DIGITAL WORK PLATFORMS AT THE INTERFACE OF LABOUR LAW

Regulating Market Organisers

EVA KOCHER

DIGITAL WORK PLATFORMS AT THE INTERFACE OF LABOUR LAW

This book shows how to design labour rights to effectively protect digital platform workers, organise accountability on digital work platforms, and guarantee workers' collective representation and action. It acknowledges that digital work platforms entail enormous risks for workers, and at the same time it reveals the extent to which labour law is in need of reconstruction.

The book focuses on the conceptual links – often overlooked in the past – between labour law's categories and its regulatory approaches. By explaining and analysing the wealth of approaches that deconstruct and reconceptualise labour law, the book uncovers the organisational ideas that permeate labour law's categories as well as its policy approaches in a variety of jurisdictions. These ideas reveal a lack of fit between labour law's traditional concepts and digital platform work: digital work platforms rarely behave like hierarchical organisations; instead, they more often function as market organisers.

The book provides a fresh perspective for international academic and policy debates on the regulation of digital work platforms, as well as on the purposes and foundations of labour law. It offers a way out of the impasse the debate around labour law classification has reached, by showing what labour law could learn from digital law approaches to platforms – and vice versa.

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• HART •
OXFORD • LONDON • NEW YORK • NEW DELHI • SYDNEY

HART PUBLISHING
Bloomsbury Publishing Plc
Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, UK
1385 Broadway, New York, NY 10018, USA
29 Earlsfort Terrace, Dublin 2, Ireland

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First published in Great Britain 2022

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A catalogue record for this book is available from the British Library.

Library of Congress Cataloging-in-Publication data

Names: Kocher, Eva, author.

Title: Digital work platforms at the interface of labour law : regulating market organisers / Eva Kocher.

Description: Oxford ; New York : Hart, 2022. | Includes bibliographical references and index.

Identifiers: LCCN 2021053497 (print) | LCCN 2021053498 (ebook) | ISBN 9781509949854 (hardback) | ISBN 9781509949892 (paperback) | ISBN 9781509949878 (pdf) | ISBN 9781509949861 (Epub)

Subjects: LCSH: Labor laws and legislation. | Electronic commerce—Employees—Legal status, laws, etc. | Telecommuting—Law and legislation.

Classification: LCC K1705 .K63 2022 (print) | LCC K1705 (ebook) | DDC 344.01—dc23/eng/20211223

LC record available at https://lccn.loc.gov/2021053497

LC ebook record available at https://lccn.loc.gov/2021053498

ISBN: HB: 978-1-50994-985-4
ePDF: 978-1-50994-987-8
ePub: 978-1-50994-986-1

Typeset by Compuscript Ltd, Shannon

To find out more about our authors and books visit www.hartpublishing.co.uk. Here you will find extracts, author information, details of forthcoming events and the option to sign up for our newsletters.

ACKNOWLEDGEMENTS AND THANKS

This book would not have been possible without the year-long cooperation with the Center for Interdisciplinary Labour Law Studies (C*LLaS), the centre established at European University Viadrina to bring together law and social, socio-legal, cultural and business studies. I have learned a lot from the researchers I have cooperated closely with in the context of interdisciplinary research projects on digital work platforms, namely Isabell Hensel, Joanna Bronowicka, Mirela Ivanova, Jochen Koch, Daniel Schönefeld, Anna Schwarz, Séan King, Ben Wagner, Anne Degner, and Imke Rickert. Elke Ebert has always been a valuable and most reliable assistant in all respects.

Writing a book in a foreign language (in my case, English) takes some gathering up of courage. I am very thankful to Judy Fudge and the School of Labour Studies at McMaster University in Hamilton, Canada, for hosting me in the summer of 2019. This research stay gave me the opportunity to immerse myself, for some time at least, in the English language and start writing chapters. Following this stint, it is then not only deepl.com, but foremost Allison West whom I have to thank for helping me out on issues of language. Allison did an incredible job of editing the book in summer 2021 by not only translating what I had thought to be English into the text you have before you, but also challenging me to get to the heart of my ideas more precisely.

Lastly, many thanks go to Roberta Bassi and Rosemarie Mearns from Hart Publishing for supporting the book, keeping me on track and organising the process excellently. The book is up to date with the literature and case law of August 2021.

In this very mobile field, between that date and the time of publication, several new decisions and laws may have surfaced which this book does not cover. Nevertheless, the book will not become outdated very quickly. It not only provides a systematisation of practices, arguments, concepts and policy proposals in the realm of digital work platform regulation; it also, and most importantly, concerns conceptual questions of labour law that are likely to accompany us for a long time to come.

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implementing the principle of equal treatment between persons
irrespective of racial or ethnic origin [2000] OJ L 180/22....................... 49, 184
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1

Introduction: Just Another Technical Revolution?

In July and August 2019, the YouTubers Union[1] made headlines in Germany when its founder Jörg Sprave announced that it was joining forces with the German metalworkers' trade union IG Metall, Europe's largest trade union with 2.3 million members. Together they launched a joint campaign called 'FairTube'[2] advocating for more transparency and fairness on the digital video-sharing platform YouTube.

But Germany is not the only place where work on digital platforms has created controversies. Transport platforms Uber and Lyft, as well as food delivery platforms Deliveroo and Glovo are publicly visible business models that make use of cheap labour by classifying workers as 'independent contractors'. These practices have been questioned before labour law courts all over the world – not always successfully, but increasingly so.[3] In February 2021, for instance, the UK Supreme Court found that Uber drivers were 'in a position of subordination and dependency in relation to Uber', and ordered Uber to treat them as 'workers' requiring the application of, among other things, minimum wage and working time regulations.[4]

This is evidence of a phenomenon that has been part of the debate all along: Businesses that started off explicitly priding themselves on being 'disruptive'[5] challenge the law. While the policy debate on the regulation of digital platforms of all kinds continues to pick up steam,[6] legal issues related to digital work platforms are also getting more attention. The UK Supreme Court's judgment in the *Uber* case is only one (and not the last) in a long line of decisions by US, French, Italian, Spanish and German courts that have established work on certain digital work platforms as a form of employment or similar.[7] Legislators have also started to become

[1] youtubersunion.org.

[2] www.fairtube.info/en/; for the campaign see also V Niebler and A Kern, 'Organising Youtube: A Novel Case of Platform Worker Organising' (Berlin, 2020).

[3] Overview and details on litigation *cf* ch 3, 3.5.2.

[4] *Uber BV and others v Aslam and others* [2021] UKSC 5; however, after completion of this book, in *Independent Workers Union of Great Britain v CAC* [2021] EWCA Civ 952, the Court of Appeal held Deliveroo riders to be self-employed; more on these discussions see below ch 3, 3.5.2.2.

[5] J Prassl, 'Disruption = Silicon Valley shorthand for breaking the law' in *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (Oxford University Press, 2018) 95.

[6] Overview ch 2, at n 8 ff; details ch 7, 7.1.1.

[7] *cf* ch 3, 3.5.2.

proactive. In November 2020, the German Federal Labour Ministry presented 'key points' with concrete proposals for 'fair work in the platform economy'.[8]

What is happening here? Is labour law finally acknowledging what should have been obvious all along: that digital platform workers are employees? Or is a fundamental paradigm shift in labour law's basic concepts under way? These are the questions at the heart of this book. Before delving into these questions, however, this chapter will first outline the basic phenomena with which this book engages and the approach it takes, departing from the example of the FairTube campaign.

1.1. Labour Law for YouTubers?

The way the FairTube campaign has engaged in questions of regulation is indicative of the difficulties that arise when attempting to apply traditional ways of thinking about labour law to digital platform work. Though the campaign makes claims of 'false employment' and appeals to labour rights in pressing YouTube to address workers' grievances, it ends up demanding not primarily labour and employment rights, but fairness and transparency.

This aspect of the FairTube campaign represents a discursive phenomenon permeating current debates on digital platform work. Even authors who strongly advocate classifying digital platform work as employment rarely support an application of employment law in the strict sense. The same authors who find 'nothing new under the sun'[9] in these work relationships end up making proposals for specific digital platform regulation, instead of simply pointing to the application of existing employment law.[10] In other words, relevant policy debates often treat the question of who counts as an employee (classification) and the matter of regulating specific rights and obligations for digital platform work as two separate issues. This is where the debate seems to run into a dead end.[11]

Taking this division as its starting point, this book explores the conceptual questions involved in searching for the link between employee classification and

[8] BMAS (*Bundesministerium für Arbeit und Sozialordnung* = German Ministry for Labour and Social Affairs), Eckpunkte, 'Faire Arbeit in der Plattformökonomie' [2021] www.denkfabrik-bmas.de/fileadmin/Downloads/eckpunkte-faire-plattformarbeit_1_.pdf.

[9] Prassl, 'Humans as a Service' (n 5) 73; on comparisons with nineteenth century capitalism, see ch 5, 5.4, at n 113.

[10] See eg J Prassl and M Risak, 'Uber, Taskrabbit & Co: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork' (2016) 37(3) *Comparative Labor Law & Policy Journal* 619; C Benner (ed), *Crowdwork – Zurück in die Zukunft?: Perspektiven digitaler Arbeit* (Bund-Verlag, 2015) ('Back to the Future'); J Prassl and M Risak, 'The Legal Protection of Crowdworkers: Four Avenues for Workers' Rights in the Virtual Realm' in P Meil and V Kirov (eds), *Policy Implications of Virtual Work* (Springer International Publishing, 2017); T Goldman and D Weil, 'Who's Responsible Here?: Establishing Legal Responsibility in the Fissured Workplace' (2020) Working Paper 114; *cf* S Hill, *Raw Deal: How the 'Uber Economy' and Runaway Capitalism Are Screwing American Workers* (St. Martin's Press, 2017) 11 ('medieval', 'back to the future'); E Dockès (ed), *Proposition de code du travail* (Dalloz, 2017) 3 ff.

[11] For a close analysis, see ch 7.

the rights and obligations that ensue from such classification. It shows how the very compatibility problems encountered in classification exercises contain the clue to consistent regulation. If we understand digital work platforms as market organisers, we can address them in their function as such, while at the same time accounting for the fact that they exert power comparable to that of an employer.

1.2. What is this Book About?

1.2.1. The Broader Picture: Digitalisation of Work

Curiously enough, IG Metall has for some time been an important actor in the gig-economy debate in Germany.[12] In 2015, it launched the platform 'Fair Crowd Work',[13] which asks crowdworkers to provide feedback on the platforms they work for, and rates the practices of crowdworking platforms as good or bad. IG Metall is also one of the actors responsible for initiating the December 2016 Frankfurt Declaration on Platform-Based Work, signed by a network of European and North American unions, labour confederations, and academics,[14] which was one of the first regulatory initiatives in the field.[15] But why is an industrial union like IG Metall engaging with digital platform work? Sure, crowdwork, if used by employers in the metal industries, could constitute a new form of 'outsourcing'[16] and therefore pose a danger to employment in the industry. But the main reason why an industrial trade union is advertising its services to YouTubers and crowdworkers is the worry that work on digital platforms may undermine the very social policy and industrial relations model the trade union and its members represent.

Digitalisation does bring about disruption in work. It offers new possibilities for cutting down work activities into ever-smaller packages with reduced costs for transport and communication, and minimal physical infrastructure requirements.[17] Yes, digitalisation is just a new phase of automation of work activities, but for labour lawyers, this does not mean that our past experiences in handling work-related automation will ultimately define how we can deal with this

[12] For an overview of the activities, see V Barth and R Fuß, 'Crowdwork und die Aktivitäten der IG Metall' (2021) 75(2) *Zeitschrift für Arbeitswissenschaft* 182.

[13] faircrowd.work/platform-reviews/, a joint initiative of several European trade unions; it was preceded by FairCrowdWork.org, an IG Metall-only platform.

[14] Frankfurt Declaration on Platform-Based Work (December 2016) faircrowd.work/unions-for-crowdworkers/frankfurt-declaration/.

[15] For further developments, see ch 7, 7.1.1.

[16] Famously: J Howe, 'The Rise of Crowdsourcing' (2006) 14 *Wired Magazine*; A Felstiner, 'Working The Crowd: Employment And Labor Law In The Crowdsourcing Industry' (2011) 32 *Berkeley Journal of Employment and Labor Law* 143, 122 ('crowdsourcing's very appeal'); *cf* below n 30.

[17] A McAfee and E Brynjolfsson, *Machine, Platform, Crowd: Harnessing our Digital Future* (Norton, 2018) 9.

new phase.[18] Yes, digitalisation does present dangers to employment, health and safety, similar to former developments in automation. Focusing on these similarities, however, misses a key point: digitalisation offers new attitudes and new ways of appropriating bodies and minds. It allows work to be done on packaged activity parcels anywhere and at any time, or more precisely, independently from time and place considerations. And it covers almost all forms of work, from the performance of basic services to complex intellectual activities requiring a high level of qualification.[19]

The permeation of work processes by digital technologies takes place in the broader context of the quantification of our societies, selves and workplaces.[20] Informatisation not only increases social productive forces through the use of information systems with ever-growing computing capacities, but the resulting abundance of data also creates new sources of value for capitalism.[21]

The explosion in the use of mobile devices has rendered work more dissolute and flexible, decentralised and mobile; boundaries between work and home have blurred, as have those between states, companies and organisations. Workplaces and work identities have become more and more 'fissured'[22] and 'boundaryless'.[23] The resulting transformation of paradigms and power asymmetries poses significant challenges to employment regulation and the entire institutional system of labour protection as we know it.

1.2.2. Digital Work Platforms: A Broad Field

Digitalisation is most fittingly represented and brought to life by digital platforms in the gig economy.[24] In particular, digital work platforms[25] have transnationalised labour markets in whole new ways. While crowdworking platforms like Amazon Mechanical Turk (AMT) cut down complex work tasks into minute activities (clicks) and distribute them to people across the world, many other platforms have

[18] *cf* C Estlund, 'What Should We Do After Work?: Automation and Employment Law' (2018) 128 *Yale Law Journal* 254–326, focussing on the loss of jobs.

[19] Accounts and analyses are numerous, amongst them, eg, SP Vallas and A Kovalainen (eds), *Work and Labor in the Digital Age* (Emerald Publishing Limited, 2019).

[20] S Mau, *Das metrische Wir: Über die Quantifizierung des Sozialen* (Suhrkamp, 2017); A Supiot, *Governance by Numbers: The Making of a Legal Model of Allegiance* (Hart Publishing, 2017).

[21] S Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (Paperback edition, Profile Books, 2019). These issues are analysed more systematically in ch 5, 5.3.4 and passim.

[22] D Weil, *The Fissured Workplace: Why Work Became So Bad For So Many and What Can Be Done to Improve It* (Harvard University Press, 2014).

[23] KV Stone, *From Widgets to Digits: Employment Regulation for the Changing Workplace* (Cambridge University Press, 2004); *cf* U Huws, *Labor in the Global Digital Economy: The Cybertariat Comes of Age* (Monthly Review Press, 2014) 27–83.

[24] *cf* JE Cohen, *Between Truth and Power: The Legal Constructions of Informational Capitalism* (Oxford University Press, 2019).

[25] On the term below at n 71.

been created that allow people to execute work activities where they are and at the time they like.

This development does in fact create new avenues for earnings. A single parent, for example, may have great difficulty in finding employment opportunities in non-urban regions. But they may be able to earn some income on crowdworking platforms like 'Clickworker'. Food-delivery platform 'Lieferando' works in Berlin with young Italian or Bulgarian bike riders, while 'Helpling' and similar platforms for housekeeping take Polish and Spanish cleaners and carers into German homes.[26] Platforms 'Jovoto' or '99designs' tender design jobs to their global crowd of designers who then compete as well as cooperate in creating the one design that will get the award, ie the pay. In other words, these platforms take advantage of split labour markets and a precarious, gendered and racialised workforce without access to stable jobs and career opportunities.[27] In doing so, they not only reproduce the imbalances of international trade,[28] but also the vulnerabilities of contingent work.[29]

For businesses, on the other hand, these platforms implement the perspective of Jeff Howe, who coined the term crowdsourcing, already articulated in 2006: 'Remember outsourcing? Sending jobs to India and China is so 2003. The new pool of cheap labor: everyday people using their spare cycles to create content, solve problems, even do corporate R & D.'[30] Digital work platforms offer on-demand work[31] and have been described as 'new players in the temporary staffing industry',[32] on the one hand, as well as providers of 'free, perfect, and instant'[33] products and services, on the other.

[26] For relevant data, see ILO, 'World Employment and Social Outlook: The Role of Digital Labour Platforms in Transforming the World of Work' (Geneva, 2021) 136–42; RA Achleitner, 'Plattformbasierte Arbeit als Herausforderung der EU: Handlungsperspektiven und aktuelle Initiativen der Union' [2020] *Zeitschrift für Europäisches Sozial- und Arbeitsrecht* 363, 365.

[27] P Zanoni, 'Labor Market Inclusion Through Predatory Capitalism?: The "Sharing Economy", Diversity, and the Crisis of Social Reproduction in the Belgian Coordinated Market Economy' in SP Vallas and A Kovalainen (eds), *Work and Labor in the Digital Age* (Emerald Publishing Limited, 2019); M Krzywdzinski and C Gerber, 'Varieties of Platform Work: Platforms and Social Inequality in Germany and the United States' (2020) *Weizenbaum Series* 7; N van Doorn, 'Platform Labor: On the Gendered and Racialized Exploitation of Low-income Service Work in the "On-demand" Economy' (2017) 20(6) *Information, Communication & Society* 898; O Lobel, 'The Law of the Platform' (2016) 101(1) *Minnesota Law Review* 87–166, 131.

[28] On the advantages of digital platform work for workers in developing countries, see R Heeks, 'Decent work and the digital gig economy: A developing country perspective on employment impacts and standards in online outsourcing, crowdwork, etc' Development Informatics 71 5–15.

[29] O Nachtwey and P Staab, 'Die Avantgarde des digitalen Kapitalismus' (2015) 24 *Mittelweg 36* 59, 81 (*digitale Kontingenzarbeitskraft*, ie 'digital contingency worker').

[30] Howe, 'Rise of Crowdsourcing' (n 16); J Woodcock and M Graham, *The Gig Economy: A Critical Introduction* (Polity, 2020) 58.

[31] Woodcock and Graham, 'Gig Economy' (n 30) 5–6; Huws, 'Labor in the Global Digital Economy' (n 23); Prassl, 'Humans as a Service' (n 5) 11; C Schubert and M-T Hütt, 'Economy-on-demand and the Fairness of Algorithms' [2019] *European Labour Law Journal* 3.

[32] van Doorn, 'Platform Labor' (n 27).

[33] McAfee and Brynjolfsson, 'Machine, Platform, Crowd' (n 17) 129 ff; 275; also GG Parker, MW van Alstyne and SP Choudary, *Platform Revolution: How Networked Markets are Transforming the Economy – and How to Make Them Work for You* (WW Norton, 2017).

There have been various attempts at developing typologies for digital work platforms, based on every conceivable variable: the type and scale of the tasks, the level of skills required for the tasks, how workers are matched to tasks (bid-based or contest-based), the type of party that determines the matching or initiates the work, and the type of remuneration.[34] Another important distinction in categorising digital work platforms is the group to whom the platforms cater: businesses or consumers and private households.

For the purpose of describing the work process on such platforms, distinguishing between offline and online work – whether the tasks are delivered on-location or online – has proven to be a helpful first step. For example, some platforms facilitate offline work like transport, food delivery or household services, while others facilitate online crowdwork.[35] Online crowdwork also comes in very different forms, and the variables mentioned are mostly relevant for differentiating between these forms. It can involve basic microwork/clickwork, such as web research, survey taking, text creation, or search engine optimisation. However, it can also refer to complex collaborative or interactive work, such as in IT or design sectors, where outcomes are developed by workers (the crowd) in cooperation with the platform clients.[36] YouTube, as a digital work platform, is most likely to fall into the latter category.

These are considerable differences that must be kept in mind when talking about legal aspects of digital work platforms. Indeed, litigation concerning transport or delivery platforms may have little or no relevance for crowdwork platforms in design or translation.

[34] ILO, 'World Employment and Social Outlook' (n 26) 78–89; WP de Groen and others, 'Employment and Working Conditions of Selected Types of Platform Work' (Luxembourg, 2018) 5–6; MC Urzì Brancati, A Pesole and E Fernández-Macías, *New Evidence on Platform Workers in Europe: Results from the Second COLLEEM Survey* (JRC science for policy report, Publications Office of the European Union, 2020); Eurofound, Typology, 6 September 2018, www.eurofound.europa.eu/data/platform-economy/typology; Achleitner, 'Plattformbasierte Arbeit' (n 26); JM Leimeister and others, 'Systematisierung und Analyse von Crowdsourcing-Anbietern und Crowd-Work-Projekten' (2016). Study 324, 38 ff; D Schönefeld and others, 'Jobs für die Crowds: Werkstattbericht zu einem neuen Forschungsfeld' (Frankfurt (Oder), 2017). Arbeit Grenze Fluss, 'Work-in-progress interdisziplinärer Arbeitsforschung'; SD Harris and AB Krueger, 'A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker"' (2015) Discussion Paper 10, 28–33; Appendix Table; V Mrass, C Peters and JM Leimeister, 'Crowdworking-Plattformen und die Digitalisierung der Arbeit' in A Boes and others (eds), *Die Cloud und der digitale Umbruch in Wirtschaft und Arbeit: Strategien, Best Practices und Gestaltungsimpulse* (Haufe Group, 2019); U Huws and others, 'Work in the European Gig Economy – Employment in the Era of Online Platforms: Research Results from the UK, Sweden, Germany, Austria, The Netherlands, Switzerland and Italy' (Brussels, 2017) 35 (crowd work as part of a continuum of casual, on-call, temporary or other forms of contingent work).

[35] Woodcock and Graham, 'Gig Economy' (n 30) 5–6; Huws, 'Labor in the Global Digital Economy' (n 23) 47–59; Groen and others, 'Employment and Working Conditions' (n 34) 5–6; ILO, 'World Employment and Social Outlook' (n 26) 74–75.

[36] Specific and detailed Typologies for activities on crowdworking platforms have been proposed by Schönefeld and others, 'Jobs für die Crowds' (n 34); Mrass, Peters and Leimeister, 'Crowdworking-Plattformen' (n 34).

