader voor het identificeren en evalueren van beleidsopties*’, available at: <https://www.rijksoverheid.nl/documenten/rapporten/2015/11/09/digitale-platforms-een-analytisch-kader-voor-het-identificeren-en-evalueren-van-beleidsopties>.

¹⁸¹ K. Frenken et al., *Eerlijk delen: Waarborgen van publieke belangen in de deeleconomie en de kluseconomie* (Den Haag, Rathenau Instituut, 2017), available at https://www.rtlz.nl/sites/default/files/content/documents/2017/05/31/Rapport_Eerlijk_delen_-_Rathenau_Instituut_2017_-_pdf.

¹⁸² *Ibid.*, pp. 44-52.

providing that the private employer is responsible to provide a safe and healthy working environment, to pay at least the statutory minimum wage and 8 % holiday allowance, to guarantee paid holidays (four times the weekly working hours) and paid sick leave (up to 6 weeks). There is no obligation to pay social security contributions, and the cleaner is responsible for the declaration of the income for tax purposes. This is a less protective system than the one that applies to professional cleaners, to whom the regular labour law provisions and several collective agreements apply. The regulation has been criticised for lacking effectiveness. Most domestic cleaning still takes place as undeclared work.

The Netherlands signed ILO Convention 187 on decent work for domestic workers in 2011 but has not ratified it. The convention provides that the working conditions of domestic workers cannot be less favourable than those of regular workers, and that they are entitled to the minimum wage, working time protection and social security. In the light of the convention, the Dutch government in collaboration with the social partners created the Commission on Domestic Service Provision, which concluded that the current legal position of domestic cleaners under the Regulation Domestic Services was incompatible with the ILO Convention's requirements. To effectively regulate the domestic cleaning market, the commission recommended a system of subsidies — akin to the Belgian system (*titres de service*), which the government has, however, considered too costly. The social partners have argued for the abolition of the regulation and the ratification of the ILO Convention.

Applying the legal provisions to the situation of Helpling is not straightforward. If Helpling is considered a mere intermediary, the only relevant employment relationship is between the private household and the cleaner, which would fall within the scope of the regulation. If, however, Helpling is considered to be the employer, then it would have to comply with the provisions of the professional cleaning market, which includes, inter alia, the higher pay-rate of the professional market, payment of up to 2 years' sick leave, social security contributions and being responsible for income tax. To date, there has been no court judgment clarifying the legal situation of Helpling and its cleaners, and no policy decision as regards the regulation and the ratification of the ILO Convention.

d) The specific case of Uber

Like in many other EU Member States, the online platform Uber has given rise to much media attention, policy response and case law.

In July 2015, Uber started offering its car service UberPop, under which private individuals transport passengers without a taxi licence, in the Netherlands. In November 2014, the Dutch authorities banned this service for incompatibility with the Dutch regulations concerning the transportation of passengers (*Wet personenvervoer 2000*). Four Uber drivers were sanctioned, and Uber itself was considered jointly responsible for the drivers' transgressions and therefore ordered to cease those activities under threat of a penalty payment.

The Dutch Court of Appeal for Business Cases (*College van Beroep voor het bedrijfsleven*) upheld the decision of the Dutch authorities.¹⁸³ It rejected Uber's claim that it should benefit from the exception provided in the regulations for carpooling services, since the court found that the drivers were engaged in an economic activity in which they were transporting persons unknown to them in order to earn money, which constitutes a taxi service regardless of the alternative terminology (e.g. *mee-rijden* — ride sharing) that Uber had submitted to the court. The court also considered that the authorities had justly held Uber jointly responsible. The court emphasised the close collaboration between Uber and the drivers in the offering and performance of taxi services. The fact that Uber does not possess the cars, does not employ the drivers and does not take part in the contract between the driver and the passenger does not change that fact. Uber selects the drivers and gives the access to the application through which the driver and the passenger reach their agreement, and passengers can use the services only through an account with Uber. Uber determines the tariffs and takes 20 % of the driver's earnings. The more rides are performed, the more money Uber makes. This clearly demonstrates that the economic activity that Uber performs in the framework of UberPop is not limited to the provision of technology and the matching of supply and demand, but includes the actual transportation of persons against payment of the driver and of Uber. Finally, it rejected Uber's arguments that it was likely that the regulations concerning passenger

¹⁸³ Case 14/726, Uber International B.V. v Minister van Infrastructuur en Milieu, ECLI:NL:CBB:2014:450.

transport would be amended soon and that they should therefore not be enforced. The court did not see any concrete evidence that an amendment that would legalise Uber's services was soon to be adopted. The court also noted that, unlike Uber had contended, the guarantees it offered were not equivalent to those under the current regulations, for instance the need to submit recent medical documentation, a special chauffeur's licence, and enforcement of these guarantees by the police and the transport inspectorate.

This, however, did not mark the end of the controversies. In response to the ruling and the measures, Uber launched an adapted taxi service in late 2015: UberX. This service requires the drivers to be in possession of a valid taxi licence. On its website, Uber directed the drivers to a partner company that allowed the drivers to operate on the basis of other drivers' taxi licences. The Dutch authorities consider this an illegal practice, and have imposed a sanction of EUR 650,000 and launched a criminal investigation into Uber and 23 drivers under this new construction.¹⁸⁴

Conclusion: Regulation and policy in relation to the online platform economy in the Netherlands

In the Netherlands, the debate on the online platform economy (*platformeconomie*), alternatively labelled the 'sharing economy' (*deeleconomie*), has been in full swing for some time. Already in 2015, comprehensive reports were published looking at the societal impact of platform economy initiatives and reflecting on the appropriate policy response. While labour law/OSH issues have generally not been directly at the heart of these debates, the problems connected to the ambiguous employment status of online platform workers have been pointed out, and these reflections merge with the longer-standing debate about self-employment/disguised employment.

Under Dutch employment law, 'employees' work under a contract of employment. Characteristically they provide work for a certain amount of time for an employer, who determines how the work is to be conducted. To this position a number of statutory rights are attached, such as the minimum wage, sick pay, payment when there is a temporary lack of work, protection in case of dismissal, the application of working time and OSH regulations, and social security protections. These are generally not applicable in the case of self-employment. Dutch employment law features a presumption of employment, which applies when self-employed people can show that they have worked on a weekly basis for an employer for a period of 3 months, or for a minimum of 20 hours per month. Still, the judge will examine the reality of the working arrangement on a case-by-case basis. Further protection is available for the self-employed in precarious, dependent conditions, for instance where they have low bargaining power, are dependent on a single 'contractor' or client, and have little autonomy in their work. For these situations, Dutch employment law features the legal institution of 'fictive employment', whereby self-employed people will be able to rely on the minimum wage and social security provisions. A condition is, however, that the activity in question is not additional to another, main, economic activity, which it often is for online platform economy workers.

Even if the system is not strictly speaking binary as it is in many other EU Member States, the situation at present is still considered unsatisfactory to capture the complexities of various forms of working arrangements that are somewhere between employment and self-employment. A 2015 interdepartmental policy report therefore recommended the introduction of a more gradual system, whereby the level of protection increases incrementally with the level of dependency the worker has vis-à-vis the contractor/client/employer. A recent study by the Rathenau Instituut has looked in detail at a number of different platform economy activities, their impact on public interest and the available policy responses, and has concluded that the question of employment status is potentially problematic.

In November 2014, the Dutch authorities banned UberPop for incompatibility with the Dutch regulations concerning the transportation of passengers. Four drivers were sanctioned, and Uber itself was considered jointly responsible for the drivers' transgressions and therefore ordered to cease those activities under threat of a penalty payment. The Dutch Court of Appeal for Business Cases

¹⁸⁴ <https://www.volkskrant.nl/binnenland/uber-krijgt-650-duizend-euro-boete-in-nederland~a4425366/>.

(*College van Beroep voor het bedrijfsleven*) upheld the decision of the Dutch authorities. While the cases do not directly concern the employment status of the drivers, the considerations of the Dutch Court of Appeal for Business Cases may be considered relevant in this respect, as they concern the measure of control and responsibility of Uber concerning the transport services that are provided.

Belgium

a) Introduction

The online platform economy is increasingly the subject of debate in Belgium. Where initially the launch of online platforms and the narrative of the ‘sharing economy’ were met with an overall welcoming approach, controversies have emerged, particularly concerning Uber. While labour law/OSH questions have not been directly at the centre of the debate, which instead has turned rather on questions of unfair competition, these issues are increasingly demanding public and political attention, not least in response to international developments such as the US and UK rulings concerning the employment status of Uber drivers and other platform economy workers.

b) Legislation¹⁸⁵

An ‘employee’ is defined in Belgian case law as a person who works under the command, the authority and the control of an employer in return for remuneration. If work is done in such circumstances, the person concerned will legally be considered to be an employee, which implies that he or she enjoys the full protection of labour law (minimum wages, working time limits, etc.) and social security for employees. When on the other hand work is not carried out in a subordinate position, as in the case of freelance work, labour law does not apply.¹⁸⁶ The existence of a subordinate (or hierarchical) relationship excludes any self-employed status and constitutes automatically a labour relation contract between an employer and an employee.

An Act of 27 December 2006 contains a Title XIII on ‘the nature of employment relationships’, creating a legal framework to ascertain the legal status of a working relationship.¹⁸⁷ This Title XIII of the Act of 27 December 2006 is generally referred to as the ‘**Employment Relations Act**’ or ‘Working Relations Act’. It provides four general criteria to assess the existence of a subordinate employment relationship:

2. the will of the parties as expressed in their agreement, whereby the classification given by the parties may not be contrary to the way they conduct their agreement in reality;
3. the freedom or the lack thereof in the organisation of working time;
4. the freedom or the lack thereof in the organisation of the job to be performed;
5. the existence of hierarchical control or the lack thereof.

These four general criteria apply to all sectors of the economy. They relate only to a legal concept of subordination and not to any socio-economic dependency.¹⁸⁸

¹⁸⁵ The discussion in this section draws heavily on the contribution by C. Vanlaere to the survey conducted by the EU Labour Inspection Network & Exchange system concerning the digital economy and independent workers, on file with the author.

¹⁸⁶ However, additional services performed under a free-service contract are deemed, failing proof to the contrary, to be performed under a contract of employment if a contract of employment for the performance of similar activities has been concluded between the person performing the services and the person for whom they are performed: Article 5bis of the Labour Contracts Act of 3 July 1978, available at: http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=1978070301&table_name=loi.

¹⁸⁷ Title XIII (Nature of employment relationships), Articles 328-343, Programme Act (I) of 27 December 2006, available at: http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2006122730&table_name=loi.

¹⁸⁸ P. Humblet and I. Plets, ‘Protection of working relationships in Belgium’, in F. Pennings and C. Bosse (eds.), *The Protection of Working Relationships: A Comparative Study* (Alphen aan den Rijn, Wolters Kluwer, 2011), p. 58.

In an attempt to act more efficiently against false self-employment, the government agreed on 29 March 2012 to submit a new bill before Parliament in order to improve the Employment Relations Act of 27 December 2006. This bill led to the adoption of the Act of 25 August 2012 amending the Employment Relations Act.¹⁸⁹ The most important innovation brought about by the Act of 25 August 2012 was the introduction, for a limited number of sectors, of a **rebuttable presumption that work is performed under a contract of employment** if at least five out of the following nine criteria are fulfilled:

1. the absence of any financial or economic risk for the person carrying out the tasks, for instance if there is:
 - a) no personal and substantial investment in the company with personal means, or
 - b) no personal and substantial participation in the profits and losses of the company;
2. the absence of any responsibility and decision-making power with regard to the financial means of the company;
3. the absence of any decision-making power with regard to the purchasing policy of the company;
4. the absence of any decision-making power about the pricing policy of the company, except if the prices are determined by law;
5. the absence of any obligation of result with regard to the agreed work;
6. the guarantee that a fixed price (standard rate) will be paid, without regard to the business results or the extent of the work performed by the person that carries out the activities;
7. not being an employer of directly and freely hired personnel, or not being allowed to hire personnel in order to carry out the work agreed upon or to have oneself replaced;
8. not acting or presenting oneself as a company towards third parties or the co-contractor or mainly or usually working for one co-contractor;
9. work in space (offices) of which one is not the owner or tenant or work with tools that have been put at the disposal, financed or guaranteed by the co-contractor.

The scope of application of the presumption does not apply to all sectors of the economy, but is limited to a number of **specific sectors** mentioned in the law. This list of sectors can be extended by means of a Royal Decree, following a procedure set out by the law. Currently, the following sectors and areas of activity fall within the scope of the presumption:

- the construction sector in the broad sense, encompassing all works related to real estate services;
- surveillance and security services for the account of a third party;
- transport of goods and persons for the account of a third party, including rental services of vehicles with chauffeur (taxi services);
- the cleaning sector;
- the agricultural and horticultural sector.

Up until now, Belgian courts have not been asked to apply the criteria of the Employment Relations Act to online platform workers. General case law, however, demonstrates that Belgian courts are reluctant to reclassify a self-employment contract as an employment contract, and are not inclined to take into account elements of socio-economic dependency when assessing the legal status of a working relationship.¹⁹⁰

¹⁸⁹ Act of 25 August 2012 amending Title XIII of the Programme Act (I) of 27 December 2006, on the nature of employment relationships, available at:

http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2012082507&table_name=loi.

¹⁹⁰ *RSZ v. De Boerenbond et al.*, Labour Court Brussels (7th Chamber), 9 October 2014, case n° 2013/AB/178, *Journal des Tribunaux de Travail* 2015, issue n° 1210, p. 87, available at:

http://jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=N-20141016-8; i2-Management BVBA et al. v. Sentipharm NV, Labour Court Brussels (3rd Chamber), 9 December 2014, case n° 2013/AB/877, *Journal des Tribunaux de Travail* 2015, issue n° 1213, p. 134, available at: http://jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=N-20141209-10.

Furthermore, the **regulatory framework pertaining to telework** should be mentioned. It is laid down in a generally binding collective bargaining agreement.¹⁹¹ This collective bargaining agreement stipulates that teleworkers who perform their work at home fall outside the scope of the working time rules laid down in the Labour Act of 16 March 1972.¹⁹² Instead, it is prescribed that teleworkers organise their work themselves within the framework of the prevailing working time in the enterprise, whereby the teleworker is subject to the same workload and efficiency norms as comparable employees in the standard workplace.¹⁹³

c) Policy initiatives¹⁹⁴

It has been reported that many people in Belgium, including government officials, assume that online platform workers are to be considered self-employed persons, regardless of the fact that the level of control exercised on the worker by the platform can be quite significant. The Belgian State Secretary for anti-fraud policy, for instance, stated in September 2015 that Uber taxi drivers were to be considered as self-employed workers according to Belgian legislation, following a legal analysis by the National Social Security Office.¹⁹⁵ It is likely that this position was partially motivated by the fact that most Uber drivers in Belgium combine their driving activities with a regular daytime job.

Consequently, the way in which the government has responded so far to the emergence of new forms of employment created by the digital economy is based on the premise that these workers are freelance 'mini-entrepreneurs'.¹⁹⁶ In this context, the government introduced an advantageous (but limited) tax regime, taking effect from 1 July 2016, for individual service providers who operate through a digital platform.¹⁹⁷ In particular, the law now sets up an effective low tax rate of 10 % for income earned from the sharing economy as long as the income does not exceed EUR 5,000 per year. To qualify for this new tax regime, the income must have been earned, outside a professional activity, by services delivered by one individual to another individual (also acting in a private capacity), on the basis of agreements that have been put in place by a recognised digital platform or a digital platform set up by the authorities. The 10 % tax will be withheld at source by the digital platform and paid to the tax authorities. This requires a commitment from the start-ups of the sharing economy; they will have to register with and be approved by the tax administration, and they will have to ban cash payments. All transactions are to be paid electronically through the digital platform so that payments can be traced. When the income from this activity exceeds EUR 5,000 per year, the entire income will be deemed to constitute income from a professional activity and be taxed as business income. The text of the law is restrictive; it is limited to services in the sharing economy. The supply of goods (e.g. takeaways) falls outside the scope of this legislation. Moreover, the mere letting of real estate property (e.g. Airbnb) or movables is excluded.

¹⁹¹ Collective Bargaining Agreement No 85 of 9 November 2005 on telework, concluded in the National Labour Council, available at: <http://www.nar.be/CCT-COORD/cct-085.pdf>.

¹⁹² Article 3bis of the Labour Act of 16 March 1971, available at: http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=1971031602&table_name=loi.

¹⁹³ Article 8, paragraphs 1 and 2 of the Collective Bargaining Agreement No 85 of 9 November 2005 on telework.

¹⁹⁴ The discussion in this section draws heavily on the contribution by C. Vanlaere to the survey conducted by the EU Labour Inspection Network & Exchange system concerning the digital economy and independent workers, on file with the author.

¹⁹⁵ *Staatssecretaris Tommelein*: 'Uber-chauffeurs zijn zelfstandigen, zegt RSZ', *De Standaard*, 15 September 2015, available at: http://www.standaard.be/cnt/dmf20150914_01866767. See also, as regards the Bringr postal delivery platform: <https://www.dekamer.be/kvvcr/showpage.cfm?section=qrva&language=nl&cfm=qrvaxml.cfm?legislat=54&dosierID=54-B102-863-0758-2016201713733.xml> and <https://www.dekamer.be/kvvcr/showpage.cfm?section=qrva&language=nl&cfm=qrvaxml.cfm?legislat=54&dosierID=54-B083-863-0602-2015201610507.xml>.

¹⁹⁶ 'Lower taxes and easy tax regime for sharing economy', 12 April 2016, Press release by Alexander De Croo, Deputy prime minister and minister of Development Cooperation, Digital Agenda, Telecom and Postal Services, available at: <http://www.decroo.belgium.be/en/lower-taxes-and-easy-tax-regime-sharing-economy>.

¹⁹⁷ Programme Act of 1 July 2016, Articles 22 and 23, available at: http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2016070101&table_name=loi. See also: <http://www.decroo.belgium.be/nl/kamer-keurt-nieuwe-regeling-deeleconomie-goed>.

In reply to a parliamentary question concerning the status of online platform economy workers, the Belgian Deputy Prime Minister and Minister for Labour, Economy and Consumers stated in December 2016, referring to a 2016 report of the High Council for Employment (*Hoge Raad voor de Werkgelegenheid*), that the online platform economy had led to new forms of employment such as online platform work.¹⁹⁸ According to the minister, this poses a range of questions concerning the labour status of these workers, in respect of which there is not sufficient information or analysis at present. It was pointed out that the scope of this phenomenon is still very small, but growing. The minister also pointed out that the social partners have not yet taken up this theme in the framework of their evaluation of the Employment Relations Act. The minister highlighted that the report of the High Council for Employment indicated that the growth of self-employment due to digitalisation and online platforms will put pressure on the categorisation of employees and self-employed, but that it advised against the creation of a special statute for workers in the online platform economy; instead it advised reflection on how the existing statutes can be applied/amended to accommodate online platform work. In this context, reference is made to the Report of the French *Conseil du Numérique* of 2016, which equally advises against the creation of a special statute, as these can quickly become outdated by rapid developments. Furthermore, it is considered that these questions are situated in a global context, and that therefore purely national responses are inappropriate and ineffective. Instead, it will be important to discuss these matters at European level, as well as in the context of the ILO.

d) The specific case of Uber

The situation of Uber's core service is currently in a state of flux in Belgium.

Initially, in September 2015, a Brussels court (*Nederlandstalige rechtbank van koophandel Brussel*) had upheld a ban on the company's low-cost UberPop service for reasons of unfair competition by means of using drivers without professional licences.¹⁹⁹

The same court held in another ruling, in June 2016, that Uber had to be considered a taxi service. The court then asked a preliminary question to the CJEU concerning the Flemish rules on taxi transport and their compatibility with EU law, in particular the freedom of establishment and to provide services. The CJEU, however, refused to provide an answer, instead declaring in October 2016 that the preliminary reference was inadmissible, owing to the lack of information provided by the Belgian court.²⁰⁰ The CJEU held in particular that the order for reference gave insufficient information concerning Uber's precise activities.

Instead of formulating a new preliminary reference, the Brussels Court then ruled in February 2017, quite remarkably, that UberPop should be allowed to operate at the airport in Zaventem, because the Flemish rules were incompatible with EU law.²⁰¹ The rules firstly constituted a restriction of Uber's freedom to provide services and establishment under EU law, and secondly could not be justified in the general interest. In that respect, the Brussels court held that the services offered by Uber were part of the 'sharing economy' and that it was therefore 'inappropriate' to subject them to the same rules as regular taxi services. As regards the protection of consumers, the court considered that Uber offers them an alternative, and that the internal quality control system of Uber guarantees safety standards equivalent to those of taxi services. As regards road safety, the court stated that 'the sharing economy entails benefits not only for the environment, but also for road safety, because individuals are sharing

¹⁹⁸ B094 - Schriftelijke vraag en antwoord nr: 1035, 'De digitalisering van de arbeidsmarkt en de daarmee samenhangende "hybride arbeidsrelaties"', available at: <https://www.dekamer.be/kvvcr/showpage.cfm?section=qvva&language=nl&cfm=qvvaXml.cfm?legislat=54&dosierID=54-b094-861-1035-2015201612056.xml>.

¹⁹⁹ *Taxis verts v. Uber BV*, Brussels Commercial Court (Dutch-speaking Chamber), *Juristenkrant* 2015, issue 315, p. 5; *Tijdschrift voor het recht van netwerkindustrieën* 2015, issue 4, p. 466. available at: http://www.emulation-innovation.be/wp-content/uploads/2013/09/N-NEYRINCK-Taxis-bruxellois-Uber-garde-un-pied-dans-la-porte-%C2%BB-Revue-du-droi_15675898.pdf.

²⁰⁰ Case C-526/15, *Uber Belgium BVBA v Taxi Radio Bruxellois NV*, ECLI:EU:C:2016:830.

²⁰¹ <https://pvmagazine.nl/brusselse-handelsrechtbank-wijst-in-bizar-vonnis-eis-op-verbod-uber-op-luchthaven-zaventem-af/>.

goods’, and Uber can therefore be ‘associated with a reduction in the number of vehicles on the road, especially in urban areas’.

Conclusion: Regulation and policy in relation to the online platform economy in Belgium

Whereas in Belgium initially the launch of online platforms and the narrative of the ‘sharing economy’ were met with an overall welcoming approach, controversies have emerged. Although labour law/OSH questions have not been directly at the centre of the debate, which instead has turned rather on questions of unfair competition, these issues are increasingly demanding public and political attention, not in the least in response to international developments such as the US and UK rulings concerning the employment status of platform economy workers.

An ‘employee’ is defined in Belgian case law as a person who works under the command, the authority and the control of an employer in return for remuneration. If work is done in such circumstances, the person concerned will legally be considered to be an employee, which implies that he or she enjoys the full protection of labour law (minimum wages, working time limits, etc.) and social security for employees. When on the other hand work is not carried out in a subordinate position, as in the case of freelance work, labour law does not apply. In an attempt to act more efficiently against false self-employment, Belgium adopted an Act of 25 August 2012 amending the Employment Relations Act, introducing for a limited number of sectors a rebuttable presumption that work is performed under a contract of employment if a number of criteria are fulfilled. Up until now, Belgian courts have not been asked to apply the criteria of the Employment Relations Act to online platform workers. General case law, however, demonstrates that Belgian courts are reluctant to reclassify a self-employment contract as an employment contract, and are not inclined to take into account elements of socio-economic dependency when assessing the legal status of a working relationship.

It has been reported that many people in Belgium, including government officials, assume that online platform workers are to be considered self-employed persons, regardless of the fact that the level of control exercised on the worker by the platform can be quite significant. Consequently, the way in which the government has responded so far to the emergence of new forms of employment created by the digital economy is based on the premise that these workers are freelance ‘mini-entrepreneurs’. In this context, the government introduced an advantageous (but limited) tax regime, taking effect from 1 July 2016, for individual service providers who operate through a digital platform. The supply of goods (e.g. takeaways) falls outside the scope of this legislation and the mere letting of real estate property (e.g. Airbnb) or movables is excluded from this new regime.

The situation of Uber is currently in a state of flux in Belgium. Initially, in September 2015, a Brussels court had upheld a ban of the company’s low-cost UberPop service for reasons of unfair competition by means of using drivers without professional licences. The same court held in another ruling, in June 2016, that Uber had to be considered a taxi service. The court then asked a preliminary question to the CJEU concerning the Flemish rules on taxi transport and their compatibility with EU law, in particular the freedom of establishment and to provide services. The CJEU, however, refused to provide an answer, instead declaring in October 2016 that the preliminary reference was inadmissible, owing to the lack of information provided by the Belgian court. The CJEU held in particular that the order for reference gave insufficient information concerning Uber’s precise activities. Instead of formulating a new preliminary reference, the Brussels court then ruled in February 2017 that UberPop should be allowed to operate at the airport in Zaventem, because the Flemish rules were incompatible with EU law. The rules firstly constituted a restriction of Uber’s freedom to provide services and establishment under EU law, and secondly could not be justified in the general interest. In that respect, the Brussels court held that the services offered by Uber were part of the ‘sharing economy’ and that it was therefore ‘inappropriate’ to subject them to the same rules as regular taxi services.

Ireland

a) General considerations

A Eurobarometer survey has shown the Irish to be the most frequent users of sharing economy services. Nevertheless, there is little further data on the extent of the online platform economy in Ireland.²⁰² A survey in 2015 found that 1 in 7 people (14 %) make a supplementary income on the internet.²⁰³

The online platform Uber is currently not allowed to offer its core product, i.e. paid trips in private cars, in Ireland, because of transport regulations, despite heavy lobbying of Irish politicians and filing of submissions with the National Transport Authority (NTA) to argue how it can benefit the country's transport system, and a sizable investment in Ireland when it opened its first 'centre of excellence' outside the USA, in Limerick.²⁰⁴

While the debate on the labour implications of the online platform economy has not dominated news headlines as it has in some other EU Member States, questions are increasingly being asked.