1.2.3. Contractual Constructions of Digital Platforms

Digital platforms are all built on different business models and only time will tell which of these prove to be sustainable.[37] But that is not this book's primary concern. The main interest of lawyers in digital platforms lies in questions of regulation. If and how to regulate digital platforms – these are the questions legislators all over the world are asking themselves,[38] and the answers to these questions will significantly impact the sustainability of the platforms' business models.[39]

There is a whole range of legal questions involved in regulating digital platforms, from data protection to fair competition.[40] However, contracts are the starting point for any kind of legal consideration. And the way digital platforms construct their contracts also differs from one platform to another.[41] The default solution used almost universally on digital platforms is based on the conclusion of user contracts as basic contractual elements. The user contract is a long-term service contract in the form of a contract of adhesion, allowing the use of the platform by different categories of users (in the case of digital work platforms, mostly business customers or consumers, on the one hand, and workers, on the other).[42]

On the basis of the terms of the user contract, any subsequent single activity will usually become the subject of a single contract. Some digital work platforms construe these as contracts between (business or consumer) clients and workers ('intermediation model').[43] If these contracts are concluded with consumer clients (such as, for example, in the case of Uber), the concept of 'sharing' has sometimes been employed.[44] Other platforms conclude separate service contracts with customers and with workers ('triangular model'),[45] with customers and workers not entering into a direct contractual relationship.

[37] On the diverse economic functions (innovation, transaction), see PC Evans and A Gawer, 'The Rise of the Platform Enterprise: A Global Survey' (New York, 2016) 5–7; on the social functions of platforms as infrastructure C Busch, *Plattformen als Infrastrukturen der Daseinsvorsorge* (FES, 2020); M Finger and J Montero, *The Rise of the New Network Industries: Regulating Digital Platforms* (Routledge, 2021).

[38] For digital work platforms: Groen and others, 'Employment and Working Conditions' (n 34) 41 for an overview over EU Member States; see in detail ch 7.

[39] When Foodora left Australia and Canada, when Deliveroo left Germany, law was always an issue among others (*cf* D Doorey, 'Thoughts on the Foodora Fiasco: Have Labour Laws Been Violated?' [2020] *Canadian Law of Work Forum*).

[40] More in ch 2, 2.3.1 and 2.4.

[41] For the following *cf* E Kocher, 'Die Spinnen im Netz der Verträge: Geschäftsmodelle und Kardinalpflichten von Crowdsourcing-Plattformen' [2018] *Juristenzeitung* 862 with further references.

[42] ILO, 'World Employment and Social Outlook' (n 26) 198–202; for the contractual constructions, see eg S Walzer, *Der arbeitsrechtliche Schutz der Crowdworker: Eine Untersuchung am Beispiel ausgewählter Plattformen* (Nomos, 2019) 73 ff; 78 ff.

[43] This is the term I have proposed (Kocher, 'Spinnen im Netz' (n 41)).

[44] eg D Das Acevedo, 'Regulating Employment Relationships in the Sharing Economy' (2016) 20(1) *Employee Rights and Employment Policy Journal* 1; on the discourse around 'sharing', *cf* ch 2, at n 54.

[45] This is the term I have proposed (Kocher, 'Spinnen im Netz' (n 41)).

All of these contracts present legal challenges in a myriad of ways, starting with the lack of transparency often found in such contracts' 'Terms and Conditions of Service'.[46] Many of these legal questions – transparency, data protection, property rights, consumer protection – are equally relevant for digital platforms that engage in, for example, sales, information or search functions.[47] And most of these questions lead us back to analysing the specific function of platforms: Are they really nothing more than 'intermediaries' or technological tools? Or are they rather market players that themselves offer the services whose quality they vouch for?[48]

1.2.4. Labour Law in the Spotlight

There is one issue that is specific to digital work platforms that sets them apart from other digital platforms: They do more than just offer (or intermediate) services to businesses and/or consumers. In the case of digital work platforms, people on one side of the platforms' user contracts are not consumers, but rather 'suppliers' or 'service providers'[49] (in the technical jargon of those platforms that claim to only intermediate contracts). These 'users' are individual people performing the services and will be called 'workers' throughout this book.[50] As workers, they may arguably be in need of social protection, which is where labour law comes into the picture. Digital work platforms have caused controversy among labour lawyers due to a feature that many if not most of these digital work platforms have in common: the classification of platform workers as independent contractors instead of employees, which situates them beyond the scope of labour law.[51]

It is not only labour law that has to grapple with the question of worker classification. In most legal jurisdictions, the classification of work between employment and independent contracting is relevant not only for labour law, but for other areas of law as well. This is certainly true for social security law, for example, where

[46] GN Diega and L Jacovella, 'Ubertrust: How Uber Represents Itself to Its Customers Through its Legal and Non-Legal Documents' (2016) 5(4) *Journal of Civil & Legal Sciences* 199 on the complicated legal representations of Uber's corporate structures in its Terms of Service; similarly: J Tomassetti, 'Algorithmic Management, Employment, and the Self in Gig Work' in D Das Acevedo (ed), *Beyond the Algorithm: Qualitative Insights for Gig Work Regulation* (Cambridge University Press, 2021); on Clickworker and Appjobs (two German Crowdworking platforms): Kocher, 'Spinnen im Netz' (n 41). Overview over contractual issues of digital labour platforms: J Moyer-Lee and N Kontouris, 'The "Gig Economy": Litigating the Cause of Labour' in International Lawyers Assisting Workers Network (ILAW) (ed), *Taken for a Ride: Litigating the Digital Platform Model* (Issue Brief, 2021) 6–36.

[47] More on the contract law issues: C Busch, 'European Model Rules for Online Intermediary Platforms' in U Blaurock, M Schmidt-Kessel and K Erler (eds), *Plattformen – Geschäftsmodelle und Verträge* (Nomos, 2018); C Busch and others, 'The Rise of the Platform Economy: A New Challenge for EU Consumer Law' [2016] *Journal for European Consumer and Market Law* 3; see ch 2, at n 42.

[48] More on the debate in ch 2, 2.4.

[49] Das Acevedo, 'Regulating Employment Relationships' (n 44).

[50] On the terminology, see also below text at nn 77–78.

[51] MA Cherry and A Aloisi, 'Dependent Contractors in the Gig Economy: A Comparative Approach' (2017) 66(3) *American University Law Review* 635, 684 give examples of platforms that have shifted towards treating workers as employees.

different entitlements and obligations regarding social rights, insurance coverage, or companies' contributions to social security systems often hinge on worker classification.[52] In many jurisdictions, tax law also relies on worker classification.[53] Determining the 'law of the labour markets'[54] is therefore a cross-cutting regulatory exercise.

Nevertheless, this book focuses on labour law for several reasons. First, in most jurisdictions, classification of employment relationships in other legal domains refers back to labour law classification, as labour law is the area where the general ideas and concepts of employment are discussed most explicitly. Secondly, while social security and tax law often differ significantly between legal jurisdictions, labour law's basic ideas are, for the most part, functionally equivalent across jurisdictions, transcending differences between national legal systems.[55] This is due to the fact that labour law is defined by its concern with the regulation of the legal relationship between worker and employer, ie the company making use of the work, which is a widespread phenomenon across the global economy.

Thirdly, this book focuses on labour law because its foundations have been profoundly thrown into question by digital work platforms. For years now, labour law scholars and courts have been grappling with the questions presented by digital work platforms. They not only mirror and exacerbate general changes and shifts in labour markets, particularly the widespread proliferation of small and unsustainable self-employment, but have also increased opportunities for companies to strategically avoid employment relationships and, accordingly, evade the rights and obligations attached to such relationships. Companies' strategies and games in this regard have been analysed as forms of 'regulatory arbitrage'[56] or 'creative compliance'.[57]

[52] *cf* I Hensel, 'Soziale Sicherheit für Crowdworker_innen?' (2017) 66 *Sozialer Fortschritt* 897, 902; Harris and Krueger (n 34) 18–20; R Smith and S Leberstein, 'Rights on Demand: Ensuring Workplace Standards and Worker Security in the On-demand Economy' (New York, 2015) 4.

[53] Harris and Krueger, 'A Proposal for Modernizing Labor Laws' (n 34); WB Liebman and A Lyubarsky, 'Crowdworkers, the Law and the Future of Work: The U.S.' in B Waas and others (eds), *Crowdwork: A Comparative Law Perspective* (Bund-Verlag, 2017) 106. On tort law, *cf* O Kahn-Freund, 'Servants and Independent Contractors' (1951) 14 *Modern Law Review* 504, 505; for German law, *cf* for example LAG Frankfurt/Main 2 April 2013, case 13 Sa 857/12, reviewed by Clemens Sudhof, Betriebs-Berater 2013, 1726-28. MR Freedland and N Kountouris, *The Legal Construction of Personal Work Relations* (Oxford University Press, 2011) 296 also give an overview over the areas concerned.

[54] SF Deakin and F Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (Oxford University Press, 2005); *cf* SF Deakin and GS Morris, *Labour Law*, 6th edn (Hart Publishing, 2012) 1–5; R Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (Oxford University Press, 2017) 104; see ch 8, 8.2.

[55] The method employed for this book is explained below, see ch 3, 3.2.

[56] V Fleischer, 'Regulatory Arbitrage' (2010) 89 *Texas Law Review* 227.

[57] D McBarnet and C Whelan, 'The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control' [1991] *Modern Law Review* 848; AHLP Donovan, *Reconceptualising Corporate Compliance: Responsibility, Freedom and the Law* (Hart Publishing, 2021) 8–10, contrasting technical compliance and 'spirited' compliance; Lobel, Lobel, 'Law of the Platform' (n 27) 156; for examples of legal strategies of 'creative compliance' and the methods makers of tax laws use to keep these at bay, see also P Cornut St-Pierre, 'Investigating Legal Consciousness through the Technical Work of Elite Lawyers: A Case Study on Tax Avoidance' (2019) 53(2) *Law&Society Review* 323.

This is why trade unions like IG Metall have been investing so intensely in organising digital platform workers and putting forward regulation proposals for platform work. The very future of labour law seems to be in danger. It is no wonder that recent articles on labour law in the gig-economy have speculated as to the future 'sustainability' or 'withdrawal' of labour law.[58] Digital work platforms are not only challenging trade unions, organised employment, social policies and social security systems all over the world, but also labour law as a regulatory approach to work.

1.3. Outline of this Book

The terms of the legal debates on digital work platforms will be outlined in more detail in the next chapter, before chapter three analyses how labour law goes about classifying digital platform work with the aim of understanding the architecture of classification and the ways in which digital platform work fails to neatly fit traditional categories.

A revisiting of theoretical approaches to labour law in chapter four will show why work organisation is the key to understanding the dynamics of what makes labour law unique. On this basis, chapter five then draws on organisation theory to explain how much of the challenge digital work platforms present to labour law concepts is due to the platforms' organisational structures and their functions as market organisers.

Chapters six and seven draw conclusions and discuss policy options. Chapter six addresses the issue of status and suggests that a new category for digital work platforms may be useful to more precisely address their specific organisational structure. Chapter seven systematises the legal consequences of labour law, ie workers' rights and employers' obligations, and explains why a new category may (only) be necessary for a specific set of issues, namely health and safety, working time and professional development. To effectively regulate and enforce such rights, however, it makes sense to explicitly address digital work platforms as market organisers, with regulatory designs that take into account the indirect mechanisms of management and governance these platforms have developed.

The last chapter is dedicated to convincing readers that a labour law approach, although constituting only a minor part in the broader effort to develop comprehensive regulation of digital work platforms, nevertheless has fundamental import for how we think about work, power and resistance – not only in relation to digital platform work.

[58] C Schubert, 'Neue Beschäftigungsformen in der digitalen Wirtschaft: Rückzug des Arbeitsrechts?' [2018] *Recht der Arbeit* 200; R Waltermann, 'Digital statt analog: Zur Zukunftsfähigkeit des Arbeitsrechts' [2019] *Recht der Arbeit* 94.

1.4. Building on Research Experiences from Germany

Digital work platforms are no longer brand new, and ample research on many issues related to them already exists. Yet still, digitalisation marks the turn of an era, and the Covid-19 pandemic has only accelerated dynamics that had not yet reached a fixed point. Researching labour law's relationship to digital platforms therefore still resembles 'nailing jelly'[59] in that it takes place in an ever-changing socio-economic and legal field.

1.4.1. Starting with German Labour Law

Digitalisation and the emergence of digital work platforms are global developments, and labour law systems all over the world resemble each other. Hence, the issues taken up in this book have been heatedly discussed in most jurisdictions around the world. Nevertheless, this is not a comparative legal study. It does not attempt to derive general notions out of comparing and juxtaposing different legal orders. Moreover, instead of diving deep into the legal consequences of classification – issues that would require a thorough review and comparison of political, economic and social institutions and histories – this book aims to deconstruct the basic ideas of labour law in order to begin reconceptualising categories that can be used to design consistent regulatory policies towards digital work platforms.

However, talking about the law without referring to specific (national) legal rules amounts to an attempt to square the circle. This is particularly true for this book, which intends to show the importance of organisational ideas running through the law by engaging in a close reading of legal texts. For this reason, the book includes examples and concepts from as many jurisdictions as possible. However, I cannot deny its origins in the German experience. The experiences framing this book have been shaped in a socio-economic system that has been modelled as a coordinated market economy, as opposed to a liberal market economy, and a specific welfare system, in which labour law regulation is embedded within a continental European institutional context.[60] Consequently, the book adds a continental European approach to the international debate, which has thus far largely been informed by authors arguing from an Anglo-American

[59] Huws and others, 'Work in the European Gig Economy' (n 34); on metaphors, see also ch 8.

[60] *cf* PA Hall and DW Soskice, *Varieties of capitalism: The institutional foundations of comparative advantage* (Oxford University Press, 2001); G Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Princeton University Press, 1990). Questioning the relevance of these differences in the digital age: CF Wright and others, 'Beyond National Systems, Towards a "Gig Economy"?: A Research Agenda for International and Comparative Employment Relations' (2017) 29 *Employ Respons Rights J* 247 doubts this for the variety-of-capitalism-approach; similarly J Pilaar, 'Assessing the Gig Economy in Comparative Perspective: How Platform Work Challenges the French and American Legal Orders' (2018) 27 *Journal of Law and Policy* 47 in his case study.

(and mostly common law) background. Hopefully, this will not end up as a limitation, but rather provide a valuable contrast that can further inform the debate by bringing some of its thus-far unspoken premises out into the open.

1.4.2. Learning from Empirical Studies

Any analysis of the law must be accompanied by a good knowledge and grasp of the empirical phenomena and conflicts that give rise to legal questions and which are, in turn, shaped by the law. This book also draws on a wealth of empirical studies – quantitative as well as qualitative and ethnographic – that have been conducted around the world in recent years.[61]

My background as a German researcher in interdisciplinary labour law studies also means that my take on the subject is influenced by specific German experiences with digital work platforms. While in the US, litigation related to Uber, Crowdflower and Lyft gave rise very early on to specific doctrinal and legislative attempts to adequately capture and address work on digital work platforms,[62] in Spain and other European countries, litigation related to Glovo and Deliveroo have dominated policy debates.[63] In Germany, the debate on digital work platforms has largely focused on social security protection for the self-employed, on the one hand, and on discourses around micro-crowdworking (prominently led by IG Metall), on the other. In this context, the book draws on specific empirical knowledge gained in three research projects I have coordinated or participated in over the course of several years:

- In a project on crowdworking in Germany funded by the Fritz Thyssen Foundation, we looked at so-called microwork or clickwork on German digital work platforms like Clickworker and AppJobs.[64] A continuation of this project

[61] In particular: J Berg and others, 'Digital Labour Platforms and the Future of Work: Towards Decent Work in the Online World' (Geneva, 2018); ILO, 'World Employment and Social Outlook' (n 26); Groen and others, 'Employment and Working Conditions' (n 34); Evans and Gawer, 'Global Survey' (n 37); Huws and others, 'Work in the European Gig Economy' (n 34); Woodcock and Graham (n 28), 70 ff for delivery work, taxi work, domestic and care work, microwork and online freelancing; P Coate and L Kersey, *Nontraditional Work Arrangements* (Quarterly Economics Briefing, 2019); C Gerber and M Krzywdzinski, 'Brave New Digital Work?: New Forms of Performance Control in Crowdwork' in SP Vallas and A Kovalainen (eds), *Work and Labor in the Digital Age* (Emerald Publishing Limited, 2019); Krzywdzinski and Gerber, 'Varieties of Platform Work' (n 27); van Doorn, 'Platform Labor' (n 27); D Das Acevedo, 'The Rise and Scope of Gig Work Regulation' in D Das Acevedo (ed), *Beyond the Algorithm: Qualitative Insights for Gig Work Regulation* (Cambridge University Press, 2021); AJ Ravenelle, 'Just a Gig?: Sharing Economy Work and the Implications for Career Trajectory' in D Das Acevedo (ed), *Beyond the Algorithm: Qualitative Insights for Gig Work Regulation* (Cambridge University Press, 2021).

[62] MA Cherry, 'Beyond Misclassification: The Digital Transformation of Work' (2016) 37 *Comparative Labor Law & Policy Journal* 577; Liebman and Lyubarsky, 'Crowdworkers' (n 53) 47 ff (CrowdFlower, Uber, Lyft).

[63] In detail ch 3, 3.5.2.

[64] Results have been published, inter alia, in I Hensel and others (eds), *Selbstständige Unselbstständigkeit: Crowdworking zwischen Autonomie und Kontrolle* (Nomos, 2019); Schönefeld and

focused on what we have come to call 'complex crowdworking', in which we researched contest-based design platforms like Jovoto or designenlassen.[65]

- In a project on food-delivery riders in Berlin funded by the Hans Böckler Foundation, we compared two platforms in the same business sector with different employment models: Foodora (now taken over by Lieferando) worked with employees, while Deliveroo (now no longer operating in Berlin) at some point adopted a self-employment model.[66]

Our projects highlighted different forms of work processes and work coordination on digital work platforms and explored the role the platforms play in organising work and directing workers, leaving them little space to make their own decisions. These studies show that the platforms go far beyond merely intermediating between businesses and workers. Even platforms like AppJobs that construct contracting in analogous ways to e-commerce platforms, ie that have businesses and workers directly conclude contracts with one another, still actively organise the workflow. Crowdsourcers will therefore not usually receive thousands of individual results in response to their assignment, but instead, the platforms will put together products based on the thousands of individual results they have manufactured.

As for the theoretical issues addressed in this book, my first attempt at conceptualising them stemmed from cooperation in a group of (then still young) German legal scholars in which we discussed *Private Macht* (private power), and I systematised the sources of power relevant in work relationships.[67] After that, all three of the interdisciplinary projects mentioned above provided ample opportunities to study the working of power and organisational structures on digital work platforms. The theoretical ideas I drew from these experiences have been published in a book on crowdworking that was edited by the research group for

others, 'Jobs für die Crowds' (n 34); E Kocher and I Hensel, 'Herausforderungen des Arbeitsrechts durch digitale Plattformen – ein neuer Koordinationsmodus von Erwerbsarbeit' [2017] *Neue Zeitschrift für Arbeitsrecht* 984; Kocher, 'Spinnen im Netz' (n 41); Hensel, 'Soziale Sicherheit' (n 52).

[65] Results have been published, inter alia, in I Rickert and E Kocher, 'Risikoverteilung und Vertragstypen im digitalen Designwettbewerb' [2020] *Zeitschrift für Urheber- und Medienrecht* 833; E Sauerborn, 'Digitale Arbeits- und Organisationsräume: Räumliche Dimensionen digitaler Arbeit am Beispiel Crowdworking' (2019) 28(3) *Arbeit Zeitschrift für Arbeitsforschung, Arbeitsgestaltung und Arbeitspolitik* 241; E Sauerborn, 'Die diskursive Herstellung von Geschlecht durch Crowdworking-Plattformen' (2021) 27 *Freiburger Zeitschrift für GeschlechterStudien* forthcoming.

[66] Results have been published, inter alia, in M Ivanova and others, 'The App as a Boss?: Control and Autonomy in Application-Based Management' (2018) Arbeit|Grenze|Fluss. Work in Progress interdisziplinärer Arbeitsforschung 2; A Degner and E Kocher, 'Arbeitskämpfe in der „Gig-Economy"?: Die Protestbewegungen der Foodora- und Deliveroo-Riders und Rechtsfragen ihrer kollektiven Selbstorganisation' (2018) 51(3) *Kritische Justiz* 247; A Degner and E Kocher, 'Quali battaglie sindacali nella gig economy?: I movimenti di protesta dei rider di Foodora e Deliveroo e le questioni giuridiche relative alla loro organizzazione autonoma e collettiva' (2019) 163 *Giornale di Diritto del Lavoro e di Relazioni Industriali* 525; J Bronowicka and M Ivanova, 'Resisting the Algorithmic Boss: Guessing, Gaming, Reframing and Contesting Rules in App-Based Management' in PV Moore and J Woodcock (eds), *Augmented Exploitation: Artificial Intelligence, Automation and Work* (Pluto Press, 2021).

[67] E Kocher, 'Private Macht im Arbeitsrecht' in F Möslein (ed), *Private Macht* (Mohr Siebeck, 2015).

the Thyssen project,[68] as well as in journal articles in both English and German.[69] This English book aims to bring my approach into international debate, and I hope it is able to provoke and inspire its readers!

1.5. Some Notes on Language and Terminology

The book uses examples and texts from several legal systems, but especially from German law. All translations of national legal texts are my own,[70] with some exceptions that are explicitly mentioned.

- Digital Work Platforms, Digital Platform Work

Different terminologies have been established for the platforms with which this book is concerned: online labour platforms, digital work platforms, digital labour platforms, digital services platforms, gig economy platforms, sharing economy platforms, online intermediation services etc.[71] All of these terms relate to different concepts, as they have each been created to explain specific issues.[72] The term 'gig-economy platform', for example,[73] alludes to the economic functions of digital platforms, to their disruptive ambitions and tendencies, and to the way they have been instrumental in shaping 'informational capitalism'.[74] The term 'digital services platform', or platforms for 'online intermediation services'[75] specifically refers to the role of digital platforms in the service market. As this book is all about the work these platforms organise and coordinate, it uses the term 'digital work platforms' as the term that best captures this endeavour.[76]

[68] Hensel and others (eds), *Selbstständige Unselbstständigkeit* (n 64).

[69] E Kocher, 'Market Organization by Digital Work Platforms: At the Interface of Labor Law and Digital Law' *Comparative Labor Law & Policy Journal* forthcoming; E Kocher, 'Reshaping the legal categories of work. Digital labor platforms at the borders of labor law' *Weizenbaum Journal of Digital Society* forthcoming; E Kocher, 'Digitale Plattformarbeit – die Verantwortung von Marktorganisatoren' *Zeitschrift für Europäisches Privatrecht* forthcoming. This mostly concern the issues put forward in chs 2–5 of this book.