For instance, in a *Dáil Éireann* debate of 8 December 2016, Deputy Mick Barry asked the Minister for Jobs, Enterprise and Innovation Information, Mary Mitchell O'Connor, if her department had noted the Uber ruling in the UK and if she would make a statement on the matter. The reply was as follows:

In Ireland there is a mechanism for the determination of the employment status of individuals or groups. Where an issue arises in relation to the employment status of an individual, cases are forwarded to the Revenue Commissioners and-or [sic] the scope section of the Department of Social Protection for investigation, either solely by the recipient or jointly with the labour inspectorate of the Workplace Relations Commission, WRC. In most cases it will be clear whether an individual is employed or self-employed. Where there is doubt about the employment status of an individual, the relevant Departments and agencies will have regard to the code of practice for determining employment or self-employment status of individuals which was drawn up and agreed to in 2007 by the relevant Departments with the ICTU and IBEC. An individual who believes he or she is being deprived of employment rights applicable to employees may refer a complaint to the WRC where the matter can be dealt with by way of mediation or adjudication, leading to a decision that will be enforceable through the District Court. WRC inspectors can also be asked to investigate certain breaches. Complaints can be made on a single complaint form available on the WRC's website. The WRC's customer service section also provides information for employers and employees on employment, equality and industrial relations rights and obligations. [...] In Ireland if individuals working in the gig economy were to take a similar case and achieve a similar outcome, they would be entitled to the national minimum wage and holiday pay. In addition, the company concerned would have to pay taxes on behalf of the individuals working for it.²⁰⁵

It has been reported that the Workplace Relations Commission recently asked the Economic Social and Research Institute to produce a report on the topic of the online platform economy, which is due to be released towards the end of 2017.²⁰⁶

The Irish Congress of Trade Unions has argued, in the context of the digital economy, for 'a new contract for workers in the global economy'. The contract would use social dialogue to ensure that all future work is decent work, that universal rights are respected and that the following ambitions are realised: more jobs created than destroyed; prosperity shared through collective bargaining and 'minimum living wages';

²⁰² http://www.wdc.ie/wp-content/uploads/WDC-Insights-New-Work-the-Gig-economy-in-the-WR-May_2017.pdf.

²⁰³ Red C survey conducted as part of the Indecon study, Assessment of the Macro-Economic Impact of Internet/Digital on the Irish Economy March 2016. Department of Communications, Climate Action & Environment (May 2016), reported by http://www.wdc.ie/wp-content/uploads/WDC-Insights-New-Work-the-Gig-economy-in-the-WR-May_2017.pdf.

²⁰⁴ <http://www.thejournal.ie/uber-ireland-plans-3-3398524-May2017/>.

²⁰⁵ [http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/\(indexlookupdail\)/20161208~BB?opendocument](http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/(indexlookupdail)/20161208~BB?opendocument).

²⁰⁶ 'Update on the "gig economy" and assessing employment status', 19 June 2017, available at: <https://byrnewallace.com/news-and-recent-work/publications/update-on-the-gig-economy-and-assessing-employment-status.html>.

guarantees of freedom of association to ensure union rights; an end to the oppression, corruption and profiteering from denial of core labour standards; gender equality and inclusion of women, young people, migrants and refugees in the labour market; government and corporate accountability in supply chains via mandated 'due diligence' and application of the rule of law; family-friendly practices and workplaces; the elimination of forced and child labour; and the creation of safe work as standard.²⁰⁷

b) Legislation and case law

In Ireland, the Safety, Health and Welfare at Work Act 2005 and the Safety, Health and Welfare at Work (General Application) Regulations 2007 (Chapter 1, 'Workplace and work equipment') address the specifics of OSH and workplace requirements. Employers have an obligation to ensure a safe and healthy working environment, no matter where it is, and that includes the employee's own home/part thereof, dependent on the activity being carried out and the contractual arrangements between the employer and the employee.

Section 8 of the Safety, Health and Welfare at Work Act 2005 provides as follows:

1. Every employer shall ensure, so far as is reasonably practicable, the safety, health and welfare at work of his or her employees.
2. Without prejudice to the generality of subsection (1), the employer's duty extends, in particular, to the following:
 - a. managing and conducting work activities in such a way as to ensure, so far as is reasonably practicable, the safety, health and welfare at work of his or her employees;
 - b. managing and conducting work activities in such a way as to prevent, so far as is reasonably practicable, any improper conduct or behaviour likely to put the safety, health or welfare at work of his or her employees at risk;
 - c. as regards the place of work concerned, ensuring, so far as is reasonably practicable—
 - i. the design, provision and maintenance of it in a condition that is safe and without risk to health,
 - ii. the design, provision and maintenance of safe means of access to and egress from it, and
 - iii. the design, provision and maintenance of plant and machinery or any other articles that are safe and without risk to health;
 - d. ensuring, so far as it is reasonably practicable, the safety and the prevention of risk to health at work of his or her employees relating to the use of any article or substance or the exposure to noise, vibration or ionising or other radiations or any other physical agent;
 - e. providing systems of work that are planned, organised, performed, maintained and revised as appropriate so as to be, so far as is reasonably practicable, safe and without risk to health;
 - f. providing and maintaining facilities and arrangements for the welfare of his or her employees at work;
 - g. providing the information, instruction, training and supervision necessary to ensure, so far as is reasonably practicable, the safety, health, and welfare at work of his or her employees;
 - h. determining and implementing the safety, health and welfare measures necessary for the protection of the safety, health and welfare of his or her

²⁰⁷ <https://www.ictu.ie/blog/2017/05/29/a-new-contract-for-a-new-economy/>.

- employees when identifying hazards and carrying out a risk assessment under section 19 or when preparing a safety statement under section 20 and ensuring that the measures take account of changing circumstances and the general principles of prevention specified in Schedule 3;
- i. having regard to the general principles of prevention in Schedule 3, where risks cannot be eliminated or adequately controlled or in such circumstances as may be prescribed, providing and maintaining such suitable protective clothing and equipment as is necessary to ensure, so far as is reasonably practicable, the safety, health and welfare at work of his or her employees;
 - j. preparing and revising, as appropriate, adequate plans and procedures to be followed and measures to be taken in the case of an emergency or serious and imminent danger;
 - k. reporting accidents and dangerous occurrences, as may be prescribed, to the Authority or to a person prescribed under section 33, as appropriate, and
 - l. obtaining, where necessary, the services of a competent person (whether under a contract of employment or otherwise) for the purpose of ensuring, so far as is reasonably practicable, the safety, health and welfare at work of his or her employees.
3. Any duty imposed on an employer under the relevant statutory provisions in respect of any of his or her employees shall also apply in respect of the use by him or her of the services of a fixed-term employee or a temporary employee.
 4. For the duration of the assignment of any fixed-term employee or temporary employee working in his or her undertaking, it shall be the duty of every employer to ensure that working conditions are such as will protect the safety, health and welfare at work of such an employee.
 5. Every employer shall ensure that any measures taken by him or her relating to safety, health and welfare at work do not involve financial cost to his or her employees.

There is no particular OSH statute for the independent worker or for the self-employed worker. The provisions of the Safety, Health and Welfare at Work Act 2005 and the Safety, Health and Welfare at Work Regulations 2007 applies to self-employed workers as if they were their own employees. This means that all the employer duties in these statutes apply equally to self-employed and independent workers. OSH laws do not cover the relationship between the self-employed worker and the purchaser. This means that many online platform workers risk falling outside the protective scope of the regulation.

In Ireland, labour inspections and OSH inspections are dealt with independently by two separate regulators. OSH inspectors come under the remit of the Health and Safety Authority. OSH inspectors can inspect any workplace/work activity as and when the need arises. However, in order to enter a home to inspect for compliance with OSH laws, the inspector must get the permission of the householder. To date there has been very little interface/dealing with employees working at home/connected via the platform economy.

While there is no reported case in Ireland dealing with the online platform economy, the questions arising in respect of employment status are not new.²⁰⁸ Irish courts have considered the classification of workers in numerous cases over the years, in which mutuality of obligation, control and the ability to make a profit are particularly important factors.²⁰⁹

²⁰⁸ 'Update on the "gig economy" and assessing employment status', 19 June 2017, available at: <https://byrnwallace.com/news-and-recent-work/publications/update-on-the-gig-economy-and-assessing-employment-status.html>.

²⁰⁹ *Ibid.*, referring to *Henry Denny & Sons v Minister for Social Welfare* [1998], *Castleisland Cattle Breeding Society Limited v Minister for Social and Family Affairs* [2004] and *Minister for Agriculture and Food v Barry* [2008].

On 7 June 2017, the Competition (Amendment) Act 2017 was passed, introducing two novel categories of worker in Ireland: the ‘false self-employed worker’ and the ‘fully dependent self-employed worker’.²¹⁰ The Act is not specifically concerned with issues of labour law/OSH and the online platform economy, but instead intended to facilitate self-employed individuals being represented by a trade union for the purposes of collective bargaining, but de-classifying such workers as ‘undertakings’ for the purposes of competition law.²¹¹ It may, however, be that this type of classification will have some wider application in Irish employment law in future, using the terms and definitions in the 2017 Act for the purposes of challenging ‘self-employed’ status.²¹²

Conclusion: Regulation and policy in relation to the online platform economy in Ireland

In Ireland, the debate on the labour implications of the online platform economy has not dominated news headlines as it has in some other EU Member States, but questions are increasingly being asked. For instance, in a Dáil Éireann debate of 8 December 2016, a deputy asked the Minister for Jobs, Enterprise and Innovation if her department had noted the Uber ruling in the UK, to which the reply was that: ‘In Ireland if individuals working in the gig economy were to take a similar case and achieve a similar outcome, they would be entitled to the national minimum wage and holiday pay. In addition, the company concerned would have to pay taxes on behalf of the individuals working for it.’ It has been reported that the Workplace Relations Commission recently asked the Economic Social and Research Institute to produce a report on the topic of the online platform economy, which is due to be released towards the end of 2017.

Irish law distinguishes between the employed and the self-employed. There is no particular statute for the dependent worker. While there is no reported case in Ireland dealing with the online platform economy, the questions arising in respect of employment status are not new. Irish courts have considered the classification of workers in numerous cases over the years, in which mutuality of obligation, control and the ability to make a profit are particularly important factors.

On 7 June 2017, the Competition (Amendment) Act 2017 was passed, introducing two novel categories of worker in Ireland: the ‘false self-employed worker’ and the ‘fully dependent self-employed worker’. The Act is not specifically concerned with issues of labour law/OSH and the online platform economy, but instead intended to facilitate self-employed individuals being represented by a trade union for the purposes of collective bargaining, but de-classifying such workers as ‘undertakings’ for the purposes of competition law. It may, however, be that this type of classification will have some wider application in Irish employment law in future, using the terms and definitions in the 2017 Act for the purposes of challenging ‘self-employed’ status.

The online platform Uber is currently not allowed to offer its core product, i.e. paid trips in private cars, in Ireland, because of transport regulations, despite heavy lobbying of Irish politicians and filing of submissions with the National Transport Authority to argue how it can benefit the country’s transport system, and a sizable investment in Ireland when it opened its first ‘centre of excellence’ outside the USA, in Limerick.

Specific developments in other EU Member States

In addition to the discussion of a number of individual EU Member States in previous sections, several key developments in other countries should be highlighted.

²¹⁰ <http://www.irishstatutebook.ie/eli/2017/act/12/enacted/en/html>.

²¹¹ ‘Update on the “gig economy” and assessing employment status’, 19 June 2017, available at: <https://bynewallace.com/news-and-recent-work/publications/update-on-the-gig-economy-and-assessing-employment-status.html>.

²¹² Ibid.

a) Germany

While there have not yet been any specific regulatory developments in Germany concerning the online platform economy and its implication for working conditions, the importance of the issue is recognised and there is a great amount of research being carried out, including research specifically commissioned by the government.²¹³

The Federal Ministry of Labour is also currently conducting a dialogue process on the future of work ('Working 4.0').²¹⁴ In this context, the challenges of new working methods such as crowdsourcing are discussed.