[70] Supported by Allison West.

[71] Overview of terms used in EU Member States: De Groen and others, 'Employment and Working Conditions of Selected Types of Platform Work' (n 34) 10.

[72] For these functions of terminologies *cf* H Collins, G Lester and V Mantouvalou, 'Introduction: Does Labour Law Need Philosophical Foundations?' in H Collins, G Lester and V Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press, 2018).

[73] *cf* Das Acevedo, 'Rise and Scope' (n 61) 9 ('gig work'); Das Acevedo, 'Regulating Employment Relationships' (n 44).

[74] For these terms: Cohen, *Between Truth and Power* (n 24); A Kapczynski, 'The Law of Informational Capitalism' (2019/2020) 129 *Yale Law Journal* 1460.

[75] Used for Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services [2019] OJ L 186/57.

[76] Also used by the World Economic Forum in its Charter of Principles for Good Platform Work of 2020; for similar terms *cf* Woodcock and Graham, *Gig Economy* (n 30): 'Digital labour platforms'; Frankfurt Declaration (n 14): 'online labor platforms'.

- Workers

As far as labour law in concerned, the legal construction of the work relationships on these platforms is of primary concern. What most interests policy-makers and academics in this regard often comes down to the question of whether the users working on (or for) these platforms are independent contractors (as most of the platforms claim), or employees (a categorisation that invokes all of labour law and most of social security law). In order to analyse this and other relevant questions, terms are needed that enable discussion about the parties on both sides of the contracts in a general way, terms that do not already carry specific legal meaning. In this book, I will use the terms 'platform' and (business or consumer) 'customers', or 'companies', to indicate the parties that make use of the work. For the person executing the work activity, however, the term 'worker' will be applied, regardless of legal status[77] (although in some jurisdictions, namely in UK law, this is a technical term which refers to a specific category of work relationships).[78]

- Labour Law

Another issue of terminology concerns the areas of law that are covered in this book. The book uses the term 'labour law' in a general sense, encompassing individual labour contracts (in some jurisdictions coined as 'employment law') as well as collective bargaining and the law of industrial relations.[79]

- Courts

Lastly, the term 'court', for comparative and interdisciplinary purposes, will be used in this book as a generic term indicating any kind of adjudication institution, including, for example, Employment Tribunals in UK law, or Labor Relations Boards in US and Canadian law.[80]

[77] This is also what the ILO does: ILO, 'World Employment and Social Outlook' (n 26), 202; equally: World Economic Forum, Charter (n 76).

[78] See in detail below ch 3, 3.4.3.1. It will be indicated when the specific UK use of the term is meant.

[79] *cf* Freedland and Kountouris, *Legal Construction* (n 53) 12 ff.

[80] A functional approach to these terms has been explored in E Kocher, *Funktionen der Rechtsprechung: Konfliktlösung im deutschen und englischen Verbraucherprozessrecht* (Beiträge zum ausländischen und internationalen Privatrecht vol 86, Mohr Siebeck, 2007).

2

Digital Work Platforms as Objects of Regulation

In the conflict between YouTube and the union-led FairTube campaign, the German metalworkers' trade union IG Metall argued that employment relationships existed between YouTube and YouTubers.[1] At the same time, the FairTube campaign's concrete demands focused on fairness and transparency instead of minimum wage or working time regulations. This is a phenomenon frequently found in such debates: labour law is invoked when talking about worker classification categories, but then put aside when discussing specific rights and obligations.

A variety of proposals for regulating digital work platforms have been developed, with most of them far more comprehensive than those put forth by the FairTube campaign.[2] The principles developed by the Fairwork project are a good example. Established with initial funding from the German government and the ILO, the Fairwork project is currently based at the Oxford Internet Institute[3] and brings together digital work platforms, workers, trade unions, regulators and academics to develop and monitor decent work standards for digital work platforms.[4]

[1] Those creating the content displayed on YouTube. On the conflict, see ch 1, 1.1.

[2] Fairwork, Principles, fair.work/en/fw/principles/; see also S Fredman and D du Toit, 'Proposal for a Draft Convention on Platform Work' in J Woodcock and M Graham, *The Gig Economy: A Critical Introduction* (Polity, 2020) 146 ff; Frankfurt Declaration on Platform-Based Work (December 2016) faircrowd.work/unions-for-crowdworkers/frankfurt-declaration/ (see ch 1, at n 13); ILO, 'World Employment and Social Outlook: The Role of Digital Labour Platforms in Transforming the World of Work' (Geneva, 2021) 202-07; DGB (*Deutscher Gewerkschaftsbund* = German Trade Union Confederation), 'DGB-Position zur Plattformarbeit' (March 2021); *Bundesministerium für Arbeit und Soziales* (German Ministry for Labour and Social Affairs, BMAS), 'Eckpunkte „Faire Arbeit in der Plattformökonomie"' [2021] www.denkfabrik-bmas.de/fileadmin/Downloads/eckpunkte-faire-plattformarbeit_1_.pdf; U Huws and others, 'Work in the European Gig Economy – Employment in the Era of Online Platforms: Research Results from the UK, Sweden, Germany, Austria, The Netherlands, Switzerland and Italy' (Brussels, 2017) 51; *cf* WP de Groen and others, 'Employment and Working Conditions of Selected Types of Platform Work' (Luxembourg, 2018) 41, 62–64 with an overview over the topics covered in the debate in several EU Member States; J Prassl and M Risak, 'The Legal Protection of Crowdworkers: Four Avenues for Workers' Rights in the Virtual Realm' in P Meil and V Kirov (eds), *Policy Implications of Virtual Work* (Springer International Publishing, 2017); SD Harris and AB Krueger, 'A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker"' (2015) Discussion Paper 10; DJT (*Deutscher Juristentag* = German Lawyers' Conference) [2016] Resolution I. 2.a.

[3] Woodcock and Graham, *Gig Economy* (n 2), 121–22 on the background.

[4] A Bertolini and others, 'Towards Decent Work in the Digital Age: Introducing the Fairwork Project in Germany' (2021) 75(2) *Zeitschrift für Arbeitswissenschaft* 187.

Fairwork advocates 'five core principles' for the platform economy, designed to be taken up by legislators, but also to enable rating, ranking and, ultimately, certification of digital work platforms.[5] The principles use the term 'fairness' (which, by the way, Katherine VW Stone predicted as early as 2004 would serve as a pivotal concept for regulation in the digital age[6]). Fairwork's five core principles are:

- fair pay (a decent income);
- fair conditions (health and safety protection);
- fair contracts (transparency, accessibility and substantial fairness of terms and conditions);
- fair management (transparency, information, documentation and equity in the use of management instruments, including algorithms); and
- fair representation (voice for workers and rights to collective organisation, collective action and collective bargaining).

Strictly speaking, these principles do not resemble those at labour law's core. Neither do institutions such as the Ombuds Office for the clearance of individual conflicts as established in 2017 by European crowdsourcing platforms in conjunction with the German Crowdsourcing Association (Deutscher Crowdsourcing Verband) and IG Metall.[7]

The categories established in labour law are designed to assign legal status, from which flows certain associated rights and obligations.[8] The category of 'employee', for example, leads to the whole set of employment rights, none of which apply to an independent contractor (whose legal relations may however fall 'within the province of some other body of law'[9]). However, if one wanted to consolidate a whole new set of rights and obligations, such as the principles developed by Fairwork, a new category would have to be created. This is, in fact, what some policy-makers, such as the German Federal Labour Ministry[10] or the US Hamilton Project[11] have proposed.[12]

However, due to their focus on self-regulation, Fairwork's reports refrain from commenting on categorisation and instead talk about legal 'loopholes' and

[5] Fairwork, fair.work (n 2).

[6] KV Stone, *From Widgets to Digits: Employment Regulation for the Changing Workplace* (Cambridge University Press, 2004) 96.

[7] crowdsourcing-code.com;faircrowd.work/2017/11/08/ombudsstelle-fuer-crowdworking-plattformen-vereinbart.

[8] On the concept of 'status', see ch 6.

[9] P Davies and M Freedland, 'Employees, Workers, and the Autonomy of Labour Law' in H Collins, P Davies and R Rideout (eds), *Legal Regulation of the Employment Relation* (Kluwer Law International, 2000) 286 ff.

[10] BMAS (n 2); details see ch 6, at n 29.

[11] Harris and Krueger, 'Proposal for Modernizing Labor Laws' (n 2); *cf* A Stemler, 'Betwixt and Between: Regulating the Shared Economy' (2016) 43 *Fordham Urban Law Journal* 31; details see ch 6, at n 19.

[12] For more examples, see ch 7.

'murky legal contexts'.[13] And they have a point in this regard. As will be shown in chapter three, the legal framework has not yet been able to capture the specific character of digital work platforms in a consistent way for several reasons. For one, the variety of digital work platforms makes it difficult to draw general conclusions.[14] Secondly, labour lawyers have shown a certain and well-founded unwillingness towards what could be seen as a giving up on the concept of employment.[15] And last but not least, the debate around legal categories has often been detached from the debate around the rights and obligations attached to these categories.[16]

Before explaining in chapter three *why* these inconsistencies between classification and the naming of resulting rights and obligations seem to arise so consistently in the regulatory debate about digital work platforms, this chapter will try to describe *how* this mixture of proposals is composed and institutionally embedded.

2.1. The Concept of Regulatory Domains

Legal subdisciplines such as, for example, constitutional law, administrative law, contract law, labour law, criminal law and competition law,[17] cannot be analysed only according to their specific bodies of norms. They operate in different institutional contexts and are closely related to specific institutions and procedures (eg courts, tribunals or administrative agencies) and correspondent epistemic communities and professional cultures (mostly communities of legal practitioners, such as judges, lawyers, legal advisers, NGOs or public administrations).

Consequently, different areas of the law build on different basic concepts, principles or paradigms. For example, labour law's approach is commonly described as compensating for unequal bargaining power between employers and employees, limiting freedom of contract to protect workers' interests, and valuing collective organisation and collective bargaining for workers.[18] This is not to say that there are not other values like industrial due process, for example, that may be important in labour law. However, these other values are generally not considered to be essential and defining features of labour law when contrasted to other areas of law like, for example, human rights.

[13] Fairwork 2020 Annual Report, fair.work/wp-content/uploads/sites/131/2020/12/Fairwork-2020-Annual-Report.pdf, 13; 16. So far, three country reports exist: on South Africa, Germany and India (fair.work/en/fw/publications/; the report on India mentions a 'murky legal context' (11)).

[14] Ch 1, 1.2.2.

[15] Ch 6, 6.3.1.

[16] Below ch 7.

[17] In this book, I use the European term 'competition law' instead of the US term 'antitrust law'.

[18] See eg SF Deakin and GS Morris, *Labour Law*, 6th edn (Hart Publishing, 2012) 2; PS Fischinger, '§ 3 Gegenstand und Leitprinzipien des Arbeitsrechts' in H Kiel, S Lunk and H Oetker (eds), *Münchener Handbuch zum Arbeitsrecht: Band 1: Individualarbeitsrecht I*, 5th edn (CH Beck, 2021); on the theoretical foundations for such description, see ch 4, 4.2.

Reflecting on how the institutional systems, norms and practices of labour law influence discourses and regulation (and vice versa) is quite novel. For this purpose, Judy Fudge has developed the socio-legal concept of 'regulatory domains'. Using the regulation of unfree labour[19] and domestic work[20] as examples, she points out possible clashes between different regulatory domains, such as criminal, labour, human rights and immigration law. She defines the term 'regulatory domain' as involving institutions, actors and discourses, but also regulatory paradigms with assumptions about the nature and causes of a problem, the goals of regulation, and the strategies or techniques of regulation.[21] Mariana Valverde, in her earlier concept of 'jurisdiction', points to the technicalities of governance, arguing that where, who, what and how something should be governed are, after all, closely connected issues, with 'where' leading the way. In this respect, she recalls Boaventura de Sousa Santos' analysis of the governance of legal governance[22] and shows that only on the surface are conflicts about jurisdiction 'explicit disputes over who rules over a spatiotemporal unit'. Instead, she argues they are indirectly part of the mapping exercise of '[sorting] competing powers and knowledges into ready-made, clearly separate pigeon-holes'.[23]

While Valverde suggests always analysing the law simultaneously from the inside and the outside,[24] Fudge highlights the social and political consequences of legal characterisation and classification. The process of 'assigning a legal category or legal classification to a social relation or activity', she argues, provides cognitive maps for understanding a social problem – maps that are shaped by the regulatory domain in which the classification operates.[25] Even without the relevant actors being conscious of this, classification involves an institutional context, a specific relationship between norms, institutions and procedures, as well as a regulatory paradigm. The (often implicit) choice of the domains that are invoked in the process of classification has real ideological and material effects on how persons organise their relations, activities and the way they interpret conflicts and rights.[26]

The concept of regulatory domains has parallels with the concept of discursive formations[27] and provides a useful theoretical framework for understanding

[19] J Fudge, 'Modern Slavery, Unfree Labour and the Labour Market: The Social Dynamics of Legal Characterization' [2017] *Social & Legal Studies* 1.

[20] J Fudge, 'Feminist Reflections on the Scope of Labour Law: Domestic Work, Social Reproduction and Jurisdiction' (2014) 22 *Feminist Legal Studies* 1.

[21] Fudge, 'Modern Slavery' (n 19); H Shamir, 'A Labor Paradigm for Human Trafficking' (2012) 60(1) *UCLA Law Review* 76.

[22] M Valverde, 'Jurisdiction and Scale: Legal "Technicalities" as Resources for Theory' (2009) 18(2) *Social & Legal Studies* 139, 141; Bd Sousa Santos, 'Law: A Map of Misreading' (1987) 14 *Journal of Law and Society* 279.

[23] M Valverde, *Chronotopes of Law: Jurisdiction, Scale and Governance* (Routledge, 2015) 85; Valverde, 'Jurisdiction and Scale' (n 22).

[24] Valverde, 'Jurisdiction and Scale' (n 22) 153.

[25] Fudge, 'Modern Slavery' (n 19); *cf* SF Deakin and F Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (Oxford University Press, 2005) 4.

[26] Fudge, 'Modern Slavery' (n 19).

[27] See R Keller, 'The Sociology of Knowledge Approach to Discourse (SKAD)' (2011) 34(1) *Human Studies* 43; R Keller, *Wissenssoziologische Diskursanalyse* (VS Verlag für Sozialwissenschaften, 2011).

clashes, misunderstandings, and incompatibilities between regulatory ideas. In this chapter, the concept will serve as the basis for an analysis of labour law as a regulatory domain in relation to other such domains relevant for regulating digital platform work, such as the emergent domain of digital law.

2.2. Labour Law in Competition with Other Regulatory Domains

The theoretical debates on regulatory domains and legal subdisciplines as discursive formations may still be in the early stages, but conflicts between labour law approaches and competing legal areas have been repeatedly observed, mostly in relation to possible inconsistencies between an individual rights framing and a collective rights framing. For example, Britta Rehder's empirical study of the German Bundesarbeitsgericht (BAG, Federal Labour Court) shows how different epistemic communities – labour law and civil law – compete in shaping jurisprudence by using different legal and conceptual frameworks, putting collective rights into focus (as in labour law) or individual rights (as in contract and civil law).[28]

Also, EU antidiscrimination law, in particular, has been suspected of weakening national labour laws, due to its preference for individual rights approaches and prioritisation of access to markets and fairness over collective bargaining, dismissal protection and acquired rights at the workplace.[29] In debates about pay equity, 'women's rights' have been said to compete with 'workers' rights', and 'protective rights for women' have been portrayed as incompatible with 'equal rights'.[30] Labour law's function of regulating economic and social power, re-distribution and de-commodification has also been said to pose a contrast to fundamental and human rights approaches.[31]

[28] B Rehder, *Rechtsprechung als Politik: Der Beitrag des Bundesarbeitsgerichts zur Entwicklung der Arbeitsbeziehungen in Deutschland* (Campus Verlag, 2011); M Becker, *Arbeitsvertrag und Arbeitsverhältnis in Deutschland: Vom Beginn der Industrialisierung bis zum Ende des Kaiserreichs* (Vittorio Klostermann, 1995) 325 and passim shows that at least in Germany, labour law has from its start developed independently and alongside general contract law.

[29] For this debate: E Kocher, 'Arbeit, Kollektivautonomie und Solidarität' in S Baer and U Sacksofsky (eds), *Autonomie im Recht – Geschlechtertheoretisch vermessen* (Nomos Verlag, 2018); D Schiek, 'Review: Somek, Engineering Equality, 2011' [2012] *Common Market Law Review* 842; D Schiek, 'Zwischenruf: Den Pudding an die Wand nageln?: Überlegungen zu einer progressiven Agenda für das EU-Anti-Diskriminierungsrecht' [2014] *Kritische Justiz* 396.

[30] M McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago Series in Law and Society, University of Chicago Press, 1994) 234; N Pedriana, 'From Protective to Equal Treatment: Legal Framing Processes and Transformation of the Women's Movement in the 1960s' (2006) 111(6) *American Journal of Sociology* 1718.

[31] J Fudge, 'The New Discourse of Labor Rights: From Social to Fundamental Rights?' [2007] *Comparative Labor Law & Policy Journal* 29; E Kocher, 'Solidarität und Menschenrechte – Zwei verschiedene Welten?' in H Lindemann and others (eds), *Erzählungen vom Konstitutionalismus: Festschrift für Günter Frankenberg* (Nomos, 2012); generally on labour law paradigms see H Collins, G Lester and V Mantouvalou, 'Introduction: Does Labour Law Need Philosophical Foundations?' in H Collins, G Lester and V Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press, 2018); this debate will be taken up in ch 4, 4.1.3.

2.3. Digital Law: A New Regulatory Domain?

The last 10 years have seen the advent of a new regulatory domain: digital law. This domain has emerged as a delineation of the subdisciplines of intellectual property law, on one side, and data protection law, on the other. There is now a growing awareness that overarching legal frameworks are needed to understand the specific challenges that informational capitalism poses for the law. Hence, in the last 10 years, 'digital law' or the 'law of the digital age' has begun to emancipate itself from these subdisciplines.[32]

2.3.1. Legal Discourses

Apart from data protection law and intellectual property law, the digital law discourse has been fed by a variety of legal discourses. Particularly in the context of European Union policy, the bulk of suggestions for regulating the digital economy have added ideas for consumer-oriented market regulation. In line with its general information approach to consumer protection, the European Commission has centred transparency and access to remedies in its regulatory approach, along with enabling companies to use digital means of communication with consumers.[33] Competition regulation is now also being reconsidered in view of digital platforms' extreme returns to scale, network externalities and their disposition towards data.[34]

In addition, particularly among digital activist communities, human rights frameworks for algorithmic and/or managerial accountability have found advocates.[35] Similarly, issues of non-discrimination and equality law are relevant, particularly when it comes to regulating algorithms.[36]

[32] L Lessig, 'The Law of the Horse: What Cyberlaw Might Teach' (1999) 113(2) *Harvard Law Review* 501 had already pointed in that direction, against Easterbrook's statement to the contrary (FH Easterbrook, 'Cyberlaw or the Law of the Horse' [1996] *University of Chicago Legal Forum* 207.

[33] European Commission, New Deal for Consumers, COM(2018) 183; Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ 136/1; Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods [2019} OJ 136/28; on the German debate; for the P2B Regulation 2019/1150, see below text at nn 43–45.

[34] J Crémer, Y-A de Montjoye and H Schweitzer, 'Competition Policy for the Digital Era: Final Report' (Brussels, 2019); H Schweitzer, 'Digitale Plattformen als private Gesetzgeber: Ein Perspektivwechsel für die europäische "Plattform-Regulierung"' (2019) 27(1) *Zeitschrift für Europäisches Privatrecht* 1; for German law: *GWB-Digitalisierungsgesetz* of Jan 2021 (Digitalisation of Competition Law Act), BGBl. (Official Journal) 2021 I-2.

[35] L McGregor, D Murray and V Ng, 'International Human Rights Law as a Framework for Algorithmic Accountability' (2019) 68(April) *International and Comparative Law Quarterly* 309, 320; B Wagner, MC Kettemann and K Vieth (eds), *Research Handbook on Human Rights and Digital Technology: Global Politics, Law and International Relations* (Edward Elgar, 2019); Charter of Fundamental Digital Rights of the European Union, 2nd revised version 2018, digitalcharta.eu/wp-content/uploads/DigitalCharter-English-2019-Final.pdf.

[36] SP Gangadhara and J Niklas, 'Between Antidiscrimination and Data: Understanding Human Rights Discourse on Automated Discrimination in Europe' (London, 2018); H Hoch and others,

2.3.2. Non-legal Discourses

In addition to legal discourses, non-legal discourses have cropped up to compete in becoming the new normative basis for future paradigms regulating the digital world. One example of this is the discourse that casts social problems as technological problems, capable of being solved through proper algorithms or further technological innovation in the 'new spirit of digital capitalism'.[37] This technological discourse is sceptical of regulation altogether, instead seeing transparency, access to information and open communication as the only necessary legal ingredients for improving markets.[38] In this vein, ethics has been competing with the law for the attention of regulators.[39]

It is worth mentioning that such competing discourses are not only found in the realm of academic, political and professional discourses and institutions. In the context of digital work platforms, for example, discursive contradictions are also reflected in workers' experiences. As, for example, ethnographic research on worker advocacy groups in California has shown, workers tend to show an 'attitudinal ambivalence', whereby they both want employee benefits and yet do not want to be employees.[40] They simultaneously acknowledge and reject their own precarious situation.[41]

2.4. Digital Platforms: More than Matchmakers?

One important subtheme in debates on the digital economy in general is the regulation of digital platforms. Its importance mostly stems from the fact that such

'Discrimination for the Sake of Fairness: Fairness by Design and Its Legal Framework' (2021); FZ Borgesius, 'Discrimination, Artificial Intelligence, and Algorithmic Decision-making' (Strasbourg, 2018); C O'Neil, *Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy* (Crown, 2016).

[37] O Nachtwey and T Seidl, 'Die Ethik der Solution und der Geist des digitalen Kapitalismus' (Frankfurt am Main, 2017). IfS Working Paper 11.

[38] ibid, 21; *cf* K Yeung and A Weller, 'How is "Transparency" Understood by Legal Scholars and the Machine Learning Community?' in E Bayamlioglu and others (eds), *Being Profiled. Cogitas Ergo Sum: 10 Years of Profiling the European Citizen* (Amsterdam University Press, 2018); JH Hoepman, 'Transparency is the Perfect Cover-up (if the Sun Does Not Shine)' in E Bayamlioglu and others (eds), *Being Profiled. Cogitas Ergo Sum: 10 Years of Profiling the European Citizen* (Amsterdam University Press, 2018).

[39] B Wagner, 'Ethics as an Escape from Regulation: From "Ethics-washing" to Ethics-shopping?' in E Bayamlioglu and others (eds), *Being Profiled. Cogitas Ergo Sum: 10 Years of Profiling the European Citizen* (Amsterdam University Press, 2018).

[40] VB Dubal, 'An Uber Ambivalence: Employee Status, Worker Perspectives, and Regulation in the Gig Economy' in D Das Acevedo (ed), *Beyond the Algorithm: Qualitative Insights for Gig Work Regulation* (Cambridge University Press, 2021); similarly: Huws and others, 'Work in the European Gig Economy' (n 2), 39–48; see also ILO, *World Employment and Social Outlook* (n 2), 143–76.

[41] A Peticca-Harris, N deGama and MN Ravishankar, 'Postcapitalist Precarious Work and Those in the "Drivers" Seat: Exploring the Motivations and Lived Experiences of Uber Drivers in Canada' (2019) 27(1) *Organization* 36, who relate these findings to a traditional capitalist narrative that working hard and having a dream will lead to advancement, security and success; for a similar account, in relation to crowdworkers, see A Al-Ani and S Stumpp, 'Rebalancing Interests and Power Structures on Crowdworking Platforms' (2016) 5(2) *Internet Policy Review*.

platforms have come to be seen as the characteristic organisational form of 'informational' or 'digital' capitalism.[42]

The regulatory discourse on digital platforms mirrors the regulatory varieties found in digital law discourses, with similar origins in intellectual property and data protection law. A widening of the discourse is evidenced by the EU's P2B Regulation,[43] which has a contract law background and is concerned with the business environment for smaller businesses and traders on online platforms. Its main cornerstones are transparency rules and conflict resolution/redress.[44] Interestingly, when in November 2018 a dispute arose between the European Parliament and the Council of the EU, the latter proposed to change the wording in the full title of the P2B Regulation from 'Fairness and Transparency' to 'Fairness by Means of Transparency', thereby negating fairness as an independent value in this regulatory context.[45]

Other proposals for regulating digital platforms from a consumer rights perspective concern access to data, facilitation of switching and multi-homing, data portability to avoid lock-in problems, and clear rules for customer ratings.[46] Based on economic considerations of indirect network effects,[47] EU lawyers have recently also re-evaluated extending competition law to online platforms.[48] Similar discussions are taking place in the US.[49]

Meanwhile, within the framework of human rights, the European Council's 2018 policy recommendations for regulating digital platforms represent perhaps the most comprehensive attempt to date to outline digital rights establishing the roles and responsibilities of such internet intermediaries. Effective legal rules

[42] JE Cohen, *Between Truth and Power: The Legal Constructions of Informational Capitalism* (Oxford University Press, 2019); A Kapczynski, 'The Law of Informational Capitalism' (2019/2020) 129 *Yale Law Journal* 1460; GG Parker, MW van Alstyne and SP Choudary, *Platform Revolution: How Networked Markets are Transforming the Economy – and How to Make Them Work for You* (WW Norton, 2017).

[43] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services [2019] OJ L 186/57.

[44] It was prepared by European Commission, Communication 'A European agenda for the collaborative economy', COM(2016)356 final; *cf* B Fabo, J Karanovic and K Dukova, 'In Search of an Adequate European Policy Response to the Platform Economy' (2017) 23(2) *Transfer European Review of Labour and Research* 163, 171.

[45] Permanent Representatives Committee, 21 November 2018, Doc. ST 13876/18 INIT (2018/0112(COD); C Busch, 'Mehr Fairness und Transparenz in der Plattformökonomie?: Die P2B-Verordnung im Überblick' [2019] *Gewerblicher Rechtsschutz und Urheberrecht* 788.

[46] Regulation (EU) 2018/1807 on a framework for the free flow of non-personal data in the European Union; for a general analysis; Cohen, *Between Truth and Power* (n 42).

[47] PC Evans and A Gawer, 'The Rise of the Platform Enterprise: A Global Survey' (New York, 2016) 5; A Engert, 'Digitale Plattformen' (2018) 218 *AcP (Archiv für die civilistische Praxis)* 304; J Prassl, *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (Oxford University Press, 2018) 23; A McAfee and E Brynjolfsson, *Machine, Platform, Crowd: Harnessing our Digital Future* (Norton, 2018) 129.

[48] Above n 34.

[49] H Feld, 'The Case for the Digital Plattform Act: Market Structure and Regulation of Digital Platforms' (2019); G Kimmelman, 'The Right Way to Regulate Digital Platforms' (2019).

('legality'), transparency, freedom of expression, privacy, data protection and access to effective remedies are the basic pillars of this digital law framework, along with platforms' collaboration with civil society associations and public authorities, and a general proposal for platforms' due diligence assessments with respect to human rights.[50]

All of these policy proposals address digital platforms from the assumption that they are more than mere 'matchmakers'.[51] In this sense, the policy proposals share a task that also falls to courts: They must identify the agency of platforms in creating the product or service around which the platforms are built, in order to establish the body of rules applicable to the platforms. Does a specific platform merely offer intermediation (ie an 'information society service' in the terms of EU law[52]), or is it subject to the rules for eg transport providers, taxis, landlords, real estate agents, product sellers, journalists or the press, respectively?

The economic background to these questions leads back to the challenge of trust-building in anonymous markets, something with which all digital platforms are confronted. After all, trust is the main economic asset in platform competition; platforms 'compete on their ability to draw in contributions and curate them effectively'.[53] For the purpose of establishing trust, the rhetoric of 'sharing economy', with its 'intriguing mix of "gift" and "market"'[54] and the deliberate blurring of lines between friendship and market, have long been instrumental.[55] Today, however, after commercialisation and proprietarisation, digital platforms often use other mechanisms in order to guarantee trust. Namely, they control quality and processes. As a result, the line between mediating and offering services (or goods and contracts, respectively) has become increasingly blurred.

The challenge of determining the character of digital platforms as mediators or providers of services come up in a plethora of legal contexts – for example, in contract law, public law, trade law, tax law, tort, etc – whenever the application of some legal regulation is in doubt. In European Union law, it often comes down to

[50] European Council, Recommendation CM/Rec(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries.

[51] DS Evans and R Schmalensee, *Matchmakers: The New Economics of Multisided Platforms* (Harvard Business Review Press, 2016). The issues covered in this section are analysed more systematically in ch 6, 6.1.

[52] Below nn 56–58.

[53] McAfee and Brynjolfsson, *Machine, Platform, Crowd* (n 47), 151; *cf* Parker, van Alstyne and Choudary, *Platform Revolution* (n 42); R Krause, 'Die Share Economy als Herausforderung für Arbeitsmarkt und Arbeitsrecht' in J Dörr, N Goldschmidt and F Schorkopf (eds), *Share Economy: Institutionelle Grundlagen und gesellschaftspolitische Rahmenbedingungen* (Mohr Siebeck, 2018); M Rossi, 'Asymmetric Information and Review Systems: The Challenge of Digital Platforms' in J-J Ganuza and G Llobert (eds), *Economic Analysis of the Digital Revolution* (Funcas, 2018); P Belleflamme and M Peitz, 'Inside the Engine Room of Digital Platforms: Reviews, Ratings, and Recommendations' in J-J Ganuza and G Llobert (eds), *Economic Analysis of the Digital Revolution* (Funcas, 2018).

[54] A Sundararajan, *The Sharing Economy: The End of Employment and the Rise of Crowd-based Capitalism* (The MIT Press, 2016); *cf* Y Benkler, *Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale University Press, 2008).

[55] See Woodcock and Graham, *Gig Economy* (n 2), 11 ff (sharing economy as 'predecessor').

classifying a digital platform as providing an 'information society service' as regulated by Directive 2000/31/EC on Electronic Commerce, which, inter alia, means limited liability,[56] or classifying it as providing a specific service with full liability, falling under Services Directive 2006/123[57] or other more specific rules, such as those in the transport sector.[58]

The European Commission, in its 2016 agenda for the 'Collaborative Economy', already pointed out the need to determine 'whether a collaborative platform also provides the underlying service'. It suggested this be established 'on a case-by-case basis by considering the level of control or influence that the collaborative platform exerts over the provider of such services', particularly with regard to setting prices, determining key contractual terms, and holding ownership of key assets.[59] This proposal built on ECJ case law originally relating to the interpretation of 'information society service' in Directive 2000/31/EC on Electronic Commerce, in the context of which the ECJ determined whether a platform '[confines] itself to providing [a] service neutrally by a merely technical and automatic processing of […] data', and whether it, rather than taking a 'neutral position' between market players, instead 'plays an active role' in relation to the services in question.[60] After the definition of 'information society services' was specified in Directive 2015/1535,[61] tests have been geared towards identifying if the 'intermediation service forms an integral part of an overall service whose main component is a service coming under another legal classification'.[62] For example, the ECJ (on Uber)

[56] 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, OJ L178/1 (Recital 2); for the reform discussion, see European Commission, *Proposal for a Regulation on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, COM(2020)825 final; R Janal, 'Haftung und Verantwortung im Entwurf des Digital Services Acts' [2021] *Zeitschrift für Europäisches Privatrecht* 227, 236–39; Art 2(2) P2B-Directive defines 'online intermediation services' following this understanding of 'information society services'.

[57] Directive 2006/123/EC on services in the internal market, OJ L376/36.

[58] Art 58(1) TFEU; such services are excluded from the scope of Art 56 TFEU, the Services Directive 2006/123 and the Directive 2000/31 on Electronic Commerce.

[59] European Commission, Communication 'A European agenda for the collaborative economy', COM(2016)356 final, 6; 10.

[60] Case C-324/09 *L'Oréal SA and Others v eBay International AG and Others* [2011] ECLI:EU:C:2011:474, paras 113–16; *cf* Case C-131/12 *Google Spain SL and Google Inc v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* [2014] ECLI:EU:C:2014:317, paras 33–41 on the term 'controller' in the Data Protection Directive 95/46/EC; Case C-236-238/08 *Google France SARL and Google Inc v Louis Vuitton Malletier SA, Google France SARL v Viaticum SA and Luteciel SARL and Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others* [2010] ECLI:EU:C:2010:159, para 114; *cf* European Commission, Proposal for a Digital Services Act (n 56), Recital 18 and 20; Janal, 'Entwurf des Digital Services Acts' (n 56) 326–39.

[61] Art 1(1)(b) of Directive (EU) 2015/1535 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, OJ L241/1 ('any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services'); this is also the definition Art 2(5) of Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L130/92 now refers to.

[62] Case C-390/18 *Criminal proceedings against X* [2019] ECLI:EU:C:2019:1112, paras 50–57 (classifying AirBnB as an information society service).

has characterised a platform service 'as being inherently linked to a transport service' if it 'exercises decisive influence over the conditions under which [the] service is provided by [the] drivers', eg by fixing the maximum fare, receiving the payment before handing over an amount to the driver, or controlling the quality of vehicles, drivers and their conduct.[63]

2.5. The Interface: Digital Work Platforms

As a subgroup of digital platforms, digital work platforms are implicated in these digital law discourses. In particular, digital work platforms display similar legal characteristics as far as contractual relationships are concerned. The legal and contractual constructs digital work platforms use mirror those of, for example, online shopping platforms, search engines or social media platforms, where the basic contractual element is the user contract – a long-term contract allowing for the use of the platform by different categories of users. For digital work platforms, user categories include business or consumer customers, on the one hand, and workers, on the other. On this basis, single activities subsequently become the subject of single contracts.[64] To date, however, the emerging legal discourse on digital platforms, both generally and particularly in the European Union,[65] has mostly focused on the interests of the (business or consumer) customer side of the contract, rather than the worker side.

Nevertheless, digital law proposals designed for purposes of contract and consumer or business law, such as the P2B Regulation (EU) 2019/1150, may also hold some appeal for regulating digital work platforms as well, despite the fact that they were not designed for such platforms.[66] Beyond transparency, proposed restrictions on the termination of contracts or downgrading of rankings[67] could also protect digital platform workers. Provisions on complaint management, dispute resolution and the right of associations to take legal action could also be applied to trade unions. And after all, as a default option for regulation, the control of contractual terms and conditions has often been mentioned in relation to digital work platforms as well.[68]

[63] Transport Service: Case C-434/15 *Asociación Profesional Elite Taxi v Uber Systems Spain SL* [2017] ECLI:EU:C:2017:981, paras 39–40; Case C-320/16 *Criminal proceedings against Uber France* [2018] ECLI:EU:C:2018:221, paras 21–28. No transport service: Case C-62/19 *App SRL v Unitatea Administrativ Teritorială Municipiul București prin Primar General und Consiliul General al Municipiului București* [2020] ECLI:EU:C:2020:980, paras 49–54.

[64] Above ch 1, at n 43 ff.

[65] Fabo, Karanovic and Dukova, 'Adequate European Policy Response' (n 44).

[66] A Schneider-Dörr, 'Die neue Richtlinie 2019/1152 und die P2B-VO 2019/1150 – ein Dilemma für Crowd Work' [2020] *Arbeit und Recht* 358; E Kocher, 'Market Organization by Digital Work Platforms: At the Interface of Labor Law and Digital Law' *Comparative Labor Law & Policy Journal* forthcoming.

[67] Arts 4 and 5 P2B Regulation 2019/1150; Busch, 'Mehr Fairness und Transparenz' (n 45).

[68] Prassl and Risak, 'Legal Protection' (n 2); W Däubler, *Digitalisierung und Arbeitsrecht: Internet, Arbeit 4.0 und Crowdwork*, 6th edn (Bund-Verlag, 2018) 477 ff; *cf* Art 3 P2B Regulation 2019/1150; see more in detail ch 7, 7.3.2.

Overall, however, private law rules like those proposed for the transparency of ranking criteria, access to data and the portability of reputational data across digital platforms are designed to enable transnational business in European markets and prioritise a certain minimum level of entrepreneurial action rather than to protect workers from the power such platforms wield. Shifting perspectives to consider the interests of the people performing the work opens up a completely new line of discussion at the interface of digital law and labour law, linked to the latter's emphasis on promoting worker power, collective bargaining and protection.

For this reason, actors traditionally associated with the regulatory domain of labour law, such as trade union IG Metall, have increasingly invested attention into digital platform regulation. Policy proposals from the labour law spectrum include individual employment rights, such as minimum and/or decent wages, limits to working time (including holidays), health and safety regulation, as well as dismissal protection. Another important bundle of rights refer to collective labour rights, starting with the right to organise and bargain collectively, including the protection of collective action through anti-victimisation rules and rights to communication, or rights of trade unions to get into contact with workers on digital platforms they cannot access 'on the ground'.[69]

The entry-point into labour law's regulatory domain is, as always, classification. For this, labour law works with very specific ideas, methods and criteria, which will be the subject of the next chapter.

[69] For references, overview and an assessment, see ch 7.

3

Fitting Pegs into Holes: Classification in Labour Law

> I can't define a giraffe, but I recognise it immediately when I see one.[1]

The title of Miriam Cherry's early article on digital platform work 'Beyond Misclassification'[2] prods us to look beyond the legal classification of platform workers to examine the broader picture of the mechanisms of digitalisation at work and their repercussions on almost all social practices, economic issues and policies relevant for the regulation of work. While Cherry's approach is extremely helpful for understanding the social and economic dynamics of digital platform work, and for unmasking digital platform 'doublespeak',[3] it risks dismissing the classification exercise too quickly.

Worker classification is not a side issue, after all, but central to understanding the business models of digital work platforms. Its importance stems from the fact that the binary choice between employment and independent contracting in worker classification creates a wide gap between the two categories in terms of employers' legal and financial obligations. And, as this chapter will show, the legal issues involved in the classification of digital platform workers remain unresolved. Indeed, doctrinal debate around employment classification continues unabated and has proven far less straightforward than one would think given the lack of autonomy and independence these work relationships entail. Consequently, policy experiments with new worker classification categories[4] often lack a consistent theoretical framework.

In an early Lyft case, US-American Judge Vince Chhabria used a famous metaphor to describe the legal problems brought about by digital platform work in labour law classification:

> The jury in this case will be handed a square peg and asked to choose between two round holes. The test the … courts have developed over the 20th century for classifying

[1] G Reinecke, 'Neues zum Arbeitnehmerbegriff?' [2019] *Arbeit und Recht* 56, 58–59, referring to a metaphor (probably used as caricature) by Thomas Dieterich, former president of the Federal Labour Court and former judge of the Federal Constitutional Court. For the context, see below at n 203.

[2] MA Cherry, 'Beyond Misclassification: The Digital Transformation of Work' (2016) 37 *Comparative Labor Law & Policy Journal* 577.

[3] See J Prassl, *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (Oxford University Press, 2018) 31 ff and below at 3.5.3.3.

[4] Below ch 6, 6.1.2.

> workers isn't very helpful in addressing this 21st century problem. Some factors point in one direction, some point in the other, and some are ambiguous.[5]

This chapter shows where the misfit lies and how we can account for it. In other words, it outlines what holes already exist in labour law classification (3.1), how the exercise of putting pegs into them works (3.2–3.4), and which aspects of digital platform work have proven difficult to fit into the existing holes (3.5).

3.1. Labour Law Categories

There will never be only one worker category for digital platform work. First, work practices on platforms vary significantly. It makes a big difference if one studies work on Amazon Mechanical Turk, Deliveroo, Lyft, Helpling, Jovoto or 99designs, for example.[6] Secondly, even though Judge Chhabria was referring to 'employment' and 'independent contracting' (or self-employment) in his reference to 'two round holes', these are not the only legal categories for worker classification that exist. In most legal jurisdictions, these two categories do comprise the basic distinction in classifying types of work, with employment usually entailing the fullest set of workers' rights and employers' obligations. However, in many jurisdictions, third and further categories exist alongside these two primary categories, some of which have only been introduced in recent decades.[7]

3.1.1. Beyond 'Employment'

Below is a non-exhaustive list of examples of worker classification categories beyond the binary 'employee' versus 'independent contractor' divide:

- Economically dependent workers

A widely used third classification category is the 'economically dependent' worker.[8] In Spain, specific regulations apply to *Trabajadores autónomos económicamente*

[5] *Cotter et al v Lyft Inc.* 60 F.Supp.3d 1067, 1078 (US District Court, Northern District of California); *cf* Cherry, 'Beyond Misclassification' (n 2); WB Liebman, 'Debating the Gig Economy, Crowdwork and New Forms of Work' [2017] *Soziales Recht* 221, 229.

[6] Above ch 1, 1.2.2. and below at 3.5.3.4.

[7] Comparative overviews: MR Freedland and N Kountouris, 'The Legal Characterization of Personal Work Relations and the Idea of Labour Law' in G Davidov and B Langille (eds), *The Idea of Labour Law* (Oxford University Press, 2011), 194; G Davidov, M Freedland and N Kountouris, 'The Subjects of Labor Law: "Employees" and Other Workers' in M Finkin and G Mundlak (eds), *Research Handbook in Comparative Labor Law* (Edward Elgar, 2015); L Nogler, *The Concept of "Subordination" in European and Comparative Law* (University of Trento, 2009) 117 ff; B Waas and GH van Voss (eds), *Restatement of Labour Law in Europe: Vol I: The Concept of Employee* (Hart Publishing, 2017); *cf* ILO, 'Promoting Employment and Decent Work in a Changing Landscape: General Survey, (Report III(B), International Labour Conference 109th Session' (Geneva, 2020) 5: 'a trend that has arisen principally in some Member States of the European Union'.

[8] Comparative overviews: B Waas, 'Comparative Overview' in B Waas and GH van Voss (eds), *Restatement of Labour Law in Europe: Vol I: The Concept of Employee* (Hart Publishing, 2017) lxiii–lxvil;

dependientes ('TRADE'[9]), ie workers receiving at least 75 per cent of their earnings from a single client/customer. In German law, the concept of *arbeitnehmerähnliche* Person (employee-like person) is used to extend certain employment rights to economically dependent workers.[10] In Canada, there is the category of the 'dependent contractor', which enjoys most employment rights.[11] Similar figures exist in Portuguese law,[12] or in Austrian law.[13]

- Homeworkers

In some jurisdictions specific regulation exists for homework – as a 'putting-out system'[14] – a form of highly gendered work which developed in the nineteenth century alongside factory work and has mostly been practiced by women. ILO Home Work Convention 177, of 1996, in Article 1 defines the homeworker as a person who carries out work:

(i) in his or her home or in other premises of his or her choice, other than the workplace of the employer;
(ii) for remuneration;
(iii) which results in a product or service as specified by the employer, irrespective of who provides the equipment, materials or other inputs used,

> unless this person has the degree of autonomy and of economic independence necessary to be considered an independent worker under national laws, regulations or court decisions.[15]

D Pottschmidt, *Arbeitnehmerähnliche Personen in Europa: Die Behandlung wirtschaftlich abhängiger Erwerbstätiger im Europäischen Arbeitsrecht sowie im (Arbeits-)Recht der EU-Mitgliedstaaten* (Nomos, 2006); R Rebhahn, 'Arbeitnehmerähnliche Personen: Rechtsvergleich und Regelungsperspektive' [2009] *Recht der Arbeit* 236; A Perulli, 'Travail économiquement dépendant/ parasubordination: les aspects juridiques, sociales et économiques' (2003); T Gyulavári, 'Trap of the Past: Why Economically Dependent Work is not Regulated in the Member States of Eastern Europe' (2014) 5(3–4) *European Labour Law Journal* 267; F Rosioru, 'Legal Acknowledgement of the Category of Economically Dependent Workers' (2014) 5(3–4) *European Labour Law Journal* 279; M Risak and T Dullinger, 'The Concept of "Worker" in EU Law: Status Quo and Potential for Change' (Brussels, 2018) 14 et seq; an overview can be found in the Opinion of the European Economic and Social Committee on 'New trends in self-employed work: the specific case of economically dependent self-employed work,' OJ. C-18, 19.1.2011, 44–52.

[9] Autonomous and economically dependent workers; on these regulations see below at 3.4.3.4.

[10] Below at 3.4.2.6.