Trade unions have been active, engaging in a large number of activities (events and publications), mostly critical towards the online platform economy and pointing out the dangers of social dumping and the negative effects on working conditions.²¹⁵

On 17 March 2017, eight Germany-based platforms signed a **Code of Conduct** in which they agree to include local wage standards as a factor in setting prices on their platforms. First initiated by the Munich-based software testing platform Testbirds, it is officially supported by the German Crowdsourcing²¹⁶ Association (*Deutscher Crowdsourcing Verband*). A 2016 survey of workers on six German platforms, carried out in collaboration with the platform operators, had revealed that workers found fair payment by far the most important principle in an earlier version of the Code of Conduct, and therefore this principle was 'clarified and strengthened as much as possible given the platforms' current business models and economic circumstances'.²¹⁷ The union IG Metall was involved in the drafting of the code and has welcomed the self-regulatory effort, but has emphasised its position that government regulation is still needed, for example to ensure that workers who are in fact employees are not misclassified as self-employed persons, and in general to ensure a level playing field among workers.²¹⁸

²¹³ Such as: 'Nutzung von Crowdfunding durch Unternehmen: Ergebnisse einer ZEW-Unternehmensbefragung' (Use of crowd working by companies), available at: <http://www.bmas.de/DE/Service/Medien/Publikationen/Forschungsberichte/Forschungsberichte-Arbeitsmarkt/fb473-unternehmensbefragung-crowdworking.html>; 'Befragung zum sozioökonomischen Hintergrund und zu den Motiven von Crowdworkern' (Survey on the socio-economic background and motives of crowd workers), available at: <http://www.bmas.de/DE/Service/Medien/Publikationen/Forschungsberichte/fb-462-endbericht-crowdworking.html>; Foresight-Studie 'Digitale Arbeitswelt', available at: http://www.bmas.de/SharedDocs/Downloads/DE/PDF-Publikationen/Forschungsberichte/f463-digitale-arbeitswelt.pdf?__blob=publicationFile&v=2

²¹⁴ <http://www.arbeitenviernull.de/>

²¹⁵ See, for example, 'Crowd work: zurück in die Zukunft?' (Crowd work: Back to the future?), available at: http://www.faircrowdwork.org/sites/default/files/inhalt_crowdworkbuch.pdf; 'Gute Arbeit für die Crowd' (Good work for the crowd), available at: https://innovation-gute-arbeit.verdi.de/++file++55f6cb266f68445214000051/download/Gute%20Arbeit%20f%C3%BCr%20die%20Crowd_AiB_EXTRA.pdf; 'Neue Arbeitsorganisation durch Crowdsourcing' (New work organization by crowdsourcing), available at: https://www.boeckler.de/pdf/p_arbp_287.pdf; 'Kreativ im Hamsterrad' (Creative in hamster wheel), available at: https://www.boeckler.de/Impuls_2017_07_4-5_a.pdf; 'Die kalifornische Herausforderung: Wie disruptive Geschäftsmodelle (nicht) zu regulieren sind' (The Californian challenge: How disruptive business models are (not) to be regulated), available at: <http://library.fes.de/pdf-files/id-moe/12906.pdf>. See also the platform FairCrowdWork: <http://faircrowd.work/>

²¹⁶ The term 'crowdsourcing' does not appear to be as common/widespread in other Member States as in Germany. For the German government it represents an important differentiator: 'Unter Crowdsourcing versteht die Bundesregierung allgemein die Auslagerung von Tätigkeiten an eine Menge unbekannter Akteure (die Crowd) in Form eines öffentlichen Aufrufs in einer digitalen Umgebung. Sofern dies bezahlte Leistungen sind, die von Auftragnehmern für Unternehmen bzw. Online-Plattformen digital erbracht werden, ist dies nach dem Verständnis der Bundesregierung als "Crowdworking" zu bezeichnen' (Deutscher Bundestag Drucksache 18/3032).

²¹⁷ See <http://faircrowd.work/2017/03/17/eight-german-labor-platforms-sign-crowdsourcing-code-of-conduct-2-0/>

²¹⁸ See <https://www.igmetall.de/begruessenswerte-entwicklung-im-crowdsourcing-24652.htm>.

b) Czech Republic

The Czech Republic considers that digital platforms will bring challenges to the world of work, in particular OSH, because of the IT implications and varied work locations. Therefore, the government approved the development of the **National Action Plan** ('Work 4.0'). The Action Plan is being developed in cooperation with several ministries (Ministry of Labour and Social Affairs, Ministry of Health, Ministry of Education, Youth and Sports, Ministry of Finance), selected research institutions and social partners, the Ministry of Labour and Social Affairs and the Ministry of Education, Youth and Sports being the national coordinators of the project.

The National Action Plan has four priorities:

Priority 1: Regulation of impact of technological changes on demand on labour force and employment;

Priority 2: Support of further specialised education;

Priority 3: Adjustment of labour market within the context of technological changes;

Priority 4: Regulation of impact of technological changes on selected social aspects.

As a part of priority 4 there are two subtasks: the first is to **revise the Labour Code in its chapter dealing with OSH and working conditions while working from home**. The second subtask is to **develop a methodology for monitoring and evaluating the impact of changes and characteristics of these types of work on mental and physical health and social aspects of the life of workers**.

In spring 2017, the draft of the Action Plan was discussed with social partners and approved at the plenary session of the Council of Economic and Social Agreement and sent to the Government Office for approval in May 2017. As agreed with the Office of the Prime Minister, the above-mentioned Action Plan will be incorporated into the Action Plan of a national project called 'Community 4.0', which will form a part of a broader project called 'Alliance of Community 4.0', governed, coordinated and supervised by the government on a larger scale.

c) Austria

In 2016, it was reported that a substantial Austrian minority (18 %) earns a part of its income through sharing economy platforms, although this income is often modest.²¹⁹ In a reaction, Rudi Kaske, President of the Austrian Chamber of Labour, stated: 'We do not intend to prevent crowd work. However, new technical developments do not justify unlawful acts. People who work online should have the right to social security and fair payment as well as the right to exercise their trade union rights'.²²⁰

The growing importance of online platform work in Austria has led to increased public discussion on this theme, to which scientific²²¹ and social partners²²² are contributing. A specific project that can be mentioned is 'Danube@work: Social partners for fair digital work',²²³ which does not only look at Austria but also includes Bulgaria, Romania and Serbia. The project is about acquiring knowledge about the status quo of digitalisation, expected future developments and about raising awareness of the labour-related challenges of the digitalisation of work and finding common solutions.

The Austrian government intends to initiate a process to **develop EU-wide guidelines for crowd work during Austria's presidency of the EU in the second half of 2018**. According to Muna Dudzar, Austrian State Secretary responsible for digitalisation: 'Employees are concerned about developments in this area, and we must face the new developments toward increased precarity. We need new, fair

²¹⁹ Gig Economy Survey done in Austria, which was carried out by the University of Hertfordshire and Ipsos MORI, in association with the Foundation for European Progressive Studies (FEPS), UNI Europa and AK Wien, available at: <http://www.uni-europa.org/2016/09/06/austrian-study-shows-gig-economy-rise-throughout-europe/>.

²²⁰ <http://www.uni-europa.org/2016/09/06/austrian-study-shows-gig-economy-rise-throughout-europe/>.

²²¹ M. Risak et al., 'Arbeit in der Gig-Economy: Rechtsfragen neuer Arbeitsformen in Crowd and Cloud' (Work in the gig economy: Legal issues of new work in crowd and cloud), available at: <http://www.gig-economy.at/>.

²²² See: https://www.arbeiterkammer.at/interessenvertretung/arbeit_digital/Crowdwork_in_Oesterreich.html.

²²³ See: http://www.oegb.at/cms/S06/S06_90.0/home.

rules — to support and enable crowd work, but also that ensure fair payment and good working conditions'.²²⁴

d) Croatia

It has been reported that Croatia is currently working on **regulations on new forms of employment, including digital platforms**. In addition, a National Programme on Protection at Work is being developed with the active participation of social partners, which will include online platform work.

Conclusion: Specific developments in other EU Member States

In Germany, while there have not yet been any specific regulatory developments concerning the online platform economy and its implication for working conditions, the importance of the issue is recognised. There is a broad social dialogue process on the opportunities and risks of the platform economy and a great amount of research being carried out, including research specifically commissioned by the government. On 17 March 2017, eight Germany-based platforms signed a Code of Conduct in which they agree to include local wage standards as a factor in setting prices on their platforms.

In the Czech Republic, the influence of digital platforms on OSH is being considered actively. The government has approved a development of the National Action Plan ('Work 4.0') which includes a revision of the Labour Code's chapter dealing with OSH and working conditions while working from home, and the development of a methodology for monitoring and evaluation of the impact of changes and characteristics of digital types of work on mental and physical health and social aspects of the life of workers.

In Austria, the growing importance of online platform work has led to increased public discussion on this theme, to which scientific actors and social partners are contributing. The Austrian government intends to initiate a process to develop EU-wide guidelines for crowd work during Austria's presidency of the EU in the second half of 2018. According to Muna Dudzar, Austrian State Secretary responsible for digitalisation: 'Employees are concerned about developments in this area, and we must face the new developments toward increased precarity. We need new, fair rules — to support and enable crowd work, but also that ensure fair payment and good working conditions'.

Finally, it has been reported that Croatia is currently working on regulations on new forms of employment, including digital platforms. In addition, a National Programme on Protection at Work is being developed with the active participation of social partners, which will include online platform work.

²²⁴ June 2017 press release, available at: <http://faircrowd.work/2017/06/08/austrian-government-proposes-eu-wide-crowd-work-guidelines/>.

PART 3. EU REGULATION AND POLICY RESPONSES IN RELATION TO THE ONLINE PLATFORM ECONOMY

This final, third part of the study will set out the main regulatory, policy and legal responses of the EU Institutions in relation to the online platform economy and its implications on working conditions. Employment and social issues are areas of shared competence between the EU and the Member States, and as we shall see there are a number of existing EU rules that may apply to online platform work, and have an impact on the Member States' policy options to regulate these activities, particularly in a cross-border context. Both the European Commission and the European Parliament are in favour of a common European response to at least some of the social/labour issues raised by the online platform economy, and have proposed some concrete legislative measures in this respect. The CJEU, meanwhile, is expected to rule in two important pending cases on the status of online platforms and (the conditions posed by EU law framing) the Member States' capacity to regulate them.

The European Commission

a) Communications on the Digital Single Market

Initially, the European Commission discussed the role of online platforms mainly in the context of the Digital Single Market. In its Communication of 6 May 2015 on a Digital Single Market Strategy for Europe 2015,²²⁵ it mentions the market power of online platforms and the importance of a 'fit for purpose regulatory environment for platforms and intermediaries'.²²⁶ The Commission indicated that it would launch before the end of 2015 a comprehensive assessment of the role of platforms, including in the sharing economy, and of online intermediaries, covering issues such as transparency, data usage, illegal content, relations between platforms and suppliers, and constraints on the ability of private individuals and businesses to move from one platform to another.

Accordingly, on 25 May 2016, the European Commission adopted a Communication on online platforms and the Digital Single Market.²²⁷ It refers back to its commitment to undertake a comprehensive assessment of the role of platforms, including in the sharing economy, and of online intermediaries, and reports that the Commission has conducted a series of workshops and studies²²⁸ and a public consultation.

The Commission announces that as a general rule, when elaborating responses to issues related to online platforms, it will take the following principles into account:

- a level playing field for comparable digital services;
- responsible behaviour of online platforms to protect core values;
- transparency and fairness for maintaining user trust and safeguarding innovation;
- open and non-discriminatory markets in a data-driven economy.

The Communication **does not address the issue online platform work, labour market implications or specifically OSH**. This issue is addressed in more detail in the Communication adopted a few days later, on a European agenda for the collaborative economy.

²²⁵ COM(2015)0192 final.

²²⁶ Section 3.3. of the Commission Communication of 6 May 2015 on a Digital Single Market Strategy for Europe 2015, COM(2015)0192 final.

²²⁷ COM(2016)0288 final.

²²⁸ These include an economic study of online platforms by the Commission's Joint Research Centre, two Eurobarometer studies, a hearing on online platforms organised by the European Political Strategy Centre, and the conclusions of numerous interactions with academics and stakeholders that fed into the Commission Staff Working Document that accompanies the Communication. See B. Martens, 'An economic policy perspective on online platforms', JRC/IPTS Digital Economy Working Paper 05 (2016), available at: <https://ec.europa.eu/jrc/sites/default/files/JRC101501.pdf>; [Online Platforms, Special Eurobarometer 446 \(2016\), available at: http://ec.europa.eu/information_society/newsroom/image/document/2016-24/ebs_447_en_16136.pdf](https://ec.europa.eu/information_society/newsroom/image/document/2016-24/ebs_447_en_16136.pdf); [The Use of Online Marketplaces and Search Engines by SMEs](https://ec.europa.eu/information_society/newsroom/image/document/2016-24/fl_439_en_16137.pdf), Flash Eurobarometer 439 (2016), available at: [http://ec.europa.eu/information_society/newsroom/image/document/2016-24/fl_439_en_16137.pdf](https://ec.europa.eu/information_society/newsroom/image/document/2016-24/fl_439_en_16137.pdf); European Commission, Staff Working Document on Online Platforms, accompanying the document 'Communication on Online Platforms and the Digital Single Market', SWD(2016) 172.

b) Commission communication of 2 June 2016 on a European agenda for the collaborative economy

As announced in its 2015 Single Market Strategy, the European Commission presented a Communication on a European agenda for the collaborative economy on 2 June 2016.²²⁹ The agenda is to serve as **legal guidance and policy orientation to Member States** to help ensure balanced development of the collaborative economy across the EU, complementary to the Commission's broader approach to online platforms presented in May 2016 as part of the Digital Single Market strategy.