[11] Below at 3.4.3.4.

[12] JJ Abrantes, 'Dem Arbeitsvertrag "gleichgestellte Verträge" im portugiesischem Recht' [2000] *Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht* 266; JB Soravilla and I Herrezuelo, 'Der Schutz des "kleinen Freiberuflers"/selbstständig Erwerbstätigen: die spanische Lösung' [2010] *Europäische Zeitschrift für Arbeitsrecht* 127; on the former Italian 'parasubordinazione', see M Borzaga, 'Wirtschaftlich abhängige Selbständige in Italien und Deutschland: Eine rechtsvergleichende Analyse' in D Busch, K Feldhoff and K Nebe (eds), *Übergänge im Arbeitsleben und (Re) Inklusion in den Arbeitsmarkt: Symposium für Wolfhard Kohte* (Nomos, 2012); on the new Italian rules ('etero-organizzazione'), see below n 274.

[13] M Risak and R Rebhahn, 'The Concept of "Employee": The Position in Austria' in B Waas and GH van Voss (eds), *Restatement of Labour Law in Europe: Vol I: The Concept of Employee* (Hart Publishing, 2017) 20; G Wachter, 'Arbeitnehmerähnliche Personen im österreichischen Arbeits- und Sozialrecht' [2000] *Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht* 250.

[14] M Finkin, 'Beclouded Work in Historical Perspective' (2016) 37(3) *Comparative Labor Law & Policy Journal* 603.

[15] See also Home Work Recommendation 184 of the same year; ILO, 'Promoting' (n 7) 8–9.

Austrian homework regulation differs from this definition in that it only applies to manual labour.[16]

- Executive staff

On the flip side of these partial extensions of labour law protection, some jurisdictions exempt certain workers from labour law protection that would otherwise be covered by the general notion of employee.[17] The German Betriebsverfassungsgesetz (BetrVG, Works Constitution Act) and the Kündigungsschutzgesetz (KSchG, Unfair Dismissal Act), for example, do not cover *Leitende Angestellte*, ie employees with executive functions or managers with the ability to hire and fire others. In the context of German Brexit transition laws in February 2019,[18] the respective exemption in the law regulating unfair dismissal was extended to those employees in 'important financial institutions' who receive a certain high, fixed salary and are considered 'risk carriers' (German Kreditwesengesetz, s 25a(5a) (KWG, Banking Act)).[19] This marked the first time that German employment law used an absolute income level for worker classification.

- Other 'workers'

In some jurisdictions (like the German), further exemptions from labour law rights and obligations have been discussed for 'entrepreneur-like employees',[20] as well as further extensions to 'employee-like independents'.[21] German law, in addition, uses the term *Beschäftigte* (most closely translated as 'wage earners') as a generic term for various legal forms of paid work relationships. The term mainly serves to cover trainees, job applicants and civil servants.[22] Some of these categories may

[16] Risak and Rebhahn, 'Austria' (n 13) 20; M Risak, 'Crowdwork: Erste rechtliche Annäherungen an eine„neue"Arbeitsform' [2015] *Zeitschrift für Arbeits- und Sozialrecht* 11, 17–18 (those who 'produce, process, handle or package goods'). See also, for example, s 1 of the Ontario Employment Standards Act 2000, which covers homeworkers provided they are not independent contractors; for Italian law, see E Ales, 'The Concept of "Employee": The Position in Italy' in B Waas and GH van Voss (eds), *Restatement of Labour Law in Europe: Vol I: The Concept of Employee* (Hart Publishing, 2017) 359; on the German Heimarbeitsgesetz (HAG, Home Work Act) see below 3.4.2.7.

[17] For a comparative overview, see Waas, 'Comparative Overview' (n 8) xl-xl.

[18] Gesetz über steuerliche und weitere Begleitregelungen zum Austritt des Vereinigten Königreichs Großbritannien und Nordirland aus der Europäischen Union (Brexit-Steuerbegleitgesetz (Brexit-StBG, Brexit Tax Accompanying Act)), BGBl. 2019 I 357.

[19] Risikoträger und Risikoträgerinnen bedeutender Institute, according to s 1(21) KWG ('employees whose professional activities have a significant impact on the risk profile of an institution'). The reference point for the relevant income is three times the income threshold for contributions to the general pension insurance scheme (s 159 Sozialgesetzbuch VI (SGB VI, Social Security Code) vol VI).

[20] Bayreuther, NZA 2013, 1238 (unternehmerähnlicher Arbeitnehmer); Bauer/von Medem, NZA 2013, 1233; similarly for Austrian law: J Prassl and M Risak, 'The Legal Protection of Crowdworkers: Four Avenues for Workers' Rights in the Virtual Realm' in P Meil and V Kirov (eds), *Policy Implications of Virtual Work* (Springer International Publishing, 2017).

[21] Arbeitnehmerähnliche Selbstständige, relevant in the general pensions insurance law (s 2 no 9 Sozialgesetzbuch VI (SGB VI), vol VI.

[22] Section 4(1) Bundespersonalvertretungsgesetz (BpersVG, Work Constitution Act for the Federal Public Sector), s 4(1) Bundesgleichstellungsgesetz (BGleiG, Federal Equal Opportunities Act), s 2(2) Arbeitsschutzgesetz (ArbSchG, Occupational Safety and Health Act), s 7(1) Pflegezeitgesetz

be used for defining the application of a single act, while others may be used for broader purposes. For example, a third-party managing director would be considered an employer-like person rather than an employee-like person in labour tribunal procedure and employment protection;[23] she would, however, be treated as *Beschäftigte* (a wage earner) or even an employee in other areas of labour law.

Which exemptions from or extensions of labour law's rights and obligations exist greatly depends on the range of the employee category in the respective jurisdiction, as well as on the rights and obligations associated with it. Most notably, UK employment legislation establishes the category of 'worker' alongside that of 'employee', partly with a view to compensating for a narrow use of the category of employee.[24]

3.1.2. Triangular Work Relationships

The employment relationship is defined by the worker's position. As such, most analyses of the employment relationship investigate the category of employee exclusively from the perspective of the worker's rights. But there is more to the employment relationship than determining a worker's rights; labour law is not only about rights, after all, but also obligations. Hence, we must also ask who the law holds responsible for these obligations. This is particularly important in the context of dual or multi-employer situations, such as triangular or even quadrangular relationships, as they may obscure accountability for labour law obligations.[25] Such concerns are highly relevant for digital platform work, as triangular or multilateral relationships are a core feature of all digital platforms. Indeed, acting as an 'intermediary' between market actors is a central feature of these business models, independently of the specific contractual structures they may adopt.

- Homework

Homework is one of the oldest regulatory models for triangular work relationships.[26] It usually entails a sharing of responsibilities between an

(Nursing Care Act), s 6(1) Allgemeines Gleichbehandlungsgesetz (AGG, General Equal Treatment Act); for criticism *cf* R Richardi, 'Arbeitnehmer als Beschäftigte' [2010] *Neue Zeitschrift für Arbeitsrecht* 1101.

[23] BAG 21 Jan 2019, case 9 AZB 23/18, BAGE 165, 61 (the EU notion of employee was not applicable here; for the EU context *cf* below 3.4.1).

[24] Freedland and Kountouris, 'Legal Characterization' (n 7) 194; Nogler, *Concept of* '*Subordination*' (n 7) 117; H Sutschet, 'Neuere Tendenzen zur personellen Reichweite des Arbeitnehmerschutzes im englischen Arbeitsrecht' (2016) 9(2) *Europäische Zeitschrift für Arbeitsrecht* 171, 173.

[25] For a comparative overview: ILO, 'The Employment Relationship: Report V(1) for the International Labour Conference 95th Session 2006' (Geneva, 2005) 42–49; *cf* European Commission, 'Modernising Labour Law to Meet the Challenges of the 21st Century: Green Paper' (COM(2006) 708 fin); G Davidov, 'Re-Matching Labour Laws with Their Purpose' in G Davidov and B Langille (eds), *The Idea of Labour Law* (Oxford University Press, 2011).

[26] *cf* H Collins, 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws' (1990) 10 *Oxford Journal of Legal Studies* 353, 354. On the relevance for digital work platforms: Finkin, 'Beclouded Work' (n 14) (and below 3.4.2.7 on German law).

intermediary (ie an overseer) and the main customer. However, it is not the only case in which the law assigns employer responsibilities to more than one 'employer' – or in which more than one employer shares responsibilities.

- Temporary Agency Work

Another example is temporary agency work. In such instances, it is not the contractual employer (the temporary work agency) that actually makes use of the work, but rather its client (the undertaking user), to whom directional powers are transferred.[27]

For EU Member States, Temporary Agency Work Directive 2008/104/EC sets up some minimum standards for such work in light of the 'considerable differences in the use of temporary agency work and in the legal situation, status and working conditions of temporary agency workers within the European Union'.[28] Among EU Member States, temporary agency work mainly comes in two models. The agency model – used, for example, in France, Spain and Italy – usually establishes equal treatment of all workers by the undertaking user, while at the same time allowing for a limitation of the employment contract. In contrast, the employee leasing model – used, for example, in Germany – designs employment protection based on a permanent employment relationship with the temporary work agency.[29] In both models, the temporary work agency and its client (the undertaking user) share employers' liabilities, with the specific distribution of rights and obligations depending on the applicable model and regulation.[30]

Notably, in both of these models, temporary work agency regulation implies the existence of an employment relationship, ie the classification of workers as employees of the temporary work agency.

- The Indirect Employer: Piercing the Corporate Veil with Labour Law

In a more general perspective, questions as to the identity of the employer come up in innumerable ways whenever workers are part of a chain of contracts. Such cases have proliferated with the fragmentation and vertical disintegration of enterprises into distinct entities. Substituting employment relationships for civil-law

[27] For an analogy with digital work platforms: L Ratti, 'Online Platforms and Crowdwork in Europe: A Two-step Approach to Expanding Agency Work Provisions?' (2017) 38 *Comparative Labor Law & Policy Journal* 477; Prassl and Risak, 'Legal Protection' (n 20); D Biegoń, W Kowalsky and J Schuster, 'Schöne neue Arbeitswelt?: Wie eine Antwort der EU auf die Plattformökonomie aussehen könnte' (Berlin, 2017) 9–10; S Lingemann and J Otte, 'Arbeitsrechtliche Fragen der „economy on demand"' [2015] *Neue Zeitschrift für Arbeitsrecht* 1042.

[28] Directive 2008/104/EC on temporary agency work, OJ L327/9, Recital 10.

[29] E Kocher, *Europäisches Arbeitsrecht*, 2nd edn (Nomos Verlag, 2020) Ch 5, para 126.

[30] Directive 2008/104/EC is limited to promoting equality of treatment between temporary workers and the core workers at the client company/the user undertaking (Art 5) and guaranteeing access to employment, collective facilities and vocational training at the user undertaking (Art 6). Member States laws have established further rules and a further sharing of responsibilities.

contracts and turning employees into subcontractors has been one aspect of these developments.[31]

When 'employer' functions are divided among different entities, labour law has to find consistent rules for the sharing and assigning of employers' responsibilities. These sometimes include lifting the veil of corporate personality.[32] The shifting of responsibilities and obligations after a transfer of undertaking is an example for this endeavour.[33] Attempts to hold transnational enterprises accountable for human rights compliance in global production chains comprise another strand of the debate.[34]

A look into the history of labour law shows that this issue has been a recurrent theme.[35] As early as in the 1890s, when the German Bürgerliches Gesetzbuch (BGB, Civil Code) was debated in the Reichstag, two MPs from the Social Democratic Party tried to introduce a rule against 'cheating employers in building and construction', as well as 'tricksters' and 'capitalists especially keen on exploitation'.[36] They demanded that the party in whose benefit the employer uses

[31] Collins, 'Independent Contractors and the Challenge of Vertical Disintegration' (n 26) 354; *cf* D Weil, *The Fissured Workplace: Why Work Became So Bad For So Many and What Can Be Done to Improve It* (Harvard University Press, 2014); J Fudge, 'Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation' (2006) 44(4) *Osgoode Hall Law Journal* 609.

[32] *cf* S Deakin, 'What Exactly Is Happening to the Contract of Employment: Reflections on Mark Freedland and Nicola Kountouris's Legal Construction of Personal Work Relations' (2013) 7(1) *Jerusalem Review of Legal Studies* 135; A Hyde, 'Legal Responsibility for Labour Conditions Down the Production Chain' in J Fudge, S McCrystal and K Sankaran (eds), *Challenging the Legal Boundaries of Work Regulation* (Hart Publishing, 2012) 93; L Krüger, *Arbeitgeberähnliche Pflichten des Dritten in arbeitsrechtlichen Dreieckskonstellationen: Unter besonderer Berücksichtigung der Entgeltzahlung und des Kündigungsschutzes* (Nomos, 2017); A Heinen and R Petri, 'Arbeitgeberverantwortung in Dreiecksverhältnissen: Eine vergleichende Untersuchung des deutschen, brasilianischen und chilenischen Rechts' [2017] *Soziales Recht* 151. Other areas where this may be relevant concern company law, criminal law or tort law.

[33] Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ L82/16; Deakin, 'What Exactly Is Happening' (n 32); Krüger, *Arbeitgeberähnliche Pflichten* (n 32) 51 ff; 87 ff.

[34] eg European Parliament (ed), *Briefing 'Human Rights Due Diligence Legislation: Options for the EU'*, June 2020; French Act on Due Diligence in global production chains, LOI n° 2017–399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, JORF n°0074; S Cossart, J Chapliert and T Beau de Lomenie, 'The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All' (2017) 2(2) *Business and Human Rights Journal* 317–23.

[35] *cf* an older proposal from the 1980s by Heide Pfarr, as quoted in U Wendeling-Schröder, 'Anmerkungen zur Veränderung des Arbeitgeberbegriffs' in W Däubler, MH Bobke and K Kehrmann (eds), *Arbeit und Recht: Festschrift für Albert Gnade* (Bund-Verlag, 1992) 372–73: 'The assumption in the law is that people who work in a business are employees of the same company that conducts this business. Derogations from this principle require a cogent reason which must not reside in simply avoiding protection rights and employment-law claims.'

[36] Reporting in the socialist newspaper *Vorwärts* on 19 March 1896, rendered by T Vormbaum (ed), *Sozialdemokratie und Zivilrechtskodifikation: Berichterstattung und Kritik der sozialdemokratischen Partei und Presse während der Entstehung des Bürgerlichen Gesetzbuchs* (Walter de Gruyter, 1977) 199–200.

the labour also be held liable for the payment of wages.[37] Although their attempt did not succeed, different legal concepts have been developed since to conceptualise the sharing of employers' responsibilities.

The concept of the 'indirect employer' in German labour law belongs in this context. In cases where employees (natural persons) have been interposed between an employer and another employee, it assigns responsibilities to the indirect employer, ie the company that actually makes use of the work, in addition to or instead of the contractual employer.[38]

Other concepts in the German context that have been developed to grapple with these phenomena include the 'partial employment relationship' or the 'functional concept of employer'.[39] In other jurisdictions, similar concepts include that of the 'co-employeur' in French case law, the 'grupo laboral' in Spanish law, the legal notion of the 'associated employer' in English law, and the concepts of 'joint', 'quasi' or 'integrated' employers in US law, in addition to rules for 'piercing the corporate veil'.[40] All of these form part of a general development towards taking an economic view of employers' responsibilities, a topic that will be explored further later on in this book.[41]

[37] E Kocher, 'Das BGB von 1896/1900: Regelungen gegen Bauschwindler?' [2015] *Arbeit und Recht* 1; Vormbaum (ed), *Sozialdemokratie* (n 36) 184–85; 199–200; *cf* E Kocher, 'Die historische „Zeitschrift für soziales Recht" – 1928–1934: Gegenstände und Bedeutung des Konzepts in heutiger Zeit' [2013] *Soziales Recht* 53.

[38] BAG 9 Apr 1957, case 3 AZR 435/54, BAGE 4, 93; BAG 8 Aug 1958, case 4 AZR 173/55, BAGE 6, 232; BAG 26 Nov 1975, case 5 AZR 337/74, BAGE 27, 340; BAG 20 Jul 1982, case 3 AZR 446/80, BAGE 39, 200 and BAG 9 Sept 1982, case 2 AZR 253/80, BAGE 40, 145. For further cases *cf* Krüger, *Arbeitgeberähnliche Pflichten* (n 32) 113 ff.

[39] F Fabricius, *Rechtsprobleme gespaltener Arbeitsverhältnisse im Konzern: dargestellt am Rechtsverhältnis der Ruhrkohle AG zu ihren Betriebsführungsgesellschaften* (Luchterhand, 1982) 27, on Nikisch and Hueck's doctrine of the 'functional concept of the employer'. *cf* Bundessozialgericht (BSG, Federal Social Court) BSG 20 Dec 1962, case 3 RK 31/58, BSGE 18, 190; BAG 19 Jul 1957, case 1 AZR 161/56, RdA 1957, 400 (on port operations groups as functional employers). On Prassl's concepts (J Prassl, *The Concept of the Employer* (Oxford University Press, 2015)) below ch 4, 4.3.3.

[40] For an overview: F Temming, 'The Co-Employer (Mitarbeitgeber) – Can He Be Regarded as Employer for the Purpose of EU Labour Law?' [2017] *Zeitschrift für Gemeinschaftsprivatrecht* 125; *cf* Deakin, 'What Exactly Is Happening' (n 32); M-T Boetzkes, *Die Konzernmutter als Mitarbeitgeberin im französischen Recht* (Peter Lang Verlag, 2015); on the 'joint employer' in US law: A Felstiner, 'Working The Crowd: Employment And Labor Law In The Crowdsourcing Industry' (2011) 32 *Berkeley Journal of Employment and Labor Law* 143, 187 ff; C Estlund, 'Rethinking Autocracy at Work: Book Review: Elizabeth Anderson, Private Government: How Employers Rule Our Lives (And Why We Don't Talk About It)' (2018) 131 *Harvard Law Review* 795–826, 97; 824; Weil, *Fissured Workplace* (n 31) 207; United States Commission on the Future of Worker-Management Relations (Dunlop Commission), 'Final Report' (1994) 69; for an overview over the theories present in US law, see MH Rubinstein, 'Employees, Employers, and Quasi-Employers: An Analysis of Employees and Employers Who Operate in the Borderland Between an Employer-and-Employee Relationship' (2012) 14(3) *University of Pennsylvania Journal of Business Law* 605, 641–57 who uses the term 'quasi-employer'.

[41] Below ch 4, 4.3 and ch 7, 7.5.

3.2. A Cross-national Analysis of Employment Classification

The preceding section has shown that different categories of 'employee' and 'employer' exist. Consequently, definitions of what an employment relationship entails will also differ. One and the same work practice might be considered 'employment' in California, 'TRADE' in Spain, and 'homework' in Germany. The legal consequences, ie the specific bundle of rights and obligations associated with these categories in the respective legal system, will probably impact classification, be it explicitly (as a functional argument) or implicitly.

Nevertheless, policy proposals and critiques of labour law classification regarding digital platform work often generalise across the borders of jurisdictions – with good reason. Labour law is defined by its concern with the regulation of the relationship between worker and employer, which in turn is shaped by the power relations of the capitalist economy in which it is embedded. Consequently, for purposes of painting the broader picture, labour law's basic ideas can be treated as functionally equivalent across jurisdictions. As previous comparative accounts of labour law's categories have shown, differences between national labour law categorisation systems are found in the details rather than the general ideas.[42]

This is not to say that the legal and institutional contexts in which labour law is embedded do not display enormous differences. But they are better taken into account at a later stage of analysis, when issues like assigning rights and obligations and designing institutions and procedures are concerned.[43]

What then is the point of collecting examples and legal doctrines from a variety of different jurisdictions, as this book intends? After all, this is not a comparative exercise; it does not aim to identify differences or similarities. Rather, what I am looking to do here is to reconceptualise the rationales of labour law that justify employment classification. For such a reconceptualisation, it makes sense to start with a comprehensive spectrum of possible definitions and indicators. Collecting examples and considerations from a great variety of jurisdictions will enable an analysis that is as detached from specific institutional systems as possible.

[42] For comparative overviews, see ILO, 'Employment Relationship' (n 25); Waas, 'Comparative Overview' (n 8); Nogler, *Concept of 'Subordination'* (n 7); R Rebhahn, 'Der Arbeitnehmerbegriff in vergleichender Perspektive' (2009) 62(3) *Recht der Arbeit* 154; B Veneziani, 'The Employment Relationship' in B Hepple and B Veneziani (eds), *The Transformation of Labour Law in Europe: A Comparative Study of 15 Countries, 1945–2004* (Hart Publishing, 2009); N Countouris, *The Changing Law of the Employment Relationship: Comparative Analyses in the European Context* (Ashgate, 2007); MR Freedland and N Kountouris, *The Legal Construction of Personal Work Relations* (Oxford University Press, 2011) 44 ff; Davidov, Freedland and Kountouris, 'Subjects of Labor Law' (n 7); G Davidov, *A Purposive Approach to Labour Law* (Oxford University Press, 2016); Waas and van Voss (eds), *Restatement Vol I* (n 7); for China, see X Ban, 'Identifying Labour Relationship in the Sharing Economy: Judicial Practice in China' in L Mella Méndez and A Villalba Sánchez (eds), *Regulating the Platform Economy: International Perspectives On New Forms Of Work* (Routledge, 2020).

[43] Below ch 7.

Such a cross-national analysis needs a benchmark against which to structure national experiences, and the International Labour Organisation (ILO) Employment Relationship Recommendation No. 198 of 2006 (although not binding) is an excellent tool for these purposes.[44] It is a text created on a comparative basis and explicitly designed to speak to a diversity of jurisdictions all over the world.[45]

At its core, this chapter asks: Which unique features set the employment relationship apart from other contractual relationships? How have these features been defined and described? And how are they fit for capturing digital platform work?

The reconstruction undertaken in this chapter will be organised in three steps. First, section 3.3 offers insight into what has been called the 'typological method' of classification, as suggested by ILO Employment Relationship Recommendation 198. Next, section 3.4 reviews the variety of definitions, descriptions and indicators that have been used in different jurisdictions for labour law classification. And finally, section 3.5 offers an account of the attempts to fit the peg of digital platform work into the holes (ie, categories) thus defined and described, showing where exactly the incongruities lie. With this done, the stage will be set for the theoretical (chapter four) and interdisciplinary (chapter five) analysis of the reasons why digital work platforms do in fact fundamentally challenge the established systems of employment classification.

3.3. The Typological Method

Different jurisdictions describe the category of employment in slightly different ways. Yet, there is something similar in all these operations: the methodology of classification.

3.3.1. The Primacy of Facts and 'False Self-employment'

The determination of an employment relationship is a specific legal operation that differs from other methods of legal qualification. In order to explain these

[44] ILO, 'World Employment and Social Outlook: The Role of Digital Labour Platforms in Transforming the World of Work' (Geneva, 2021) 249; *cf* ILO, *Annotated Guide to the Recommendation* (Geneva, 2007).

[45] For more detail on the background and development: ILO, 'Employment Relationship' (n 25); Freedland and Kountouris, *Legal Construction* (n 42) 23–26; for its (limited) relevance for the personal scope of ILO Standards, see V de Stefano, 'Not as Simple as it Seems: The ILO and the Personal Scope of International Labour Standards' [2021] *International Labour Review*; On the role of this recommendation, see also ILO, Promoting employment and decent work in a changing landscape, General Survey, (Report III(B), International labour conference 109th session, 2020, 5. Note that the UK Court of Appeal in its recent *Deliveroo* judgment (below n 341) took the recommendation into account when interpreting the European Convention on Human Rights (ECHR).

methodological instruments, the ILO Employment Relationship Recommendation No. 198 of 2006 can serve as model. In its Part II, which deals with the 'Determination of the Existence of an Employment Relationship', Paragraph 9 establishes the principle of 'primacy of facts' over contract,[46] a rule that has also been dubbed the 'economic' or 'business perspective'.[47] It says:

> For the purposes of the national policy of protection for workers in an employment relationship, the determination of the existence of such a relationship should be *guided primarily by the facts* relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterised in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties. (emphasis added)

The rationale behind the 'primacy of facts' principle is intimately linked to the realisation that employers will often consider labour law rights and obligations as unwanted burdens. As employment relationships are characterised by unequal power between the parties, it will usually be the employer drawing up the contracts. Letting the wording of the contract prevail would therefore enable employers to choose the applicable legal regime.[48]

This is what the principle of primacy of facts is up against: It is designed to prevent 'regulatory arbitrage' and 'creative compliance'[49] with labour law obligations, ie strategies of businesses' '*post hoc* manipulation of the law to turn it – no matter what the intentions of the legislators or enforcers – to the service of their own interests and to avoid unwanted control'.[50] Giving primacy to facts instead of contracts is supposed to lessen the leeway available to employers for avoiding or circumventing labour law requirements. At its core, this approach invites us to look at the business model at stake rather than just read the contract.[51]

Paragraph 4(b) of ILO Recommendation 198 alludes to this rationale when it explains the notion of 'disguised employment relationships' in contrast to the notion of 'true legal status', with the following words:

> [National policy should …] combat *disguised employment relationships* in the context of, for example, other relationships that may include the use of other forms of contractual arrangements that hide the *true legal status*, noting that a disguised employment relationship occurs when the employer treats an individual as other than an employee

[46] For the concept and a comparative overview, see ILO, 'Employment Relationship' (n 25) 24–26.

[47] *cf* E Kocher, 'Private Macht im Arbeitsrecht' in F Möslein (ed), *Private Macht* (Mohr Siebeck, 2015) 275; Prassl, *Humans as a Service* (n 3) 96.

[48] W Däubler, 'Die offenen Flanken des Arbeitsrechts' [2010] *Arbeit und Recht* 142, 142–43.

[49] On these concepts, see ch 1, nn 56 and 57; for labour law, see also C Estlund, 'What Should We Do After Work?: Automation and Employment Law' (2018) 128 *Yale Law Journal* 254–326.

[50] D McBarnet and C Whelan, 'The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control' [1991] *Modern Law Review* 848.

[51] For an example of how looking at the economic reality (or substance) of a particular transaction and adopting a more purposive rather than literal approach to the interpretation of the statute has fuelled a similar 'new realist' approach to tax avoidance: AHLP Donovan, *Reconceptualising Corporate Compliance: Responsibility, Freedom and the Law* (Hart Publishing, 2021) 19 ff.

> in a manner that hides his or her true legal status as an employee, and that situations can arise where contractual arrangements have the effect of depriving workers of the protection they are due. (emphasis added)

3.3.2. Indicator Clustering According to Descriptive Categories

The primacy of facts principle has given rise to a specific methodology of classifying employment relationships. The ILO Employment Relationship Recommendation 198 outlines the basic technique of classification in paragraphs 12 and 13. After 'defining the conditions applied for determining the existence of an employment relationship, for example, subordination or dependence' (para 12), 'specific indicators of the existence of an employment relationship' should be defined (para 13).

Although the ILO Recommendation sets out the basic instruments of classification, it is not intended to orientate national courts directly. As an international and non-binding standard addressed to national legislators, it can only give a very rough idea of the legal methodology that could be used to put this into practice. German law offers an example of how a critical analysis of facts can be designed to enable the facts to take precedence over contractual design in a private law environment. In a 1996 decision, the German Bundesverfassungsgericht (BVerfG, Federal Constitutional Court) found that the method of classification in social security law (analogous to labour law) differs from the usual doctrinal work of lawyers. Rather than rely on 'a sharply-defined concept [of subordination] that could inspire simple subsumption', this method of classification creates 'a *legal type*', meaning that the persons covered 'are not defined but are *described* in the form of a type that takes its orientation from a certain standard case. … The decisive issue is *the overall picture*' (emphasis added).[52]

Classification, then, is ultimately based on a legal *description* instead of a legal *definition*. This regulatory technique is vital for the typological method. In addition to implementing the primacy of facts, this specific methodology of classification is not only supposed to prevent companies from construing *contracts* in a way so as to avoid labour law, but also to prevent them from construing *the facts* in such a way as to avoid employment classification.

From a constitutional point of view, the court endorsed this method by pointing to its specific purpose in labour and social security law: 'Thanks to the use of the "type" as a legal concept, the rules – over decades and in changing social conditions – have been able to fulfil their purpose and to preclude circumvention to the detriment of dependent workers.'[53] A strict legal definition would indicate

[52] BVerfG 20 May 1996, case 1 BvR 21/96, NZA 1996, 1063, para 7.
[53] BVerfG, case 1 BvR 21/96 (n 52).

to businesses which facts (maybe minor) would need to be altered to creatively engender classification as independent contracting. By focusing on a description of the typical features of the case at hand instead of single and specific criteria defined before the event, a typological description enables courts to look at the entirety of the business model and its inherent dynamics for work relationships, as well as what imperatives the business model entails for the management of workers. The courts are supposed to do this by comparing the case to a 'type', ie to a typical employment relationship, without giving individual facts too much importance. Notably, this method only works if there are certain features of a contract and its implementation (the 'facts') that cannot easily be manipulated by companies into creative compliance.

The description ultimately and necessarily comes with the primacy-of-facts principle. Criticism that this approach leads to dissolving the difference between being and ought ('Sein und Sollen')[54] is unfounded: The law has to use facts to classify, and the type is still being described by the law. The problem with employment classification is not the use of a descriptive type instead of a definition, but lacking clarity about the functions and specific features of the type described by the law.[55]

To summarise, the typological method consists of three steps:[56]

- certain *criteria* are established as a test to *describe* a 'type' (often also referred to as a 'category' in comparative literature);
- facts are identified as *indicators* of a type;
- the indicators are *clustered*[57] by way of an 'overall assessment' in order to establish classification as a type.

3.3.3. 'Grey Zones': Features of the Typological Method

While this may seem straightforward, the method comes with several problems. One is the indeterminacy inherent in the use of a description instead of a definition. This indeterminacy is significantly greater than that which is already to

[54] U Preis, '§ 611a BGB' in R Müller-Glöge, U Preis and I Schmidt (eds), *Erfurter Kommentar zum Arbeitsrecht*, 19th edn (Beck, 2019) para 53; on the debate, see references below n 115.

[55] It will be discussed below at n 201 and at 3.6 (at n 412) what is missing in order to get to an effective 'typological-functional method' (L Nogler, 'Die typologisch-funktionale Methode am Beispiel des Arbeitnehmerbegriffs' [2009] *Zeitschrift für Europäisches Sozial- und Arbeitsrecht* 461). My use of the terms 'definition' vs 'description' therefore differs slightly from the ILO's use as explained in ILO, 'Employment Relationship' (n 25) 19–21.

[56] *cf* the structures of the reports in Waas and van Voss (eds), *Restatement Vol I* (n 7); on the method, see R Wank, 'Der Arbeitnehmer-Begriff im neuen § 611a BGB' [2017] *Arbeit und Recht* 140, 149; B Rüthers, C Fischer, and A Birk, *Rechtstheorie*, 11th edn (CH Beck, 2020) margs 930 ff.

[57] Term used by A Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (A report prepared for the European Commission. with María Emilia Casas, Jean de Munck, Peter Hanau, Anders L. Johansson, Pamela Meadows, Enzo Mingione, Robert Salais, Paul van der Heijden tr, Oxford University Press, 2001) 12.

be expected in any legal operation. In short, the typological method necessarily creates 'grey zones'.[58]

This high level of legal uncertainty in labour law classification has always bothered actors, particularly employers, businesses and employee representatives.[59] The stakes are high in the sense that misclassification poses serious economic and social risks.[60] In most jurisdictions, only a final court decision will be able to decisively determine the correct classification. Another problem closely related to the high degree of indeterminacy is that of enforcement. It is not only contractual partners that act in an area of high legal uncertainty, but also public enforcement agencies and other enforcement actors.

In recent decades, a third problem has also become more and more apparent due to the fissuring of workplaces, the fragmentation of organisations, and the emergence of 'new self-employment'.[61] Labour law's descriptions have been developed for a specific type of employment and they work well for those work relationships that exhibit the features of the type. They are harder to apply, however, to 'atypical' work practices that have arisen in numerous jurisdictions over the last few decades, creating grey zones in which atypical business models and work organisations have been classified as 'employment' by some courts and as 'independent contracting' by others. The case of digital work platforms is just one example of this problem.

3.3.4. Misclassification: 'Disguised' or 'False' Employment?

This brings up another puzzle of terminology. ILO Recommendation 198 uses the term 'disguised employment' (para 4(b)) to indicate work relationships that possess the dominant traits of an employment relationship without having been designated as such in the contract. The term 'disguised' suggests intention and ill will on the side of the employer.[62]

But creative compliance as understood here is not always about bad faith. Similarly, the purpose of the primacy of facts principle is not limited to uncovering

[58] Veneziani, 'Employment Relationship' (n 42) 119; European Commission, 'Modernising Labour Law' (n 25) 3.

[59] The indeterminacy problems have been described, for example, by the European Commission, 'Modernising Labour Law' (n 25).

[60] See also V Daskalova, 'The Competition Law Framework and Collective Bargaining Agreements for Self-Employed: Analysing Restrictions and Mapping Exemption Opportunities' in B Waas and C Hießl (eds), *Collective Bargaining for Self-Employed Workers in Europe: Approaches to Reconcile Competition Law and Labour Rights* (Wolters Kluwer, 2021) on the specific risks associated with competition law fines.

[61] For the term: K Schulze Buschoff and C Schmidt, *Neue Selbstständige im europäischen Vergleich: Struktur, Dynamik und soziale Sicherheit* (Edition Hans-Böckler-Stiftung, Setzkasten, 2007). On these developments below ch 5, n 33 ff.

[62] The term 'bogus' employment carries this implication even clearer (used by eg Hans Dietrich and Alexander Patzina, 'Bogus self-employment in Germany. Also a question of definition', IAB-Forum. The Magazine of the Institute for Employment Research, 3 April 2018).

bad intentions. At its core, the primacy of facts principle is able to establish the binding and mandatory nature of employment laws.[63] It is designed to leave no choice to businesses as to the contractual model. The principle of primacy of facts and the typological method it entails enable courts to identify employment relationships and implement labour law even in grey zones. This is what the somewhat more neutral term of 'false self-employment' addresses, without necessarily implying that an actor wilfully disrespected the law.[64]

3.4. Descriptions and Indicators for Employment

The previous section has explained the method that results from the principle of primacy of facts as incorporated in ILO Recommendation 198, assuming that national legal systems deal with the problem it tackles in one way or another. This section now looks at the legal categories (types), descriptions (tests), indicators and methods that have been developed in different jurisdictions for classifying work relationships as 'employment'.

These national examples are meant to visualise and synthesise a typology that can later be used to indicate ways in which digital platform work either fits the typology's categories or not. In other words, this section describes the instruments and materials labour lawyers have in hand when confronted with the task of classifying digital platform work.

3.4.1. The Law of the European Union

As far as EU law applies, Member States are not free to define the application of their domestic laws. Wherever Member States implement EU law in the field of social policy, the European autonomous concept of worker applies.[65] That is why this cross-national account of descriptions and indicators of employment starts with the categories, descriptions and indicators developed and used by the European Court of Justice (ECJ).

3.4.1.1. The 'Lawrie-Blum' Criteria

The ECJ first developed its autonomous notion of 'worker' for EU law in the area of free movement of workers. The notion marked the line between free movement of

[63] Waas, 'Comparative Overview' (n 8) liii–liv.

[64] The term 'pseudo self-employment' has similar connotations (used by eg P Popp, 'Issues of employment status: pseudo self-employment and hidden personnel leasing in Germany', blog network Norton Rose Fulbright, Global Workplace Insider, 6 June 2018). More on these questions below at 3.4.2.5.1 and 3.4.3.1.

[65] Kocher, *Europäisches Arbeitsrecht* (n 29) ch 1 margs. 105; 136–49.

workers (now Article 45 of the Treaty on the Functioning of the European Union (TFEU)), on the one hand, and the freedom of independent businesses to provide services (Article 56 TFEU) as well as their freedom of establishment (Article 49 TFEU),[66] on the other. Subsequently, however, the ECJ transposed this notion into anti-discrimination law and, later, into almost every area of social policy and labour law. The court has been criticised for this transposition,[67] as the context of its initial cases and decisions continue, at least in part, to shape the concept.[68] Remarkably, the use of the term 'self-employed' in the Commercial Agents Directive 86/653/EEC has not yet received attention in this respect.[69]

The ECJ's general ideas and definitions for the autonomous notion of 'worker' were first brought forward in 1986 with the *Lawrie-Blum* case. This case concerned a British national who had passed the first German state examination for the profession of teacher, but was then refused admission to the preparatory service leading to the second state examination. Candidates admitted to the preparatory service are appointed as temporary civil servants, which was the rationale for restricting admission to persons who qualified for appointment to the civil service, ie to German nationals (among other conditions).

The ECJ held that Ms Lawrie-Blum fell under the term of 'worker' in what is now Article 45 TFEU, and therefore, should enjoy the freedom of movement accorded to workers in the EU. The requirements of 'economic activity' and 'real and genuine activity' it established in reaching this decision can be disregarded here, as they represent general requirements for the application of economic freedoms in the EU; they are not meant to distinguish 'workers' from the self-employed.[70] For the latter purpose, the court called for a broad definition of the concept of 'worker', defining it 'in relation to objective criteria' and stating 'the essential feature of an employment relationship' as follows:

> [F]or a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.[71]

[66] Which, according to Art 49(2) TFEU, includes 'the right to take up and pursue activities as self-employed persons'; see eg Case C-577/10 *European Commission v Kingdom of Belgium* [2012] ECLI:EU:C:2012:814.

[67] A Junker, 'Die Einflüsse des europäischen Rechts auf die personelle Reichweite des Arbeitnehmerschutzes: Der Arbeitnehmerbegriff in der Rechtsprechung des Europäischen Gerichtshofs' (2016) 9(2) *Europäische Zeitschrift für Arbeitsrecht* 184; K Ziegler, *Arbeitnehmerbegriffe im Europäischen Arbeitsrecht* (Nomos 2011); Risak and Dullinger, *Concept of "Worker"* (n 8), 46.

[68] E Kocher, 'Die wirtschaftliche Betrachtungsweise des Arbeitsverhältnisses im Recht der Europäischen Union' in U Faber and others (eds), *Festschrift für Wolfhard Kohte* (Baden-Baden, Nomos Verlag, 2016); Kocher, *Europäisches Arbeitsrecht* (n 29), ch 1, para 132.

[69] Directive 86/653/EEC on the coordination of the laws of the Member States relating to self-employed commercial agents, OJ L382/17, Art 1(2): '"commercial agent" shall mean a self-employed intermediary who has continuing authority to negotiate the sale or the purchase of goods on behalf of another person'; *cf* Case C-828/18 *Trendsetteuse* [2020] ECLI:EU:C:2020:438 on the term 'negotiate'.

[70] For a review of the case law, see Risak and Dullinger, 'Concept of "Worker"' (n 8); on the variety of notions in European Union law in more detail, see Kocher, *Europäisches Arbeitsrecht* (n 29) ch 1, margs. 136–58.

[71] Case 66/85 *Lawrie-Blum* [1986] ECLI:EU:C:1986:284, para 17.

While the aspect of receiving remuneration was by and large intended to identify the existence of an economic work relationship on a labour market as opposed to non-economic transactions (to distinguish free movement of workers from free movement of citizens), the main focus of the definition lies on work 'for and under the direction of another person'.

3.4.1.2. The 'Allonby' Formula of Disguised Employment

The 2004 *Allonby* case made this even clearer. This case concerned a lecturer whose employment contract had been changed into an independent service contract with an agency, and who now wanted to be treated equally to her colleagues who still had employment contracts. Here, the ECJ clarified that the interpretation of 'worker' in what is now Article 157(1) TFEU excluded 'independent providers of services who are not in a *relationship of subordination* with the person who receives the services' (emphasis added).[72]

The *Allonby* decision also established the notion of 'disguised employment' and clarified that the legal characterisation and form of the relationship under national law cannot be decisive when classifying a worker under EU law.[73] Several years later, in the 2010 *Danosa* decision, the ECJ formulated its notion of 'disguised employment' as follows:

> Similarly, formal categorisation as a self-employed person under national law does not exclude the possibility that a person may have to be treated as a worker [under EU law] if that person's independence is merely notional, thereby disguising an employment relationship within the meaning of that directive.[74]

While this formula has been interpreted as establishing the principle of primacy of facts within EU law, it is not identical with said principle. Although it does refer to instances of misclassification or false employment ('formal categorisation', 'merely notional'), it also points to defining the area of competence of European law in relation to national law. Hence, it tells us as much about the facts overriding the contractual definition as it does about EU law overriding the national law of the Member State.

Notwithstanding this caveat, the ECJ demands that the national courts use a typological methodology to discover misclassification. In *Danosa*, it states:

> The answer to the question whether a relationship of subordination exists within the meaning of the above definition of the concept of 'worker' must, in each particular case,

[72] Case C-256/01 *Allonby v Accrington and Rossendale College* [2004] ECLI:EU:C:2004:18, paras 67 and 68.

[73] Case C-256/01 (ibid), para 71.

[74] Case C-232/09 *Dita Danosa v LKB Līzings SIA* [2010] ECLI:EU:C:2010:674, para 41; C-256/01 (n 73), para 71; recalled, inter alia, Case C-216/15 *Betriebsrat der Ruhrlandklinik*) [2016] ECLI:EU:C:2016:883, para 27.

> be arrived at *on the basis of all the factors and circumstances characterising the relationship between the parties*.[75] (emphasis added)

As an example of the indicators that could be used in making such a determination, it is worth taking a closer look at the *Danosa* case. Ms Danosa, a member of a Latvian company's Board of Directors, was removed from this post when she got pregnant, and the ECJ held that it was possible that she had to be regarded as a 'worker' within the meaning of the Pregnant Workers Directive 92/85/EEC.[76] Considering the circumstances in which Ms Danosa was recruited as a Board Member, the nature of her duties, the context in which those duties were performed, the scope of her powers, the extent to which she was supervised within the company, and the circumstances under which she could be removed, the ECJ came to the conclusion that she prima facie satisfied the criteria for being classified as a 'worker' under EU law.[77]

Interestingly, in this decision the ECJ also incidentally pointed out that Ms Danosa provided services to a company of which she was 'an integral part', thereby seemingly adopting organisational integration as an important indicator, complementary to subordination.[78]

3.4.1.3. The 'FNV Kunsten' Case

The *Danosa* decision has been widely interpreted as a first step in extending the *Lawrie-Blum* definition.[79] With the 2014 *FNV Kunsten* case, however, the ECJ went much further.[80] This case concerned a collective agreement on minimum rates for members of an orchestra. It revolved around the question of whether the collective agreement at stake, that also laid down minimum fees for independent service providers, fell within the substantive scope of Article 101(1) TFEU (and restricted free trade and competition), or if it did not fall within the scope of the norm because it constituted the result of a collective negotiation between employers and employees. In its decision, the ECJ stated:

> It follows that the status of 'worker' within the meaning of EU law is not affected by the fact that a person has been hired as a self-employed person under national law, for tax, administrative or organisational reasons, as long as that person acts under the

[75] C-232/09 *Danosa* (n 75), para 46.

[76] Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, OJ L348/1.

[77] C-232/09 *Danosa* (n 75), para 47.

[78] C-232/09 *Danosa* (n 75), para 48.

[79] R Wank, 'Der Arbeitnehmerbegriff in der Europäischen Union: Praktische Konsequenzen' [2018] *Europäische Zeitschrift für Arbeitsrecht* 327, 333.

[80] M Freedland and N Kountouris, 'Some Reflections on the 'Personal Scope' of Collective Labour Law' (2017) 46(1) *Industrial Law Journal* 52, 59–65; Junker, 'Einflüsse des europäischen Rechts' (n 68) 195; Wank, 'Arbeitnehmerbegriff in der EU' (n 80) 333.

> direction of his employer as regards, in particular, his freedom to choose the time, place and content of his work …, does not share in the employer's commercial risks …, and, for the duration of that relationship, forms an integral part of that employer's undertaking, so forming an economic unit with that undertaking …[81]

The significance of this definition for the concept of 'worker' in EU law is not at all clear.[82] Due to its context in Article 101(1) TFEU, the *FNV Kunsten* decision defines the 'worker/employee' (for labour law) as much as it does the 'undertaking' (for competition law).

On the one side, the *FNV Kunsten* judgment starts with the *Lawrie-Blum* definition, seemingly clarifying it. The fact that the court mentions the notion of false self-employment also points to 'worker' being considered the relevant category. If interpreted in this vein, the decision would have added new criteria or indicators to the *Lawrie-Blum* definition, such as the bearing of commercial risks of the activity and the lack of an independent economic unit.