As was already discussed in Part 1 of the present study, the Commission defines the 'collaborative economy' as referring

to business models where activities are facilitated by collaborative platforms that create an open marketplace for the temporary usage of goods or services often provided by private individuals. The collaborative economy involves three categories of actors: (i) service providers who share assets, resources, time and/or skills — these can be private individuals offering services on an occasional basis ('peers') or service providers acting in their professional capacity ('professional services providers'); (ii) users of these; and (iii) intermediaries that connect — via an online platform — providers with users and that facilitate transactions between them ('collaborative platforms'). Collaborative economy transactions generally do not involve a change of ownership and can be carried out for profit or not-for-profit.²³⁰

The Commission states that the collaborative economy creates new opportunities for consumers and entrepreneurs, but that it also often raises issues with regard to the application of existing legal frameworks, blurring established lines between consumer and provider, employee and self-employed, or the professional and non-professional provision of services. It is noted that this can result in uncertainty over applicable rules, especially when combined with regulatory fragmentation stemming from divergent regulatory approaches at national or local level, hampering the development of the collaborative economy in Europe and preventing its benefits to materialise fully. At the same time, 'there is a risk that regulatory grey zones are exploited to circumvent rules designed to preserve the public interest'.²³¹

The question of market access is relevant for online platforms such as Uber, which have been faced with licensing and bans on the national level, and this question is the subject of pending cases at the CJEU, as discussed further in section 3 below. The Commission notes that whether or not platforms can be subject to market access requirements depends on the nature of their activities. If they provide an information society service, they cannot be subjected to prior authorisations or any equivalent requirements that specifically and exclusively target those services, according to EU law.²³² Member States can impose regulatory requirements on platforms in such a situation only under limited circumstances and subject to a notification procedure. If the platform, however, is the provider of the underlying service (e.g. transport or short-term rental service), this is different. The right to market access and Member States' regulatory capacity then needs to be assessed on the basis of the underlying service in question. According to the Commission, the relevant elements to determine whether the underlying service is provided by the platform or not are:

- Price: does the collaborative platform set the final price to be paid by the user, as the recipient of the underlying service? Where the collaborative platform is only recommending a price or where the underlying services provider is otherwise free to adapt the price set by a collaborative platform, this indicates that this criterion may not be met.

²²⁹ COM(2016)0356 final.

²³⁰ Ibid., p. 3.

²³¹ Ibid., p. 2.

²³² Article 2(a) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on 'e-Commerce'), OJ L 178, 17.7.2000, pp. 1-16, and Article 1(1)(b) of Directive 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, OJ L 241, 17.9.2015, pp. 1-15.

- Other key contractual terms: does the collaborative platform set terms and conditions, other than price, which determine the contractual relationship between the underlying services provider and the user (e.g. setting mandatory instructions for the provision of the underlying service, including any obligation to provide the service)?
- Ownership of key assets: does the collaborative platform own the key assets used to provide the underlying service?²³³

The Commission adds that other criteria may also play a role. Importantly, this includes the situation where ‘an **employment relationship** exists between the collaborative platform and the person providing the underlying service in question’, which ‘could indicate that the collaborative platform exerts a high level of control and influence over the provision of the underlying service’.²³⁴

The Communication specifically addresses the **impact of the collaborative economy on the labour market**. The Commission notes that it generates new employment opportunities but that these more flexible work arrangements may not be as regular or stable as traditional employment relations, creating uncertainty about applicable rights and the level of social protection. The Commission notes that working arrangements in the context of the collaborative economy are often based on individual tasks performed on an ad hoc basis rather than tasks regularly performed in a predefined environment and timeframe. The Commission considers this to be part of a more structural shift of increasingly blurred boundaries between the self-employed and workers, and an increase in temporary and part-time work and multiple job-holding. In this context, it refers to its initiative concerning the European Pillar of Social Rights, discussed below.

The Commission acknowledges that most labour law falls under national competence, but stresses that the EU has nonetheless developed certain minimum standards in the field of social policy. To provide some orientation on how the traditional distinction between the self-employed and workers applies in the context of the collaborative economy, the Commission communication **sets out the conditions under which an employment relationship exists in line with EU labour law, for the purposes of applying EU labour law**. It should be noted that **this interpretation is not legally binding, as it is the CJEU that has the final say in the interpretation of EU law**.

(i) The European Commission’s interpretation of the concept of ‘worker’ for the purposes of EU labour law

The Commission states that EU law guaranteeing rights to workers is applicable only to people who are in an employment relationship, i.e. who are considered ‘workers’. While EU Member States are responsible for deciding who is to be considered a worker in their national legal order, at EU level the CJEU has defined the concept for the purpose of applying EU law. This definition has primarily been developed within the framework of the free movement of workers. The CJEU stated that ‘the essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration’. The Commission remarks that the CJEU has confirmed that this definition shall also be used to determine who is to be considered a worker when applying certain EU directives in the social field.

Whether an employment relationship exists or not has to be established on the basis of a case-by-case assessment, considering the reality of the relationship, looking cumulatively in particular at the following three essential criteria:

- the existence of a subordination link;
- the nature of the work; and
- the existence of remuneration.

²³³ European Commission, Communication on a European agenda for the collaborative economy, COM(2016)0356 final, p. 6.

²³⁴ Ibid.

For the **criterion of subordination** to be met, the service provider must act under the direction of the collaborative platform, the latter determining the choice of the activity, remuneration and working conditions. The provider is not free to choose which services he or she will provide and how. The existence of subordination is not necessarily dependent on the actual exercise of management or supervision on a continuous basis.

For the **nature of the work criterion** to be met, the provider must pursue an activity of economic value that is effective and genuine, excluding services on such a small scale as to be regarded as purely marginal and accessory. National courts have adopted divergent approaches in identifying what is marginal and accessory even within the context of more traditional employment relationships. There is a mix of use of thresholds (hour- or wage-based) and ad hoc assessments of the features of a given relationship. In the context of the collaborative economy, where persons actually provide purely marginal and accessory services through collaborative platforms, this is an indication that such persons would not qualify as workers, although short duration, limited working hours, discontinuous work or low productivity cannot in themselves exclude an employment relation. At the same time, persons providing services on more than an occasional basis may be either workers or self-employed, as the actual qualification of their status results from a comprehensive test of all three criteria.

The **remuneration criterion** is primarily used for distinguishing a volunteer from a worker. Thus, where the provider does not receive any remuneration or receives merely reimbursement of costs incurred for his or her activities, the remuneration criterion would not be met.

The Commission notes that, while the above criteria are referred to when applying the EU definition of workers, courts in the Member States tend to use a similar set of criteria when they undertake their global assessment of a given employment relationship in the national remit.

(ii) Comments concerning the notion of ‘worker’ in EU labour law

It is true, as the Commission states, that in the context of Article 45 TFEU on the free movement of workers, the CJEU has since long held that the definition of ‘worker’ is autonomous and defined at European level. This is, however, different in the context of the EU social *acquis*. In the TFEU’s Social Policy Title, Article 151(2) obliges the EU ‘to take account of the diverse forms of national practices, in particular in the field of contractual relations’. Perhaps in the light thereof, a number of EU labour law directives refer to national law and practices, for instance to determine to which ‘employment relationships’ they apply.²³⁵

Under the current state of EU law, it is an open question to what extent Member States can limit the scope of application of the EU labour law directives by such references to their own national legislation. This is a question of mounting importance considering the increase in (the use of) non-standard forms of employment, such as ‘zero-hours contracts’ in the UK and so-called ‘civil law contracts’ in Poland,²³⁶ as well as in the context of online platform workers. It would seem harmful to the social objectives of the *acquis* if its scope of application could be unilaterally limited by Member States, excluding certain forms of work or workers regardless of the material conditions of their employment.²³⁷

For certain directives, the CJEU has decided to give an autonomous definition of their scope of application, such as for the Working Time Directive²³⁸ and Directive 98/59 on collective redundancies,²³⁹ but these measures do not refer to national law. By contrast, in the context of the Part-Time Work Directive, which does make reference to national law and practice, the court confirmed in *Wippel*

²³⁵ E.g. the Fixed-Term Work Directive 1999/70/EC, the Part-Time Work Directive 97/81/EC, the Temporary Agency Work Directive 2008/104/EC, the Information and Consultation Directive 2002/14/EC, the Insolvency Directive 2008/94/EC and the Written Statement Directive 91/533/EEC.

²³⁶ See European Commission, ‘Employment and Social Developments in Europe 2015’, SWD(2016) 7 final.

²³⁷ See the Opinion of AG Saugmandsgaard of 6 June 2016, in Case C-216/15, *Betriebsrat der Ruhrländklinik gGmbH v Ruhrländklinik gGmbH*, ECLI:EU:C:2016:518.

²³⁸ Case C-428/09, *Union syndicale Solidaires Isère v Premier ministre and Others*, ECLI:EU:C:2010:612. The CJEU applies its case law concerning Article 45 TFEU.

²³⁹ Case C-55/02, *Commission of the European Communities v Portuguese Republic*, ECLI:EU:C:2004:605 and Case C-596/12, *European Commission v Italian Republic*, ECLI:EU:C:2014:77.

concerning a zero-hours contract that it was for the national level to determine whether the Directive applied, following national legal definitions and practices.²⁴⁰

However, even when a directive refers to national definitions, the Member States' discretion is not 'wholly unfettered', as the Court held in *Tümer* concerning the Insolvency Directive.²⁴¹ The Court ruled that the Netherlands could not exclude illegally resident third-country nationals from the scope of application of the Directive, as it had recognised such third-country nationals under its civil law as having the status of an 'employee' with an entitlement to pay. Similarly, as regards the Part-Time Work Directive, the CJEU held that while 'it is for the Member States to define the concept of "workers who have an employment contract or an employment relationship" in Clause 2.1 of the Framework Agreement on part-time work [...] and, in particular, to determine whether judges fall within that concept' this is 'subject to the condition that that does not lead to the arbitrary exclusion of that category of persons from the protection offered by [the] Directive.'²⁴²

Most recently, in *Ruhrlandklinik*,²⁴³ the CJEU ruled on this very issue with regard to the Temporary Agency Work Directive, which similarly refers to 'any person who, in the Member State concerned, is protected as a worker under national employment law'. It held that such a reference 'cannot be interpreted as a waiver on the part of the EU legislature of its power itself to determine the scope of that concept for the purposes of Directive 2008/104, and accordingly the scope *rationae personae* of that directive'. The reference to national law meant only that the EU legislature intended to preserve the power of the Member States to determine the persons who fall within the scope of the concept of 'worker' for the purposes of national law and who must be protected under their domestic legislation.²⁴⁴ The CJEU declared: 'the essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person, in return for which he receives remuneration, the legal characterisation under national law and the form of that relationship, as well as the nature of the legal relationship between those two persons, not being decisive in that regard'.²⁴⁵

In terms of the application of EU labour law to online platform workers, it would be necessary not only to carefully consider the factual reality of the relationship in question, as the Commission states, **but also to consider the specific EU legislative measure the application of which is being considered.** It may well be that an online platform worker will be considered a worker for the purposes of one directive (e.g. the Working Time Directive or OSH legislation) but not for another (e.g. the Collective Redundancies or Part-Time Work Directive). As the Commission also points out, much will depend on the interpretation of the nature of the work criterion in the case of micro-task work on digital platforms such as Amazon Mechanical Turk. If each task is considered by itself, it is indeed difficult to see how these would escape the definition of 'services on such a small scale as to be regarded as purely marginal and accessory'. However, if the relationship is determined in a broader sense, as between the platform and the worker, **including all the various tasks performed in the context of that umbrella relationship**, things will look very different. Finally, as the Commission points out, the services need to be provided for remuneration. While the Commission does not note this explicitly, this criterion is of high pertinence in distinguishing the 'collaborative (or online platform) economy' from the 'sharing economy', because it thereby **excludes genuine sharing activities such as carpooling and couch-surfing**. As discussed in Part 1 of this study, that exclusion is appropriate, but it does not align with the Commission's own definition of the 'collaborative economy' which includes not-for-profit services.

²⁴⁰ Case C-313/02, *Nicole Wippel v Peek & Cloppenburg GmbH & Co. KG*, ECLI:EU:C:2004:607, para. 40.

²⁴¹ Case C-311/13, *O. Tümer v Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen*, ECLI:EU:C:2014:2337.

²⁴² Case C-393/10, *Dermod Patrick O'Brien v Ministry of Justice*, ECLI:EU:C:2012:110. The Court added: 'An exclusion from that protection may be allowed only if the relationship between judges and the Ministry of Justice is, by its nature, substantially different from that between employers and their employees falling, according to national law, under the category of workers.'

²⁴³ Case C-216/15, *Betriebsrat der Ruhrlandklinik gGmbH v Ruhrlandklinik gGmbH*, ECLI:EU:C:2016:883.