An important argument along these lines comes from the court's citation of the *Agegate* case, a 1989 case that concerned fishermen on board British vessels who were paid on the basis of the proceeds of sale from their catches. At the time, the ECJ held that this fact did not exclude the application of the free movement of workers. In this context, the ECJ used a classification of 'worker' that was established in the negative, ie by determining 'whether such a relationship is absent'. Among the factors and circumstances characterising the arrangements between the parties, the court not only mentioned 'the freedom for a person to choose his own working hours and to engage his own assistants', but also 'the sharing of the commercial risks of the business'.[83]

The *FNV Kunsten* decision mostly refers to competition law cases. In this area, the concept of 'undertaking' is used to define the 'independent economic operator' that is bound by rules of free competition, whereas an economic unit that has been 'incorporated' into another undertaking by forming an integral part of it would not be addressed by Article 101 TFEU. Here, identifying the person that bears the financial and commercial risks of the economic activity concerned serves as an important indicator for classification as an 'undertaking'.[84]

While juxtaposing the notions of 'worker/employee' and 'undertaking' in *FNV Kunsten*, the ECJ seems to imply that there are parallel binary divisions in labour law and competition law, according to which a person can only be a worker or an undertaking.[85] But the fact that the ECJ seems to answer questions of labour

[81] Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* [2014] ECLI:EU:C:2014:2411, para 36; the decision is analysed in more detail in ch 7, 7.6.3.2, at n 215 ff.

[82] Junker, 'Einflüsse des europäischen Rechts' (n 68) 195.

[83] Case C-3/87 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Agegate Ltd* [1989] ECLI:EU:C:1989:650, para 36.

[84] *cf* Case C-22/98 *Becu and Others* [1999] ECLI:EU:C:1999:419, para 26; Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio* [2006] EU:C:2006:784, paras 43 and 44.

[85] That is why Freedland and Kountouris, 'Some Reflections' (n 81), 59 consider the decision as just another example for a strict binary divide.

law and competition law simultaneously, without accounting for the relationship between these two areas of law and possible differences, makes it difficult to assess the specific quality and relevance of the *FNV Kunsten* judgment outside of competition law and collective bargaining. After all, it is not at all clear that the two areas of the law should mirror each other so completely, as the ECJ's *FNV Kunsten* decision seems to imply.[86]

Notwithstanding this lack of clarity, the ECJ admits in its *FNV Kunsten* decision that it was confronted with a problem that had perhaps not yet been solved in a satisfactory manner – neither in competition law nor in labour law. Significantly, the ECJ stated that 'in today's economy it is not always easy to establish the status of some self-employed contractors as "*undertakings*"'[87] by citing a paragraph in the Advocate General's opinion where the latter admits 'that, in today's economy, the distinction between the traditional categories of *worker* and self-employed person is at times somewhat blurred'[88] (emphases added).

3.4.1.4. The European Commission's Regulatory Attempts

In view of these problems, the European Commission has for a long time been trying to establish an autonomous European concept of 'worker' that would be applied in all instances in which European labour law and social policy pertain. The concept was supposed to ensure that workers could 'exercise their employment rights, regardless of the Member State where they work'[89] – and to ensure this, it would have to be adaptable to novel work relationships. In 2006, however, the Commission's Green Paper 'Modernising labour law to meet the challenges of the 21st century' failed spectacularly, as the debate around the notion of 'worker' got caught up in the controversies around the 'flexicurity' approach promulgated in the Green Paper.[90]

In the end, it proved to be the European Commission's last attempt for the next 10 years to take initiative in the regulation of fundamental questions of labour law. Only with the European Pillar of Social Rights – a joint proclamation by the European Parliament, the Council and the European Commission in November 2017 – did European legislation once again take up some of the issues addressed in the 2006 Green Paper. In particular, the Commission intended what was later

[86] See in detail below ch 7, 7.6.3.2., at n 215 ff.

[87] C-413/13 *FNV Kunsten* (n 82) para 32.

[88] AG Wahl, Case C-413/13 Opinion in *FNV Kunsten* [2014] ECLI:EU:C:2014:2215, margs. 51–52; he illustrated his statement with cases 'in which the working relationship between two persons … did not … fall neatly into one or other category, displaying features characteristic of both'.

[89] European Commission, 'Modernising Labour Law' (n 25) question 12.

[90] U Preis, 'Grünbuch und Flexicurity: Auf dem Weg zu einem modernen Arbeitsrecht?' in H Konzen and others (eds), *Festschrift für Rolf Birk zum siebzigsten Geburtstag* (Mohr, 2008); R Wank, 'Das Grünbuch Arbeitsrecht: Eine Perspektive für das europäische Arbeitsrecht?' (2007) 62(7–8) *Arbeit und Recht* 244; H Pfarr, 'Flexicurity: Ein Konzept für das Arbeitsrecht der Zukunft?' [2007] *WSI-Mitteilungen* 416.

to become Directive (EU) 2019/1152 on Transparent and Predictable Working Conditions[91] to encapsulate a new, autonomous, and far-reaching definition of 'worker'. Recital 8 of the Directive tells us something about the Commission's original intentions. It starts by mentioning ECJ case law, including *Lawrie-Blum* and *FNV Kunsten*, and goes on to state that 'domestic workers, on-demand workers, intermittent workers, voucher based-workers, platform workers, trainees and apprentices could fall within the scope of this Directive'.[92] However, this assumption is then mitigated by admitting that these workers would only be covered by the Directive if 'they fulfil [the] criteria' deriving from the case law of the ECJ.

As for its explicit regulations, Article 1(2) of Directive 2019/1152 refrains from any attempt to autonomously define 'worker' and instead refers to 'every worker in the union who has an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each Member State with consideration to the case-law of the Court of Justice'. This marks quite the departure[93] from the Commission's original intent to specify indicators for the ECJ's long-standing *Lawrie-Blum* description of 'worker' or to at least codify it.[94]

3.4.1.5. Summary: Field of Application of the EU Notion of Employment

Summing up, we find the following main criteria for classification as a 'worker' (ie employee for the purpose of this book[95]) in ECJ case law:[96]

- performance of services for and under the direction of another person (*Lawrie-Blum*);
- remuneration in return for these services (*Lawrie-Blum*);
- no share in the employer's commercial risks (*FNV Kunsten*);
- forming an integral part of the employer's undertaking, ie forming an economic unit within it (*FNV Kunsten*).

[91] Directive (EU) 2019/1152 on transparent and predictable working conditions in the European Union, OJ L186/105.

[92] ibid, Recital 8.

[93] RA Achleitner, 'Plattformbasierte Arbeit als Herausforderung der EU: Handlungsperspektiven und aktuelle Initiativen der Union' [2020] *Zeitschrift für Europäisches Sozial- und Arbeitsrecht* 363, 366: 'a missed opportunity'; U Preis and K Morgenroth, 'Die Arbeitsbedingungenrichtlinie 2019/1152/EU – Inhalt, Kontext und Folgen für das nationale Recht (Teil I)' [2020] *Zeitschrift für Europäisches Sozial- und Arbeitsrecht* 351; M Henssler and B Pant, 'Europäisierter Arbeitnehmerbegriff: Regulierung der typischen und atypischen Beschäftigung in Deutschland und der Union' [2019] *Recht der Arbeit* 321; nevertheless hoping for innovative implementation by the Member States: Don't Gig Up, *Policy Recommendations* (Jan 2020).

[94] European Commission, Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union, COM(2017) 797, Art 2(a); *cf* Risak and Dullinger, 'Concept of "Worker"' (n 8) 48.

[95] On the use of the term 'worker' for the purposes of this book, see ch 1, 1.5.

[96] Notwithstanding some other criteria that have, from time to time, been mentioned in passing (see text at n 84).

As for methodology, the ECJ has always stressed that the determination of the existence of an employment relationship should be guided by the facts relating to the actual performance of the work and not by the parties' description of the relationship. Therefore, the ECJ implicitly suggests adopting the primacy of facts principle and utilising the typological method, albeit with the double objective of protecting the 'worker' (employment) category and protecting the competence of EU law in defining the employment relationship autonomously.[97]

The ECJ has also implicitly addressed the contrast between notions of 'disguised employment' and 'false self-employment' mentioned above.[98] While it used the term 'disguised employment' in and since the 2004 *Allonby* decision, the 2014 *FNV Kunsten* case marked a transition to the use of 'false self-employment', although the ECJ still seems to use the terms without much differentiation.[99]

Last but not least, a note on the field of application of the autonomous EU category of 'worker': Apart from Article 45 and Article 157 TFEU, the autonomous definition of 'worker' has also been used in the context of several Directives, most notably the Anti-Discrimination Directives.[100] In contrast, a number of Directives expressly state that the concept of 'worker' is determined 'as defined by the law, collective agreement or practice in force in each Member State',[101] or as 'any person who, in the Member State concerned, is protected as an employee under national employment law'[102] and 'in accordance with national practice'.[103] For these Directives, the autonomous concept of 'worker' does not apply. Directives 2019/1152 on Transparent and Predictable Working Conditions and 2019/1158 on Work-Life Balance take an uneasy middle-road by pointing to the concepts 'as defined by the law, collective agreements or practice in force in each Member State, taking into account the case-law of the Court of Justice'. The EU Commission has failed more than once in its attempt to streamline a unitary and broad approach to the worker category.

As these differences demonstrate, there is still significant room for Member States to assert their own definitions – including the wide scope the ECJ leaves for national courts in applying definitions and categories, and particularly in determining indicators for such categories.

[97] See text above at n 66.

[98] Above at 3.3.4.

[99] Case C-413/13 *FNV Kunsten* (n 82) paras 31, 38, 39, 41, 42 ('false self-employed'); para 35 ('disguising an employment relationship').

[100] Kocher, *Europäisches Arbeitsrecht* (n 29) ch 1 marg 136. This concerns Directives 2006/54/EC, 2000/43/EC and 2000/78/EC, Pregnant Workers Directive 92/85/EC, Working Time Directive 2003/88/EC, Employee Protection at Insolvency Directive 2008/94/EC and Collective Redundancies Directive 98/59/EC (disputedly, see Junker, 'Einflüsse des europäischen Rechts' (n 68) 187–88). See also Art 2 of Framework Directive 89/391/EEC on Safety and Health at Work for a slightly adapted description.

[101] Kocher, *Europäisches Arbeitsrecht* (n 29) ch 1 marg 151. This concerns Part-Time Work Directive 97/81/EC and Fixed-Term Work Directive 99/70/EC.

[102] ibid, para 151. This concerns Temporary Agency Directive 2008/104/EC and Transfer of Undertaking Directive 2001/23/EC.

[103] ibid, para 151. This concerns Information and Consultation Directive 2002/14/EC.

3.4.2. German Law

Several comparative accounts of labour law's categories across different jurisdictions exist, each undertaken with different goals and methods.[104] While these show that the employment relationship is generally associated with basic ideas about dependency, subordination and control across different jurisdictions, as soon as we take a deeper look into specific cases, ways of arguing and fields of application, differences between national approaches come to the fore.

This book does not seek to provide another comparative analysis of employment classification. Instead, it builds on the existing scholarship by highlighting the existing variety of ideas across jurisdictions. In order to understand the challenges digital platform work presents for labour law classification, we must account for the ideas upon which the latter is built. This section therefore presents a collection of possible categories, definitions, descriptions, tests, indicators and methods in as comprehensive a manner as possible – starting with the German experience.

3.4.2.1. The Legislative Context

In April 2017, a statutory description of 'employment contract' was introduced in the German Bürgerliches Gesetzbuch (section 611a(1) BGB, Civil Code) for the first time ever. Now whenever the term employee (*Arbeitnehmerinnen und Arbeitnehmer*) is encountered in German legislation, collective agreement, or jurisprudence, it is to this description that it refers.

Prior to April 2017, employment classification was a case-law exercise, mainly dedicated to distinguishing contracts for services only governed by general contract law (independent service contracts) and contracts for services delivered in 'personal dependence' (employment contracts). The wording of today's section 611a(1) BGB definition approximates a literal rendering of the Federal Labour Court's descriptions in a series of judgments, designating 'subjection to instructions' as the central feature of employment.[105]

The historical background of this description of employment goes back to the nineteenth century, when private and civil law tended to disregard *die soziale Frage* (the social question), instead 'narcissistically brooding over the doctrinal structures of Roman law'.[106] It was social security law, particularly Bismarck's

[104] See above n 42.

[105] BAG, case 10 AZR 282/12 (n 128); BAG, 15 Febr 2012, 10 AZR 301/10, NZA 2012, 731, para 13; BAG, case 5 AZR 499/06 (n 119) para 13.

[106] U Preis, 'Von der Antike zur digitalen Arbeitswelt: Herkunft, Gegenwart und Zukunft des Arbeitsrechts' [2019] *Recht der Arbeit* 75, 77–80; in detail on these early discussions: M Becker, *Arbeitsvertrag und Arbeitsverhältnis in Deutschland: Vom Beginn der Industrialisierung bis zum Ende des Kaiserreichs* (Vittorio Klostermann, 1995) 219 ff.

social security legislation in the 1880s, that laid the foundation for the description of 'employment' that is currently being used today.[107] Even before Philip Lotmar published his landmark treatise on the employment contract in 1902,[108] the Reichsversicherungsamt (RVA), the administrative agency responsible for implementing social security laws, had already referred to managerial instructions as the guiding idea for the establishment of what defines an 'employee' since 1887.[109]

In (West) German labour law since 1945, the description used in case law and now codified in section 611a(1) BGB has classified the employment relationship (or the employment contract, respectively) against three neighbouring concepts. The description is supposed to:

- distinguish employment from independent service contracts;
- distinguish employment from self-employment in economic dependence;[110] and
- (most recently) identify the employer in trilateral relationships and distinguish a standard employment relationship from temporary agency employment.[111]

3.4.2.2. The Primacy of Facts

As for the method of classification, section 611a(1) BGB codifies, in sentence 6, the principle of primacy of facts. It says:

> If the actual implementation of the contractual relationship indicates that it is an employment relationship, the designation in the contract bears no relevance.[112]

Section 611a(1)(4 and 5) BGB specify this with the help of a rather general formula according to which all facts of the case must be taken into account:

> The degree of personal dependence required has to be determined depending on the nature of the respective activity. Determination of the contract of employment depends on an overall assessment of all relevant acts.

[107] W Hromadka, 'Zur Auslegung des § 611a BGB: Eine historisch-dogmatische Analyse' [2018] *Neue Zeitschrift für Arbeitsrecht* 1583, 1584; Preis, 'Von der Antike' (n 107) 78–79.

[108] P Lotmar, *Der Arbeitsvertrag nach dem Privatrecht des Deutschen Reichs I* (Leipzig 1902) (who (53 ff) departs from concrete phenomena and professions references social security law as sources); *cf* U Zachert, 'Philip Lotmar: Die Tarifverträge zwischen Arbeitgebern und Arbeitnehmern' [2007] *Kritische Justiz* 428–35 on Lotmar's ideas for collective labour law; see also the socialist party's proposals for defining employment (Becker, *Arbeitsvertrag* (n 107), 234).

[109] Hromadka, 'Auslegung des § 611a BGB' (n 108) 1584.

[110] More on this notion of 'employee-like person' below at 3.4.2.6.

[111] This was in fact the policy objective behind the April 2017 BGB codification.

[112] For the translation of s 611a BGB, the formulae found by B Waas, 'The Concept of 'Employee': The Position in Germany' in B Waas and GH van Voss (eds), *Restatement of Labour Law in Europe: Vol I: The Concept of Employee* (Hart Publishing, 2017) fn 1 has been used.

3.4.2.3. Criteria and Indicators for Employment

It we analyse the first three sentences of the description in section 611a(1) BGB according to the method of regulation explained above (at 3.3), we can identify a general description in sentence 1:

> Through a contract of employment, an employee will be obliged to work in the service of another person, observing the instructions issued by that person and being in a position of heteronomy (Fremdbestimmung) and personal dependence.

Sentences 2 and 3 are basically dedicated to naming indicators:

> The power of issuing instructions may either affect the content, mode of work performance, time or location of the activity. A person is subject to instructions if he or she is not essentially free to arrange his or her professional activities at his or her own discretion and to determine his or her working hours.

The way section 611a(1) BGB goes about describing the employment relationship in these sentences more than just resembles the description of the independent commercial agent in section 84 of the Handelsgesetzbuch (HGB, Commercial Code), which distinguishes between an 'independent' commercial agent (para 1), and a 'dependent' commercial agent (para 2). In fact, section 611a(1)(3) BGB is the exact mirror of section 84(1)(2) HGB[113] which says:

> A person is self-employed if he is essentially able to arrange her activities at his own discretion and to determine his working hours.

This is not a coincidence, as section 84 HGB was the one legislative basis that was used in the past by the Federal Labour Court to develop what has now been codified in section 611a BGB.

Another norm relevant here is section 106(1) of the Gewerbeordnung (GewO, Trade Regulation Act), which talks about the employer's right to issue directions:

> The employer may, at her reasonable discretion, specify the content, manner, place and time of the work, unless such working conditions are specified in the employment contract, the provisions of a works agreement, an applicable collective agreement, or statutory provisions.

However, this norm has a rather different legal quality. While both section 611a BGB and section 84 HGB establish what it means to be dependent or independent, section 106 GewO regulates the right of the employer once an employment relationship has been established: With the employment contract, the employer wields a right to issue directives (ie managerial authority) to her employee. It may look like a form of *petitio principii*, or circular reasoning, to classify persons by their

[113] R Wank, 'Die personelle Reichweite des Arbeitnehmerschutzes aus rechtsdogmatischer und rechtspolitischer Perspektive' (2016) 9(2) *Europäische Zeitschrift für Arbeitsrecht* 143; on the parallel EU provision, see above at n 70.

being subject to directions, with the legal consequence that they will be subject to directions. This does, however, make sense if one approaches the definition in section 611a(1) BGB as a typological description, in the way explained above (at 3.3).[114]

Reading it as a description (and therefore as a feature in a typological approach) would also solve a problem pointed out by several authors: If one tries to grasp the new regulation in terms of conventional doctrinal methods of definition and subsumption, the legislator has created a strange piece of legislation.[115] Sentence 1 alone contains at least four attributes which all point in the same direction and are all but inseparable from each other: work in the service of another person; subjection to instructions; personal dependence; heteronomy. In its jurisprudence prior to the section 611a(1) BGB codification, the Bundesarbeitsgericht (BAG, Federal Labour Court) used these attributes side by side. At the time, 'personal dependence' was thought of as the most generic of these terms, as personal dependence and heteronomy (*Fremdbestimmung*) had to be evidenced by subjection to instruction (*Weisungsgebundenheit*). With the BGB codification, however, the question of how these terms relate to each other became more acute. Rolf Wank, in particular, has argued that heteronomy should be considered as an alternative to subjection to instructions, with both terms describing instances of personal dependence.[116] The following examples from case law will clarify the point by showing how descriptions and indicators have been deployed by German labour courts and scholars.

3.4.2.3.1. Subjection to Instructions

Subordination, understood as being subject to instruction, has long been at the centre of German case law on employee classification.[117] Today, sentences 2 and 3 of section 611a(1) BGB show as strong a focus on instructions as they do on considerations of time, duration, place and execution of work. This section looks at several examples of when employee classification was denied or could not be substantiated based on the available evidence.

First is the case of a sports editor at a regional public broadcasting company. The Federal Labour Court could not find sufficient evidence of 'employment'

[114] It is still debated as to whether this provision does effectively establish the typological method (yes: O Deinert, 'Neuregelung des Fremdpersonaleinsatzes im Betrieb' [2017] *Recht der Arbeit* 65, 66–67, 71; Wank, 'Arbeitnehmer-Begriff im neuen § 611a BGB' (n 57) 149; against M Henssler, 'Fremdpersonaleinsatz durch On-Site-Werkverträge und Arbeitnehmerüberlassung: Offene Fragen und Anwendungsprobleme des neuen Rechts' [2017] *Recht der Arbeit* 83, 85; Reinecke, 'Neues zum Arbeitnehmerbegriff?' (n 1) 58–59; Preis, '§ 611a BGB' (n 54) para 53.

[115] The criticism of Hromadka, 'Auslegung des § 611a BGB' (n 108) 1585 may be taken as representative here; Reinecke, 'Neues zum Arbeitnehmerbegriff?' (n 1) 57–58 gives an excellent overview of the debate.

[116] Wank, 'Arbeitnehmer-Begriff im neuen § 611a BGB' (n 57); Preis, '§ 611a BGB' (n 54) para 10.

[117] BAG 24 Jun 1992, case 5 AZR 384/91, NZA 1993, 174; BAG 16 July 1997, case 5 AZR 312/96, BAGE 86, 170 (newspaper delivery person); BAG 11 Aug 2015, case 9 AZR 98/14, NZA-RR 2016, 288 ECLI:DE:BAG:2015:110815.U.9AZR98.14.0 (Wheel of Death).

in this case because the editor, it said, commanded a considerable degree of creative freedom in the way interviews were conducted, even if interview partners and certain questions were pre-specified by the company.[118] In this case, it seems the court was looking for more specific and individualised directions than those given to the editor. In a similar vein, the Landesarbeitsgericht (LAG, Regional Labour Court) Düsseldorf, in 2018, denied employee status to an attorney with an independent service contract at a law firm, although the attorney claimed to have worked for the law firm on weekdays during office hours from 10:00 to 18:30 and, in addition, to have worked overtime and undertaken business trips. He could not explain, however, 'who … had given him instructions in this regard and when'.[119] In another judgment, the 'communication of expectations' by the company was explicitly considered not to equal 'giving instructions'.[120]

Other German court decisions have focused on distinguishing between the *fact* of having been given instructions, and the company's *right* to give such instructions. For example, a 2016 Federal Labour Court judgment concerned an IT engineer and programmer who was responsible for the maintenance and further development of the software distributed by what used to be his formal employer.[121] He had built up specialist knowledge on a particular aspect of the software, the so-called calculation scores. After he moved to a new home around 180 km away from the company, his contract was changed (on his own initiative) from an employment contract to an independent service contract. This was the contract the Federal Labour Court had to assess, because after his dismissal, the worker claimed to have been working in 'false self-employment'.