²⁴⁴ *Ibid.*, para. 31.

²⁴⁵ *Ibid.*, para. 27.

c) The European Pillar of Social Rights

On 26 April 2017, following a year-long preparatory phase,²⁴⁶ the European Commission officially launched a European Pillar of Social Rights.²⁴⁷ The Pillar consists of a set of social rights and principles and is accompanied by a package of proposals, comprising pre-existing initiatives, new legislation and soft law measures. Two new legislative initiatives are potentially relevant for online platform economy workers:

1. (i) an Access to Social Security initiative for a potential action addressing the challenges of access to social protection for people in all forms of employment and potentially also self-employment;²⁴⁸ and
2. (ii) a revision of the Written Statement Directive, 91/533/EEC, to introduce minimum standards applicable to every employment relationship and prohibiting abuse.²⁴⁹

Both initiatives touch on the issue of social precariousness connected to non-standard forms of employment and (dependent) self-employment. The first-stage consultation of the social partners on these potential actions has been initiated on the occasion of the launch of the Pillar, so the proposals are not yet concrete and are very much in their initial, exploratory stage. The consultation documents nevertheless clearly show the ambition of the two initiatives: to provide new and tangible minimum protection and security for workers in atypical employment and for the (dependent) self-employed. In view of the rise of precarious working arrangements especially during the recent financial crisis, these measures are very welcome from a social perspective.

The **Access to Social Security initiative**²⁵⁰ aims to tackle the problem that up to half of people in non-standard work and self-employment across the EU are at risk of not having sufficient access to social protection and/or employment services, which is likely to become a growing impediment to the good functioning of labour markets, to the sustainability of social protection systems and to the welfare of an increasing proportion of the workforce. The gap in protection is often linked to the labour law status of people in non-standard employment and due to the growing number of transitions between and combinations of dependent employment and self-employment, causing problems of accessibility and transferability. One option for the potential action would be an EU Directive with provisions ensuring (i) similar social protection rights for similar work and (ii) the transferability of acquired social protection rights. As for the legal basis, the Commission indicates in the consultation document that ‘Article 153(1)(c) of TFEU provides, within certain limits, for the EU to adopt legislation in the area of “social security and social protection of workers” and could be used to establish new *acquis* necessary to address the challenges of access to social protection for people in non-standard employment. A combination of Articles 151 and 352 of TFEU could be the base for EU legislation seeking to address access for people in self-employment’.²⁵¹

The **proposed revision of the Written Statement Directive** aims to reinforce the rights already contained in that Directive about the information the worker is entitled to receive in his or her employment contract by applying them to all workers irrespective of the form of their employment. In addition to these more procedural rights, the consultation indicates the Commission’s intention to introduce a more important substantive element to the Directive, in defining core labour standards for all workers, particularly for the protection of atypical, casual forms of employment such as on-call work and zero-hours contracts.²⁵² The Commission, on a preliminary basis, identifies the rights that could be attached to any employment relationship as the right to a maximum duration of probation where a probation

²⁴⁶ European Commission, Communication of 8 March 2016 launching a consultation on a European Pillar of Social Rights, COM(2016)0127 final.

²⁴⁷ European Commission, Communication of 26 April 2017 establishing a European Pillar of Social Rights, COM(2017) 250 final.

²⁴⁸ The Commission has launched the first-phase consultation of the social partners required on the basis of Article 154 TFEU, C(2017) 2610 final.

²⁴⁹ The Commission has launched the first-phase consultation, C(2017) 2611.

²⁵⁰ European Commission, *Commission Work Programme 2017: Delivering a Europe that Protects, Empowers and Defends* (2016), point 11.

²⁵¹ European Commission, C(2017) 2610 final.

²⁵² The Commission’s consultation document refers to Eurofound’s definitions for these terms, as given in the report *New Forms of Employment* (Luxembourg, Publications Office of the EU, 2015), p.46.

period is laid down, the right to reference hours in which working hours may vary under very flexible contracts to allow some predictability of working time, the right to a contract with a minimum of hours set at the average level of hours worked during a preceding period of a certain duration for very flexible contracts,²⁵³ the right to request a new form of employment (and the employer's obligation to reply), the right to training, the right to a reasonable notice period in cases of dismissal/early termination of contract, the right to adequate redress in cases of unfair dismissal or unlawful termination of contract and, finally, the right to access to effective and impartial dispute resolution in cases of dismissal and unfair treatment.²⁵⁴

As will be discussed below, the European Parliament has called on the Commission to take the position of online platform workers specifically into account in the formulation of these legislative initiatives in the context of the European Pillar of Social Rights.

Conclusion: The European Commission's approach to online platform work

The European Commission has set out the conditions under which it considers that an employment relationship exists in line with EU labour law, for the purposes of applying EU labour law. It considers that the CJEU's definition of 'worker' as applied in the context of the free movement of workers also guides the application of EU labour law, entailing that 'the essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration'. Whether an employment relationship exists or not has to be established on the basis of a case-by-case assessment, considering the reality of the relationship, looking cumulatively at the existence of a subordination link, the nature of the work and the existence of remuneration.

The Commission has furthermore proposed two legislative measures in the context of the European Pillar of Social Rights that may affect online platform workers' social and employment rights. Firstly, the Access to Social Security initiative may entail a new EU Directive ensuring (i) similar social protection rights for similar work regardless of employment status and (ii) the transferability of acquired social protection rights. Secondly, a proposed revision of the Written Statement Directive aims to reinforce the rights already contained in that Directive about the information the worker is entitled to receive in his or her employment contract by applying them to all workers irrespective of their employment status. In addition, the revised Directive may define core labour standards for all workers, particularly for the protection of atypical, casual forms of employment, such as the right to a maximum duration of probation where a probation period is laid down, the right to reference hours in which working hours may vary under very flexible contracts to allow some predictability of working time, the right to a contract with a minimum of hours set at the average level of hours worked during a preceding period of a certain duration for very flexible contracts, the right to request a new form of employment (and the employer's obligation to reply), the right to training, the right to a reasonable notice period in cases of dismissal/early termination of contract, the right to adequate redress in cases of unfair dismissal or unlawful termination of contract and, finally, the right to access to effective and impartial dispute resolution in cases of dismissal and unfair treatment.

The European Parliament

The European Parliament has weighed in on the digital economy and the online platform economy on several occasions. Apart from its resolutions on the digital single market, the collaborative economy and the European Pillar of Social Rights, discussed in detail below, it has helped structure and enrich the

²⁵³ This corresponds to the protection provided by the Dutch courts in cases of *nul-uren contracten* (zero-hours contracts), developed in the national case law.

²⁵⁴ The Parliament is likely to support such a measure. In its Resolution on the Pillar, the Parliament has called for a framework directive on decent working conditions to include relevant minimum standards to be ensured in more precarious forms of employment, in particular fair working conditions for internships, traineeships and apprenticeships, a clear distinction between genuine self-employment and those in an employment relationship, and limits regarding on-demand work. European Parliament resolution of 19 January 2017 on a European Pillar of Social Rights (2016/2095(INI)), para. 5.

political debate by providing various authoritative background studies,²⁵⁵ such as a comprehensive **in-depth analysis on the situation of workers in the collaborative economy**, which notably includes a section on the OSH implications of online platform work.²⁵⁶

a) Resolution of 19 January 2016 on Towards a Digital Single Market Act

In its January 2016 Resolution on the Digital Single Market, the Parliament reacts to the Commission Communication. While it deals with digitalisation in a more general sense, it contains several important statements concerning the online platform economy and its impact on labour markets and working conditions.

In particular, the Parliament calls on the Member States to ensure that employment and social policies are fit for purpose for digital innovation, entrepreneurship, and the growth of the sharing economy and its potential for more flexible forms of employment, by identifying new forms of employment and **assessing the need for the modernisation of social and employment legislation so that existing employment rights and social welfare schemes can also be maintained in the digital world of work**. While it recognises that the provision of social security is a Member State competence, it asks the Commission to identify and facilitate exchanges of best practices in the EU in these areas and at international level.

As regards the OSH implications of digitalisation, the Parliament notes in particular that:

the **effects of digitalisation on health and safety at work need to be assessed and existing health and safety measures adapted** accordingly; notes the possibility of accidents to which persons teleworking or crowdworking from home may be exposed; emphasises that work-related mental health problems such as **burnout caused by constant accessibility** and the **erosion of traditional working time arrangements** represents a serious risk for workers; calls on the Commission to arrange for a study to be produced on the spill over effects of digitalisation, such as greater **labour intensity**, on **workers' psychological wellbeing and family life** and on the **development of cognitive abilities in children**.²⁵⁷

b) Resolution of 19 February on a European Pillar of Social Rights

The European Parliament responded to the Commission's initiative for a European Pillar of Social Rights with a report²⁵⁸ and a Resolution.²⁵⁹ In the Resolution, the Parliament notes that European labour markets are increasingly evolving towards 'atypical' or 'non-standard' forms of employment, such as temporary work, involuntary part-time work, casual work, seasonal work, on-demand work, dependent self-employment or **work intermediated by digital platforms** — although permanent jobs continue to contribute most to employment expansion, growing faster than temporary employment over the past 2.5 years. Demand for labour is becoming more diversified than in the past, which in some cases can be beneficial for productivity, work–life balance, transitions into the labour market and second career opportunities, but can also involve prolonged economic insecurity and bad working conditions, notably

²⁵⁵ P. Goudin, 'The cost of non-Europe in the sharing economy: Economic, social and legal challenges and opportunities', European Parliamentary Research Service Study (January 2016), available at: [http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU\(2016\)558777](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU(2016)558777); J. Valant, 'Sharing economy: They come in like a wrecking ball', European Parliamentary Research Service At A Glance Note (April 2016), available at: [http://www.europarl.europa.eu/RegData/etudes/ATAG/2016/581956/EPRS_ATA\(2016\)581956_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/ATAG/2016/581956/EPRS_ATA(2016)581956_EN.pdf); and J. Valant, 'A European agenda for the collaborative economy', European Parliamentary Research Service Briefing (November 2016), available at: [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/593510/EPRS_BRI\(2016\)593510_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/593510/EPRS_BRI(2016)593510_EN.pdf).

²⁵⁶ M. Schmid-Drüner, 'The situation of workers in the collaborative economy', European Parliament: In-Depth Analysis (2016), available at: [http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/587316/IPOL_IDA\(2016\)587316_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/587316/IPOL_IDA(2016)587316_EN.pdf).

²⁵⁷ European Parliament resolution of 19 January 2016 on Towards a Digital Single Market Act (2015/2147(INI)) para. 8.

²⁵⁸ Ibid.

²⁵⁹ European Parliament Resolution of 19 January 2017 on a European Pillar of Social Rights (2016/2095(INI)).

in terms of lower and less certain incomes, lack of possibilities to defend one's rights, lack of social and health insurance, lack of a professional identity, lack of career prospects, and difficulties in reconciling on-demand work with private and family life. The Parliament considers that a dynamic labour market should ensure that everyone has the chance to use their skills and abilities in their working life, based inter alia on healthy and safe working conditions, active labour market policies and updating competences over the course of one's life through regular and lifelong learning.²⁶⁰

In concrete terms, the Parliament **calls on the Commission to broaden the Written Statement Directive (91/533/EEC) to cover all forms of employment and employment relationships**, and calls for this **framework directive on decent working conditions also to include relevant existing minimum standards to be ensured in certain specific relationships**, including **limits regarding on-demand work** (stating that zero-hour contracts should not be allowed, in view of the extreme uncertainty which they involve), and, importantly:

for work intermediated by digital platforms and other instances of dependent self-employment, a clear distinction — for the purpose of EU law and without prejudice to national law — between those **genuinely self-employed and those in an employment relationship**, taking into account ILO Recommendation No 198, according to which the fulfilment of several indicators is sufficient to determine an employment relationship; the **status and basic responsibilities of the platform**, the client and the person performing the work should thus be clarified; **minimum standards** of collaboration rules should also be introduced with full and comprehensive information to the service provider on **their rights and obligations, entitlements, associated level of social protection** and the identity of employer; those employed as well as those genuinely self-employed who are engaged through online platforms should have **analogous rights as in the rest of the economy** and be protected through participation in **social security and health insurance schemes**; Member States should ensure **proper surveillance** of the terms and conditions of the employment relationship or service contract, preventing abuses of dominant positions by the platforms.²⁶¹

It furthermore points out that the **right to healthy and safe working conditions** also involves protection against workplace risks as well as limitations on working time and provisions on minimum rest periods and annual leave. It urges the Member States to fully implement the relevant legislation and awaits Commission proposals for concrete measures to uphold this right effectively for all workers, noting that such measures should be based on an impact assessment, reflecting all current knowledge about safety and health risks and taking into account new ways of working associated with digitalisation and other technological developments.²⁶²

Finally, it notes that **'digital platforms and other intermediaries should have an obligation to report all work undertaken through them to the competent authorities for the purpose of ensuring adequate contributions and protection through social and health insurance for all workers'**.²⁶³

c) Resolution on a European Agenda for the collaborative economy

On 15 June 2017, the European Parliament by a strong majority²⁶⁴ adopted a Resolution on the collaborative economy. It takes note of the importance of the collaborative economy, in reference to the 2016 Commission Eurobarometer survey indicating that 17 % of European consumers have used services provided by the collaborative economy. It also considers the Commission communication on a European agenda for the collaborative economy 'a good starting point for promoting and regulating this

²⁶⁰ Ibid., point K.

²⁶¹ Ibid., para 5.

²⁶² Ibid., para. 7.

²⁶³ Ibid., para. 22.

²⁶⁴ 510 votes in favour, 60 against and 48 abstentions.

sector effectively'.²⁶⁵ It notes, however, that '**promoting social justice and protection**, as defined in Article 3 of the Treaty on European Union and Article 9 on the Treaty on the Functioning of the European Union, is also an objective of the EU's internal market' and that 'there is a need to incorporate the gender equality perspective and to reflect the provisions of the relevant anti-discrimination legislation in the context of further analysis and recommendations in this field'.²⁶⁶

While the Parliament agrees that the collaborative economy generates new and interesting entrepreneurial opportunities, jobs and growth, and frequently plays an important role in making the economic system not only more efficient, but also socially and environmentally sustainable, allowing a better allocation of resources and assets that are otherwise underused, and thus contributing to the transition towards a circular economy, it acknowledges at the same time that the collaborative economy can have a significant impact on long-established regulated business models in many strategic sectors such as transport, accommodation, the restaurant industry, services, retail and finance; that it understands the challenges linked to having different legal standards for similar economic actors; and that it stresses the importance of ensuring a high level of consumer protection, of **fully upholding workers' rights** and of ensuring tax compliance.²⁶⁷

The Parliament considers that the development of a dynamic, clear and, where appropriate, harmonised legal environment and the establishment of a level playing field is an essential precondition for a flourishing collaborative economy in the EU. In that respect, it regrets that the Commission communication 'did not bring sufficient clarity about the applicability of existing EU legislation to different collaborative economy models' and emphasises the need for the Member States to step up **enforcement of existing legislation**.²⁶⁸ The Parliament calls on the Commission to aim for an enforcement framework supporting the Member States in their efforts, most importantly regarding the Services Directive and the consumer *acquis*, making full use of all tools available in this context, including infringement procedures. Importantly, the Parliament:

urges the Commission to work together with Member States to **provide further guidelines on laying down effective criteria for distinguishing between peers and professionals**, which is crucial for the fair development of the collaborative economy; points out that these guidelines should provide clarity and legal certainty and take into account, inter alia, the differing legislation in Member States and their economic realities, such as income level, the characteristics of the sectors, the situation of micro and small businesses and the profit making purpose of the activity; is of the opinion that a set of general principles and criteria at EU level and a set of thresholds at national level could be a way forward, and calls on the Commission to conduct a study in this respect.²⁶⁹

In a specific section on the '**impact on labour markets and workers' rights**', the Parliament notes that the collaborative economy is opening **new opportunities to enter work** for those who are unemployed, are currently far from the labour market or would otherwise be unable to participate in it, such as young people and marginalised groups, but that in some circumstances this development can also lead to **precarious situations**. It therefore stresses the need for labour market flexibility, on the one hand, and for economic and social security for workers on the other, in line with customs and traditions in Member States.²⁷⁰

The Parliament points out that all workers in the collaborative economy are **either employed or self-employed based on the primacy of facts and must be classified accordingly**. It also underlines the importance of ensuring the fundamental rights and adequate social security protection of the rising number of self-employed workers, including the **right of collective bargaining and action, and also with regard to their compensation**.

²⁶⁵ European Parliament resolution of 15 June 2017 on a European Agenda for the collaborative economy (2017/2003(INI)), point I.

²⁶⁶ Ibid., points I and J.

²⁶⁷ Ibid., paras. 4-6.

²⁶⁸ Ibid., para. 15.

²⁶⁹ Ibid., para. 18.

²⁷⁰ Ibid., para. 37.

In terms of specific further action, the Parliament:

- calls on the European Commission
 - to examine **how far existing Union rules are applicable to the digital labour market** and ensure adequate implementation and enforcement,
 - to **publish guidelines** on how Union law applies to the various types of platform business models in order, where necessary, to fill regulatory gaps in the area of employment and social security,
 - to **examine how far the Directive on Temporary Agency Work 2008/104/EC is applicable to specific online platforms**, considering that many intermediating online platforms are structurally similar to temporary work agencies (triangular contractual relationship between temporary agency worker/platform worker, temporary work agency/online platform and user undertaking/client);
- calls on the Member States
 - to **carry out sufficient labour inspections** with regard to online platforms and to impose sanctions where rules have been breached, especially in terms of working and employment conditions and specific requirements regarding qualifications,
 - to provide **sufficient resources for inspections**,
 - in collaboration with social partners and other relevant stakeholders, to assess the need to **modernise existing legislation**, including social security systems, so as to stay abreast of technological developments while ensuring workers' protection,
 - through the national public employment services and the European Employment Services (EURES) network to communicate better on the opportunities offered by the collaborative economy;
- encourages social partners
 - to **update collective agreements** where necessary so that existing protection standards can also be maintained in the digital work world;
- calls on the Commission and the Member States
 - to **coordinate social security systems** with a view to ensuring the exportability of benefits and aggregation of periods in accordance with Union and national legislation,
 - to pay special attention to **undeclared work and bogus self-employment** in this sector, and to put the platform economy on the agenda of the European Platform Tackling Undeclared Work,
 - to ensure **fair working conditions and adequate legal and social protection for all workers in the collaborative economy, regardless of their status**;
- calls on the Commission, the Member States and social partners
 - to **provide adequate information to platform workers on working and employment conditions and workers' rights, and on their working relationships** with both platforms and users, considering that platforms should play a pro-active role in providing information to users and workers regarding the applicable regulatory framework with a view to fulfilling legal requirements,
 - to gather more reliable and comprehensive data in this respect and encourages the Member States to appoint an already existing national competent entity to monitor and evaluate emerging trends in the collaborative labour market.

In terms of specific features of platform work that affect workers, the Parliament underlines the importance of platform workers being able to benefit from the **portability of ratings and reviews**, 'which constitute their digital market value', and the importance of facilitating the transferability and accumulation of ratings and reviews across different platforms while respecting rules on data protection and privacy. It notes the possibility of **unfair and arbitrary practices regarding online ratings**, which may affect the working conditions and entitlements of platform workers and their ability to obtain jobs, and argues that rating and review mechanisms should be developed in a transparent way and that

workers should be informed and consulted at the appropriate levels on the general criteria used to develop such mechanisms.

Conclusion: The European Parliament's approach to online platform work

The European Parliament's position, in general terms, has been that fair working conditions and adequate legal and social protection should be ensured for all workers in the collaborative economy, regardless of their status.

Specifically in response to the European Pillar of Social Rights, the Parliament has called on the Commission to broaden the Written Statement Directive to cover all forms of employment, and for this new Framework Directive on decent working conditions also to include relevant existing minimum standards to be ensured in certain specific relationships, including 'for work intermediated by digital platforms and other instances of dependent self-employment, a clear distinction — for the purpose of EU law and without prejudice to national law — between those genuinely self-employed and those in an employment relationship, taking into account ILO Recommendation No 198, according to which the fulfilment of several indicators is sufficient to determine an employment relationship; the status and basic responsibilities of the platform, the client and the person performing the work should thus be clarified; minimum standards of collaboration rules should also be introduced with full and comprehensive information to the service provider on their rights and obligations, entitlements, associated level of social protection and the identity of employer; those employed as well as those genuinely self-employed who are engaged through online platforms should have analogous rights as in the rest of the economy and be protected through participation in social security and health insurance schemes; Member States should ensure proper surveillance of the terms and conditions of the employment relationship or service contract, preventing abuses of dominant positions by the platforms'.

The Parliament has furthermore pointed out that the right to healthy and safe working conditions also involves protection against workplace risks as well as limitations on working time and provisions on minimum rest periods and annual leave. It has urged the Member States to fully implement the relevant legislation, to apply their national law on (self-)employment based on the primacy of facts and to enforce it accordingly, to invest in labour inspections and to consider updating the regulatory framework to stay abreast of technological developments. It also has requested that the Commission examine how far the Directive on Temporary Agency Work is applicable to specific online platforms, considering that many intermediating online platforms are structurally similar to temporary work agencies.

The Court of Justice of the EU

a) Case C-434/15, Asociación Profesional Elite Taxi

As noted by Advocate General (AG) Szpunar:

Although the development of new technologies is, in general, a source of controversy, Uber is a case apart. Its method of operating generates criticisms and questions, but also hopes and new expectations. In the legal field alone, the way Uber works has thrown up questions concerning competition law, consumer protection and employment law, among others. From an economic and social standpoint, the term 'uberisation' has even emerged. **This request for a preliminary ruling therefore presents the Court with a highly politicised issue that has received a great deal of media attention.**²⁷¹

The case concerns a request from the *Juzgado Mercantil No 3 de Barcelona* (Commercial Court No 3 of Barcelona) in the context of national proceedings between *Asociación Profesional Elite Taxi*, a

²⁷¹ Opinion of Advocate General Szpunar of 11 May 2017, Case C-434/15, *Asociación Profesional Elite Taxi v Uber Systems Spain SL*, ECLI:EU:C:2017:364, para. 1.

professional organisation representing taxi drivers in the city of Barcelona, and *Uber Spain*. Elite Taxi is seeking an order from the national court declaring that Uber's activities, which allegedly infringe the legislation in force and amount to misleading practices, are acts of unfair competition; to order it to cease its unfair conduct consisting of supporting other companies in the group by providing on-demand booking services by means of mobile devices and the internet, when that is directly or indirectly linked to use of the digital platform Uber in Spain; and to prohibit it from engaging in such activities in the future.

(i) The Opinion of AG Szpunar

According to the AG, 'the main issue is therefore whether possible rules on how Uber operates are subject to the requirements of EU law, in the first place those relating to the freedom to provide services, or whether they fall within the scope of the shared competence of the European Union and the Member States in the field of local transport, a competence which has not yet been exercised at EU level'.²⁷² The national court is essentially enquiring whether or not Uber's activity falls within the scope of Directive 2006/123 of the European Parliament and of the Council of 12 December 2006 on services in the internal market (Services Directive) and Directive 2000/31 of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market (Electronic Commerce Directive) as well as the provisions of the TFEU on the freedom to provide services. This essentially means determining whether Uber's activities classify as '**information society services**' or on the other hand '**transport services or services in the field of transport**'. The free movement of services in the field of transport is achieved within the framework of the common transport policy and those services are therefore excluded from the scope of the Services Directive. In the words of the AG: 'What is Uber? Is it a transport undertaking, a taxi business to be blunt? Or is it solely an electronic platform enabling users to locate, book and pay for a transport service provided by someone else?'²⁷³

The AG's Opinion, while not legally binding, contains many **interesting considerations** concerning the legal status of Uber, and online platforms more generally, **including the implications for employment law**. The AG considers that Uber is often described as an undertaking (or platform) in the 'collaborative economy', but that there is no point in discussing the precise meaning of that term. Instead, what is relevant is that it 'certainly cannot be considered to be a ride-sharing platform'.²⁷⁴ Drivers on the Uber platform offer passengers a transport service to a destination selected by the passenger and, accordingly, are paid an amount which far exceeds the mere reimbursement of expenses incurred. This makes it a traditional transport service, and whether or not it is regarded as forming part of a 'collaborative economy' is irrelevant to its classification under the law. The AG dismisses Uber's claims that it simply matches supply to demand, as it creates the supply itself and lays down rules concerning the essential characteristics of the supply and organises how it works. Drivers carry out transport activities subject to the binding terms and conditions imposed by Uber, covering both the taking up and pursuit of the activity and the conduct of drivers when providing services. Drivers receive a financial reward from Uber if they accumulate a large number of trips, and they are informed of where and when they can rely on there being a high volume of trips and/or preferential fares, meaning that, without exerting any formal constraints over drivers, Uber is able to tailor its supply to fluctuations in demand. The ratings function means that Uber exerts control, albeit indirect, over the quality of the services provided by drivers. Finally, Uber sets the price of the service provided, calculated based on the distance and duration of the trip, and on the intensity of the demand. The AG considers that, although Uber's representatives stated at the hearing that drivers are, in principle, free to ask for a lower fare than that indicated by the application, this does not seem to be a genuinely feasible option for drivers. In conclusion, the AG finds that '**Uber exerts control over all the relevant aspects of an urban transport service**'.²⁷⁵

Importantly, the AG adds that:

²⁷² Ibid., para. 2.

²⁷³ Ibid., para. 41.

²⁷⁴ Ibid., para. 42.

²⁷⁵ Ibid., para. 51.

While this control is not exercised in the context of a traditional employer–employee relationship, one should not be fooled by appearances. Indirect control such as that exercised by Uber, based on financial incentives and decentralised passenger-led ratings, with a scale effect, makes it possible to manage in a way that is just as — if not more — effective than management based on formal orders given by an employer to his employees and direct control over the carrying out of such orders,²⁷⁶

and that:

The above finding does not, however, mean that Uber’s drivers must necessarily be regarded as its employees. The company may very well provide its services through independent traders who act on its behalf as subcontractors. The controversy surrounding the status of drivers with respect to Uber, which has already resulted in court judgments in some Member States, is **wholly unrelated to the legal questions before the Court in this case.**²⁷⁷

The AG concludes that Uber cannot be treated as a mere intermediary between drivers and passengers. Drivers who work on the Uber platform do not pursue an independent activity that exists independently of the platform. On the contrary, the activity exists solely because of the platform, without which it would make no sense. This is why, according to the AG, it is wrong to compare Uber to intermediation platforms such as those used to make hotel bookings or purchase flights.

In accordance with the above considerations, Uber’s activities cannot be regarded as an ‘information society service’ but instead must be classified as a ‘service in the field of transport’.

(ii) Comments on the AG’s Opinion

In a nutshell, if the Court follows the AG, this means that Member States are free to impose their passenger transport regulations on Uber’s activities. The reasoning set out in the Opinion is very similar to the large majority of national court rulings concerning Uber in the EU Member States and the USA, some of which have been discussed in Part 2 of the present study.

While the AG made it clear that the case does not concern the employment status of the drivers, the Opinion nevertheless contains many elements that are relevant in this respect. The level of control exercised by Uber is described in such a way that under many national tests of employment there will be an employment relationship instead of one of self-employment. The AG’s considerations, especially if not explicitly contradicted by the Court in its final ruling, may further encourage national courts to hold that Uber drivers are not self-employed but either ‘workers’ or ‘employed’ depending on the national legal system, with all the national employment law consequences that this entails. Similarly, it points in the direction that Uber drivers would be considered ‘workers’ for the purposes of EU labour law, with all the connected benefits for drivers in terms of social and employment protection that this entails.

The AG has a different approach from the European Commission, which in its agenda for the collaborative economy considered that ‘ownership of key assets’ is a key determinant when answering the question of whether or not a collaborative platform also provides the underlying service, as discussed further above. The AG considered that ‘[t]he fact that Uber is not the owner is, in my view, irrelevant, since a trader can very well provide transport services using vehicles belonging to third persons’.²⁷⁸

b) Case C-320/16, Criminal proceedings against Uber France SAS

There is a second pending case calling on the Court to consider legal issues regarding the way in which the local transport platform Uber works. The case, raised by the *Tribunal de Grande Instance de Lille* (Regional Court, Lille, France), asks specifically whether or not the *loi Thévenoud* of 1 October 2014,

²⁷⁶ Ibid., para. 52.

²⁷⁷ Ibid., para. 54.

²⁷⁸ Ibid., para. 55.

amending the regulation of passenger transport services in the Transport Code and discussed in Part 2 of this study, is compatible with EU law provisions concerning technical notification.

AG Szpunar again provided the Opinion in this case. In the Opinion, he referred to his Opinion in *Taxi Elite*, and stated that he maintained that position in the context of the present case, and added two points. Firstly, Uber's situation had to be distinguished from that in the dispute which gave rise to the judgment in *Vanderborght*, which the CJEU handed down a few days before the Opinion in *Elite Taxi*. In that judgment, the Court held that advertising for a dental practice posted on an Internet website created by the practitioner in question fell within the definition of an 'information society service'. That service in question consisted in the communication of information, directed at the general public in the hope of attracting new patients. That sort of communication may or may not result in the subsequent provision of dental services (and, probably, in most cases it will not). Although the advertising was without question closely connected with the dental practice as such, it had, by contrast, no real connection with the actual dental care provided to individual patients. The AG considered that the opposite is true of the connection service provided by the Uber platform, which is directed at people who are already Uber customers and which is intended to result in the actual provision of a transport service. Moreover, the connection is a necessary precursor to the transport service provided in the context of the Uber system. Given those differences, the AG did not think that the guidance offered by the judgment in *Vanderborght* can be directly applied to the question of the classification of services such as UberPop as information society services.

Secondly, the AG added that Uber's situation is clearly different from the relationship between a franchisor and its franchisees under a franchise agreement. Admittedly, the franchisor may also exercise strict control over the activities of its franchisees, to the extent that customers will perceive the franchisees as branches of the franchisor rather than as independent undertakings. However, the role of the franchisor is limited to providing services (such as trade mark licences, know-how, the supply of equipment and the provision of advice) to the franchisees. It will have no relationship with the users of the final services, which will be provided solely by the franchisees. The services of the franchisor are therefore independent of the final services, even if, in such a context, the franchisor determines the conditions under which those services are provided. Uber, on the other hand, is directly involved in the provision of the final service to users, and therefore must, by contrast with a franchisor, be regarded as the provider of that service, according to the AG.

As regards the interpretation of the relevant EU rules on technical notification, laid down in Directive 98/34, the question was whether or not these must be interpreted as meaning that a provision of national law such Article L. 3124-13 of the French Transport Code, which prohibits and penalises the organisation of a system for putting customers in touch with persons engaging in the carriage of passengers in contravention of the rules which apply to such transport activities, is subject to the notification obligation under Article 8 of the Directive, and therefore is invalid when not notified.

The AG accepted that the French prohibition is principally directed at systems for connecting two parties by electronic means and thus specifically aimed at information society services. However, the purpose of the provision is not to prohibit or to regulate in some other way the activity of putting customers in touch with providers of transport services in general. The purpose of the provision is solely to prohibit and to punish the activity of intermediary in the illegal exercise of transport activities. The activity of intermediary in legal transport services remains entirely outside the scope of the provision. The AG therefore shares the view expressed by the Polish Government in its written observations, that the provision affects information society services only in an incidental manner. Indeed, the purpose of the provision is not to regulate such services specifically, but to ensure the effectiveness of the rules relating to transport services, which are not covered by Directive 98/34. Furthermore, the AG held that the provisions of Article L. 3124-13 of the Transport Code, in so far as they prohibit the organisation of systems for putting customers in touch with persons providing transport services in breach of the applicable rules, must be assessed in context. If an activity is illegal, any complicity in the exercise of that activity may also be regarded as illegal under national law. That is particularly so when the complicity involves the organisation of a system and when its purpose is to make a profit. Therefore, in reality, the regulatory contribution made by Article L. 3124-13 of the Transport Code lies principally in the establishment of criminal sanctions for participation in an activity which is already illegal under national legislation. The AG added that, if every national provision that prohibited or punished intermediation in

illegal activities had to be regarded as a technical regulation merely because the intermediation most likely takes place by electronic means, then a great number of internal rules in the Member States, written and unwritten, would have to be notified as technical regulations. That would lead to an unwarranted extension of the obligation to notify, without that really contributing to the attainment of the objectives of the notification procedure, the purpose of which is to prevent the adoption by the Member States of measures that are incompatible with the internal market and to enable economic operators to make more of the advantages inherent in the internal market.

The AG thus concludes that Article L. 3124-13 of the French Transport Code affects only incidentally the service of connecting customers with persons providing transport services, inasmuch as the connection relates to the unlawful provision of such services. Article L. 3124-13 must therefore be excluded from the scope of Directive 98/34, as amended, in accordance with the second indent of the fifth subparagraph of Article 1(5) thereof. That exclusion arises not from the fact that the provision at issue is a provision of criminal law, but from the fact that the provision prohibits and penalises an activity which is in the nature of an information society service not in a general fashion, but only in so far as the activity amounts to an act of complicity in the exercise of another activity, one that is illegal and, moreover, one that falls outside the scope of Directive 98/34, as amended.

c) Case C-371/17, Uber

Finally, it should be noted that a third case is pending at the CJEU concerning Uber. The application was lodged on 19 June 2017 and comes from the *Bundesgerichtshof*, (Federal Supreme Court) Germany. No further information is available to date.

Conclusion: The CJEU's approach to online platform work

In an important case pending at the CJEU (Case C-434/15, *Asociación Profesional Elite Taxi*), the nature of the activities of the online platform company Uber are being examined. The central question is whether Uber's activities can be classified as 'information society services' under EU law, in which case market access should be granted and restrictions on its operation should have been notified and can only be accepted in limited circumstances, or whether they instead constitute 'transport services', which fall outside the scope of the EU rules in question and can therefore in principle be freely regulated by the Member States. Advocate General Szpunar has advised the CJEU to hold that Uber is engaged in transport services. While the Opinion (and the case) is not directly relevant for the question of employment status, it contains many interesting observations in this regard, particularly concerning the measure of control exercised by the online platform. The highly anticipated ruling will certainly shed some more light on these issues. A further pending case (Case C-320/16, *Criminal proceedings against Uber France SAS*) raises similar issues.

4 Concluding remarks

▪ The changing world of work and OSH challenges

Only hindsight will be able to tell us with certainty whether we currently find ourselves on the cusp of an entirely revolutionised society or instead we are experiencing developments that are part of an incremental evolution of technological progress that will be embedded and absorbed in existing societal structures without any paradigmatic shifts. We must not underestimate the extent to which this eventual outcome can be influenced, as it depends on political choices to be made in terms of how to respond to the various challenges posed by the progressing digitalisation of our societies and economies.

This study has focused specifically on those challenges posed by the phenomenon of online platforms where they have an impact on the provision of labour, and the implications for labour law and particularly OSH in that regard. The type of work provided via online platforms tends to be highly 'atypical' compared with standard permanent full-time employment, in that it is often fixed-term, remote, semi-independent, intermediated, casual and on-call. All the well-known OSH risks related to non-standard employment therefore apply to online platform work: higher accident rates and stress incidence, and lower job security, with all its physical and psycho-social implications. Furthermore, in online platform work, these atypical features tend to be cumulative, so the risks can be expected to be too.

▪ The importance of the employment relationship for OSH

The study has shown that probably the most crucial aspect of online platform work and its implications for labour law and OSH is the question of the employment relationship. Many jurisdictions make the application of regulatory standards and social protection dependent on the existence of a certain kind of employment relationship, requiring a varied range of features which are often devised to capture 'dependency', to the exclusion of independent self-employment. The many (often combined) atypical features of online platform work make it difficult to easily categorise it as either employment or self-employment, and a case-by-case assessment of the reality of the relationship is often necessary. It has often come down to court rulings to determine the employment status and connected rights and obligations of specific instances of online platform work. This implies a great deal of uncertainty for all concerned parties — workers, employers and customers, as well as policy-makers and regulators — about the applicable regulations, safeguards, responsibilities and liabilities. This uncertainty in itself poses an important OSH challenge.

▪ The variety in policy responses to the OSH challenges of the digital platform economy

The study has also shown that there is a great variety in policy responses to these issues. Whereas some jurisdictions have already adopted specific rules concerning online platform work, many others are only just starting to consider how to fit these developments into the existing regulatory frameworks and if new measures may be needed. Where courts have already been required to rule on online platform work in specific instances, the outcome has varied, although many judges have been inclined to adopt a wide interpretation of the concept of 'employment' or 'worker' and have generally rejected the claims of online platform companies that they are mere intermediaries between independent contractors and clients.

Considering the (potentially) cross-border nature of online platform work and the similarity in terms of regulatory challenges posed, it would seem opportune to explore the possibilities of a joint policy response at European level. Indeed, the EU institutions have become involved in the discussion on online platform work, labour status, and occupational and social protection. The issue is currently being explored particularly in the context of the European Pillar of Social Rights, with possibly a legislative proposal being developed that envisages the clarification and application of core EU labour rights to atypical employment including online platform work. An important preliminary reference pending at the Court of Justice can be expected to shed some further light on the issue of the employment relationship in the case of online platform work.

- **The need for further research**

In order to further explore the many complex issues connected to online platform work, labour status and OSH, and in order to keep abreast of the fast-changing situation, further research is merited. First and foremost, the specific physical and psycho-social risks of the various kinds of online platform work need to be examined in more detail. While it is probably possible to extrapolate findings connected to other types of atypical employment, the specific situation of online platform work, which combines a range of atypical features (intermediated work, on-call, mini-tasks, homework), warrants specific research. Furthermore, the notions of employment, dependency and independency, and their connection to the applicability of regulatory and social standards, need to be reconsidered in the context of online platform work. Finally, in practical terms, it is necessary to explore how to apply regulatory standards to online platform work, which is often conducted in non-professional settings and is often of an informal nature.

The European Agency for Safety and Health at Work (EU-OSHA) contributes to making Europe a safer, healthier and more productive place to work. The Agency researches, develops, and distributes reliable, balanced, and impartial safety and health information and organises pan-European awareness raising campaigns. Set up by the European Union in 1994 and based in Bilbao, Spain, the Agency brings together representatives from the European Commission, Member State governments, employers' and workers' organisations, as well as leading experts in each of the EU Member States and beyond.

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