While he was essentially free to choose his place of work and his working hours, there was regular email contact between the worker and the company and its employees. These emails often concerned specific requests in which the IT engineer was turned to and asked to take a position in relation to problems. Sometimes there were quasi-orders such as, 'please work on …'. Nevertheless, the Federal Labour Court established that he was 'free to decide whether and to what extent he would perform his activities'. That the worker may have been in permanent service to the company, that he did not refuse (quasi-)orders and also took on additional work which went beyond his pure programming activities (such as answering factual inquiries on the part of the customers or solving programming problems), was considered inconclusive:

> The decisive factor here is not the worker's readiness to accept orders or to carry out activities, but whether the [company] could assign tasks unilaterally, i.e. independently of his readiness.[122]

[118] BAG 14 Mar 2007, case 5 AZR 499/06, NZA-RR 2007, 424 (sports editor).

[119] LAG Düsseldorf 21 Aug 2018, case 3 Ta 288/18, NZA-RR 2018, 620.

[120] BAG 27 June 2017, case 9 AZR 851/16, NZA 2017, 1463 (music teacher) para 31.

[121] BAG 14 Jun 2016, case 9 AZR 305/15, BAGE 155, 264, ECLI:DE:BAG:2016:140616.U.9 AZR305.15.0.

[122] BAG, case 9 AZR 305/15 (n 122) para 25.

In the same decision, the Federal Labour Court made it rather clear that instructions and control should not be mixed up:

> The decisive factor is not whether the [company] had the possibility to control when and to what extent the [worker] carries out which activities, but whether the [worker] was able to determine the course of events himself or whether this was specified by the [company].[123]

In contrast to this case, control has at other times been seen as a corollary to instructions, as for example in the formula (used for identifying temporary agency work): 'exercise of instruction rights under a work contract, including the associated monitoring and inspection rights'.[124]

Another method used in employment classification by German courts is the comparison between 'typical' employment and 'typical' independent contracting. Labour courts have repeatedly pointed to the fact that work on the basis of independent contracting also implies a certain degree of contractual programming,[125] which may even result in a right of the (business) customer to issue instructions vis-à-vis the independent contractor.[126] Consequently, labour courts have been trying hard to distinguish 'instructions on the performance of the work' (independent service contract) and 'instruction rights with regard to the work process and time management' (employment contract).[127] It is not hard to imagine the difficulties involved in this kind of differentiation and, in some cases, courts have taken refuge in looking at 'additional work' being performed[128] or instructions and activities 'outside the scope of duties defined in the contract'.[129]

To summarise, when looking at the right to give instructions rather than the fact that the instructions have been given, the Federal Labour Court has developed a tendency to give distinct relevance to formal (contractual) competences,

[123] BAG, case 9 AZR 305/15 (n 122) para 28.

[124] BAG 30 Jan 1991, case 7 AZR 497/89, BAGE 67, 124, para 55. This decision was concerned with defining temporary agency work, albeit with a similar test as the one used for employment (*cf* below at 3.4.2.3.5). As the competence for deciding cases on employee classification is with the 9th Senate of the Federal Labour Court, while temporary agency work classification is decided by the 7th Senate, this may account for some difference in jurisprudence.

[125] See also: R Giesen and J Kersten, *Arbeit 4.0: Arbeitsbeziehungen und Arbeitsrecht in der digitalen Welt* (CH Beck, 2017) 109–10.

[126] Preis, '§ 611a BGB' (n 54) para 14. For example, s 645(1)(1) BGB, which makes the customer liable to pay a part of the remuneration if the work, before acceptance, is destroyed or deteriorates or becomes impracticable 'as the result of an instruction given by the customer for the carrying out of the work'.

[127] BAG 25 Sept 2013, case 10 AZR 282/12, BAGE 146, 97, para 17; LAG Berlin-Brandenburg, 6 Dec 2018, case 14 Sa 1501/18, ECLI:DE:LAGBEBB:2018:1206.14SA1501.18.00, para 49; AG 19 Nov 1997, case 5 AZR 653/96, BAGE 87, 129, 137; *cf* BAG, case 9 AZR 98/14 (n 118) (Wheel of Death); BAG, case 10 AZR 282/12 (n 128); BSG 18 Nov 2015, case B 12 KR 16/13 R, BSGE 120, 99 (nurses working on-demand in hospitals); Wank, 'Arbeitnehmer-Begriff im neuen § 611a BGB' (n 57) 147; Hromadka, 'Auslegung des § 611a BGB' (n 108); M Henssler, 'Überregulierung statt Rechtssicherheit: Der Referentenentwurf des BMAS zur Reglementierung von Leiharbeit und Werkverträgen' [2016] *Recht der Arbeit* 18 with a focus on identifying temporary agency work.

[128] LAG Berlin-Brandenburg, case 14 Sa 1501/18 (n 128).

[129] BAG, case 10 AZR 282/12 (n 128).

notwithstanding the principle of primacy of facts. As for the kind of instructions that courts will consider relevant for an employment relationship, some questions remain. In general, there is a tendency to look out for orders referring to minor details of the work instead of unchangeable traits of the business model and work organisation. These aspects of the jurisprudence entail significant danger for an effective implementation of the primacy of facts.[130]

3.4.2.3.2. No Entrepreneurial Opportunities

In addition to the approach outlined above, an alternative approach to employee classification has been troubling German labour law for quite some time. It was primarily developed by Rolf Wank in the late 1980s, while in the 1990s, it even gave rise to a minority legislative proposal.[131] Ultimately, Wank's approach is not about distinguishing between employment and self-employment in the context of contracts, but about distinguishing between employee and 'entrepreneur'. Wank proposed – and proposes to this day – deciding the question of personal dependence not on directional authority, but on the test of whether workers have the opportunity to make their own business decisions under their own responsibility, with their own goals and risks on the market.[132]

Wank's point of departure is the assertion that employment rights and obligations should be accounted for as the purpose of classification in a consistent and justifiable manner. Subordination would then only be an adequate description of employment if the category of employment engendered rights and obligations that protect against the specific dangers arising out of subordination.[133] I will come back to this theory later.[134] For the moment, it is important to mention that the description of the employee as a person who cannot make use of entrepreneurial opportunities in the specific contractual relationship into which she has entered has been adopted also by courts. The Bundessozialgericht (Federal Social Court, BSG), for example, used it in 2019 when it had to decide on the classification of a group of anaesthetists working in surgical service, who worked on duty in the hospital ward during the day and were on call at night and on weekends. When

[130] For a critique, see Wank, 'Personelle Reichweite' (n 114).

[131] S 1 Entwurf eines Arbeitsvertragsgesetzes (ArbVG, proposal of a Labor Contract Act) des Landes Sachsen, BR-Drs. 293/95; s 2(1) Entwurf eines Gesetzes zur Bereinigung des Arbeitsrechts des Landes Brandenburg (Proposal of a Law to Streamlining of the Labor Law of the State Brandenburg, BR-Drs. 671/96; Gesetzentwurf der Länder Hessen und Nordrhein-Westfalen zur Bekämpfung der Scheinselbständigkeit (Proposal of a Law against bogus self-employment by the States Hessen and Nordrhein-Westfalen BR-Drs. 793/96 (Gesetzesantrag) (Proposal for a revision of s 7 SGB IV).

[132] Wank, 'Personelle Reichweite' (n 114) 150–51: Employee is '[a] person who, under the terms of the contract, cannot make entrepreneurial decisions on his own account because he is subject to instructions and is integrated into the other person's company.'

[133] Wank, 'Arbeitnehmer-Begriff im neuen § 611a BGB' (n 57) 153; Wank, 'Personelle Reichweite' (n 114).

[134] Below ch 4, 4.3.4.

classifying them as employees, it found the hospital in which they worked to have 'a high degree of organisation, over which the affected persons have no entrepreneurial influence of their own'.[135]

In view of the new statutory description of 'employment' in section 611a(1) BGB, with its plurality of concepts that include the term 'heteronomy' alongside personal dependence, Wank's approach has gained new followers.[136]

Wank's description has in the past been misunderstood as defining economic dependence.[137] He has clarified, however, that the approach is not about those economic options and entrepreneurial opportunities that a person might have besides the work relationship that is up for classification. The test of entrepreneurial opportunities is only designed to identify the options in the context of the specific work relationship being examined.

An important indicator for entrepreneurial opportunities in this sense is disposition over capital or, even more importantly, organisation and infrastructure.[138] If a worker is, for example, 'not permitted to install specialised software on his own computer in order to be able to perform activities at another location', this may be an indicator for employment.[139] In another example, being entitled to engage in professional and commercial activities for other companies during the term of the contract could be considered an indicator for self-employment.[140] In this context, then, integration into an organisation becomes an important indicator, as organisational integration directly leads to personal dependence and a lack of entrepreneurial opportunities by shutting workers off from direct access to markets.

3.4.2.3.3. Organisational Integration

Lately, Rolf Wank himself has explicitly shifted his focus from 'entrepreneurial opportunities' to 'organisational integration' as a test in its own right. And such a test has become more important in jurisprudence as well. A Federal Labour Court decision that resulted in the establishment of employee status on the basis of 'organisational integration' concerned a research assistant at the Bavarian Regional Authority for Monument Preservation (Bayerisches Landesamt für Denkmalpflege).[141] The research assistant's work consisted of assessing monuments for the Authority. In order to do this, he had to enter data into the Authority's

[135] BSG 4 June 2019, case B 12 R 11/18 R, BSGE 128, 191.

[136] F Bayreuther, 'Arbeitnehmereigenschaft und die Leistung fremdbestimmter Arbeit am Beispiel des Crowdworkers' [2020] *Recht der Arbeit* 241.

[137] On this description/test, see below at 3.4.2.6.

[138] R Wank, 'Telearbeit' [1999] *Neue Zeitschrift für Arbeitsrecht* 225, 227; *cf* BSG, case B 12 KR 16/13 R (n 128).

[139] BAG, case 10 AZR 282/12 (n 128).

[140] BAG, case 9 AZR 98/14 (n 118) (Wheel of Death).

[141] BAG, case 10 AZR 282/12 (n 128).

databases, for which he only had access to the relevant files at the Authority's offices. He worked during the normal office working hours, but without participating in the Authority's time recording system for employees. Access to the files was made possible via a PC workstation with a personal user ID and, at times, he had an official e-mail address and was listed in the Authority's Microsoft Outlook address directory. After having searched in vain for specific instructions the worker may have been subjected to, the Federal Labour Court changed its approach by taking 'local involvement in the defendant's work organisation as an important indication of his personal dependence'. The Court accepted the relationship as one of 'employment' because 'the work activity is planned and organised by the "purchaser", and the "contractor" is integrated into a process involving such a division of labour as to de facto exclude an independent organisation of the production process by the "contractor"'.[142] In another case, the fact that indispensable work tools were owned by the worker was considered an indicator for self-employment.[143]

Considering 'organisational integration' as a test for 'employment' has become a recurrent theme in German case law, particularly in cases where 'the nature of the activity may leave the employee with a high degree of creative freedom, initiative and professional independence'.[144] The Federal Social Court – confronted with a statutory definition that explicitly uses 'working to instructions and an integration into the work organisation of the person giving the instructions' as indicators[145] – has been using the description of employment as organisational integration more proactively in the above-mentioned 2019 case of anaesthetists. Contrary to their contracts, the court held them to be 'employees' due to their integration in the hospital's organisation:

> Anaesthetists are usually part of a team for an operation, which has to work together in a division of labour under the leadership of a responsible person. The work as a ward physician also regularly presupposes that they fit into the prescribed structures and procedures. … In addition, fee-based physicians use the hospital's personnel and material resources in their work.[146]

Other indicators that have been used to establish organisational integration include working together with other employees of the company, being subject to time recording systems, and using tools, software, hardware, the premises or other materials belonging to the company.[147]

[142] BAG, case 10 AZR 282/12 (n 128) para 17.
[143] BAG, case 9 AZR 98/14 (n 118) (Wheel of Death) (referring to both the high ropes course and the death wheel, as working tools for high-rope circus artists).
[144] LAG Berlin-Brandenburg, case 14 Sa 1501/18 (n 128); *cf* LAG Hessen 14 Febr 2019, case 10 Ta 350/18, ECLI:DE:LAGHE:2019:0214.10TA350.18.00.
[145] Section 7(1) Sozialgesetzbuch *IV* (SGB IV), vol IV.
[146] BSG, case B 12 R 11/18 R (n 136).
[147] Wank, 'Personelle Reichweite' (n 114).

Whether integration into a company could and should be considered relevant for employee classification used to be highly disputed in Germany.[148] Particularly in the first half of the twentieth century, 'employment contract' and 'employment relationship' represented two perspectives on employment that divided scholarship. Since the 1920s, however, it became rather undisputed that integration could not lead to dispensing with the contract. It is the contract, after all, which provides the formal legitimation for the relationship, and hence, also for the right to issue instructions.[149] Still, arguments today that focus on aspects of organisational integration have to combat suspicions of fascist connotations. From 1933 to 1945, the fascist German state almost exclusively defined labour law as the law of the work community (*Betriebsgemeinschaft*), negating conflicts and interests, abolishing structures that institutionalised conflicts, and killing those who represented conflicts. However, looking at organisational integration as a possible basis for employee classification today has little to do with this history. Instead, the argument of organisational integration refers to structural aspects in the socio-economic relationship between worker and employer that are characteristic of any modern work organisation.[150] This is ultimately behind the differentiation between 'employment contract' and 'employment relationship'.[151]

Consequently, 'organisational integration' is considered increasingly relevant today in order to concretise or supplement 'subjection to instructions' in determining employment relationships. Both the Federal Labour Court and the Federal Social Court have already used 'organisational integration' as a descriptor of 'employment'.[152] From a systematic perspective, however, it is still debatable if 'organisational integration' should be considered a descriptor of employment in German law separate from 'subjection to instruction',[153] or a mere indicator of being subject to instruction.[154] The new statutory definition in

[148] Nogler, *Concept of "Subordination"* (n 7); Veneziani, 'Employment Relationship' (n 42), 101 for debates in other European countries and the context of communitarian theories.

[149] Waas, 'Germany' (n 113) 253; see, in particular, the former main protagonist of 'integration theory' A Nikisch, 'Die Eingliederung in ihrer Bedeutung für das Arbeitsrecht' [1960] *Recht der Arbeit* 1 ('modified labor-law integration theory'). On the relation between employment contract and relationship *cf* also Freedland and Kountouris, *Legal Construction* (n 42) 322–23.

[150] On these dynamics more in detail below ch 5, 5.1.2, 5.1.3.

[151] Waas, 'Germany' (n 113), 253; for a theoretical perspective *cf* G Lyon-Caen, 'Défense et illustration du contrat de travail' (1968) 13 *Archives de Philosophie du Droit* 59–69.

[152] BAG, case 10 AZR 282/12 (n 128); BSG, case B 12 KR 16/13 R (n 128); Wank, 'Arbeitnehmer-Begriff im neuen § 611a BGB' (n 57) 144–45; Henssler, 'Überregulierung' (n 128) 19–20 gives a detailed account of this phenomenon, pointing out the primary importance of this description for Works Constitution law; for criticism K Uffmann, 'Projektbezogener Einsatz hochqualifizierten Fremdpersonals in der Compliancefalle?' [2018] *Neue Zeitschrift für Arbeitsrecht* 265, 268; for criticism *cf* Deinert, 'Neuregelung des Fremdpersonaleinsatzes' (n 115) 67–68; Preis, '§ 611a BGB' (n 54) para 10.

[153] Wank, 'Personelle Reichweite' (n 114).

[154] F Rancke, 'Arbeitnehmerbegriff und sozio-ökonomischer Strukturwandel – Eine Analyse der Rechtsprechung des BAG' [1979] *Arbeit und Recht* 9, 11–12; B Boemke, 'Neue Selbständigkeit und Arbeitsverhältnis: Grundsatzfragen sinnvoller Abgrenzung von Arbeitnehmern, Arbeitnehmerähnlichen und Selbständigen' [1998] *Zeitschrift für Arbeitsrecht* 285, 325.

section 611a(1) BGB, with its plurality of concepts including the term 'heteronomy' (Fremdbestimmung) and 'personal dependence', provides a strong argument in favour of 'organisational integration' as a concept in its own right.[155]

3.4.2.3.4. Personal Performance

Personal performance has also been recognised as an indicator of employment in German case law. There is little controversy around this particular issue. After all, the object of the employment relationship is to provide the employer with the employee's personal 'capacity for work'.[156] In fulfilling the employment contract and performing her job, the individual cannot and is not supposed to set aside her 'nature as a person'.[157] Consequently, section 613 BGB orders that 'the party under a duty of service must in case of doubt render the services in person'. As a consequence, if the contract grants the worker the right to involve third parties in the provision of her services, this is considered an indicator of self-employment.[158]

3.4.2.3.5. The Employer in Temporary Agency Arrangements

In trilateral employment relationships, it is not only the worker who must be classified. The identity of the employers must also be scrutinised in order to determine who should be held responsible for complying with the rights and obligations associated with the employment relationship. In German labour law, there is a huge difference between providing services to a customer with the help of one's own employees and assigning one's own employees to a customer (the user undertaking[159]) in the capacity of a temporary work agency. Importantly, temporary work agencies may only assign workers if they have a licence to do so. The lack of such a licence means the employees will automatically be considered to be under an employment contract with the user undertaking (section 10(1) of the Arbeitnehmerüberlassungsgesetz (AÜG, Act on Temporary Agency Work)).

These conflicts around temporary agency work provided the social policy background to the 2016/2017 debate on German employment law that gave rise to the new statutory definition of the employment relationship in section 611a(1) BGB. In a parallel legislative act, the definition of temporary agency work was also revised,

[155] Wank, 'Arbeitnehmer-Begriff im neuen § 611a BGB' (n 57), 144; Bayreuther, 'Arbeitnehmereigenschaft' (n 137) 245–47.

[156] This also holds for the established case law of the German Federal Labor Court (BAG 11 Dec 2013, case 2 AZR 667/02, BAGE 109, 87; BAG 17 Jan 2008, case 2 AZR 536/06, BAGE 125, 257 ('An employee [fulfils] his/her contractual obligation if he/she works to the fullest extent of his/her personal capabilities').

[157] P Schwerdtner, *Fürsorgetheorie und Entgelttheorie im Recht der Arbeitsbedingungen: ein Beitrag zum Gemeinschafts- und Vertragsdenken im Individualarbeitsrecht und allgemeinen Zivilrecht* (Recht und Wirtschaft 1970) 86–87; H Potthoff, Wesen und Ziel des Arbeitsrechtes (1922) 18, 38–44.

[158] BAG, case 9 AZR 305/15 (n 122).

[159] According to the terminology of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work.

with a slight discrepancy to section 611a(1) BGB. While Article 1(1) of Directive 2008/104/EC defines temporary agency work as the assignment of workers to user undertakings 'to work temporarily under their *supervision and direction*'[160] (emphasis added), section 1(1)(2) of the Arbeitnehmerüberlassungsgesetzes, (AÜG, German Act on Temporary Agency Work) uses the following definition:

> Employees are assigned to work if they are integrated into the user undertaking's work organisation and subject to his instructions.

Here, organisational integration is treated on the same level and as an alternative test to subjection to instruction.

3.4.2.4. Clustering: Establishing the Typical

The final assessment for employee classification depends on a clustering of indicators. The following section will give an impression of the ways and methods German courts and scholars have used to arrange indicators and assign them to categories. Often, it is not one single indicator that tips a case towards classification as employment or self-employment, but the overall assessment of indicators and a comparison with typical employment or self-employment work relationships.

3.4.2.4.1. Not Typical Enough

The most important instrument in clustering assesses the degree of typicality of a certain indicator. Particularly indicators that contradict the wording of the contract have often only been considered as relevant by the courts if they were 'exemplary manifestations of a consistent contractual practice'.[161] For example, in a case of high-rope circus 'Wheel-of-Death' artists, after mentioning certain indicators against employment status, the Federal Labour Court looked into the artists' obligations to participate in the circus' animation of audiences – before special events, at the entrance, in the final parade, and in press and public relations activities – as possible indicators in favour of employment. However, the Court disregarded all of these on the grounds that they did not give the work relationship its imprint, meaning they were rather incidental and not typical enough to characterise the artists' obligations.[162]

It may also be worth mentioning here that the German Federal Labour Court has rejected using the way in which remuneration is calculated (ie based on working time or piece-meal by results) as an indicator for either type of work relationship.[163]

[160] Emphasis added.
[161] BAG, case 9 AZR 98/14 (n 118) (Wheel of Death), para 33; BAG, case 9 AZR 305/15 (n 122); BSG, case B 12 R 11/18 R (n 136).
[162] BAG, case 9 AZR 98/14 (n 118) (Wheel of Death); similarly BAG, case 9 AZB 23/18 (n 23).
[163] BAG, case 5 AZR 499/06 (n 119); BAG, case 9 AZR 305/15 (n 122) (hourly remuneration).

Judging the degree of typicality makes for another formula that provides for some extra flexibility. In the case of the aforementioned IT engineer who argued he was in 'false self-employment', for example, the Federal Labour Court considered the fact that the company had paid him the costs of several training events as 'indeed atypical for self-employment', but not atypical enough to classify him as an employee.[164] And in the case of the attorney who argued he was an employee of the law firm for which he worked despite his contract designation otherwise, the Landesarbeitsgericht (Regional Labour Court, LAG) of Düsseldorf decided to exclude from consideration the fact that the lawyer had received a business card from the law firm, along with a telephone extension, an email address and other resources. These factors, according to the Court, were 'in the overall assessment only an indication of minor importance for the assumption of an employment relationship'.[165]

3.4.2.4.2. 'Conceivable in All Kinds of Work Relationships'

Another method the Federal Labour Court has used to free certain indicators of their indicating function, is the assertion that the specific work practices and organisation could be used in any kind of work relationship and could therefore point either way. This line of reasoning often comes up, for example, when courts try to apply a sophisticated distinction between different kinds of instructions received by workers. For example, in the case of the aforementioned sports editor with a public broadcasting company, the Federal Labour Court pointed out that 'a freelancer must also reckon with a control of the quality of his work'. The Court also considered the fact that the editor had not been free to choose the topics of the sports news he presented as being perfectly 'possible and usual' in an independent service contract.[166]

The same argument came up in the judgment of the aforementioned IT engineer.[167] The worker invoked the fact that he had to coordinate his work with other employees of the company, that he provided his work in the company's technological environment, and that he had his own password-protected user access to the operating system. However, the Federal Labour Court rejected these facts as inconclusive, stating that self-employed workers usually also performed their work in an organisational context provided by a customer and prepared regular reports on the status of their activities. And what about the IT homeworker's use of the company's time recording programme, which, 'at least potentially', offered the possibility of surveillance? According to the Court, this could be seen as part of a general obligation to inform the customer and account for the status

[164] BAG, case 9 AZR 305/15 (n 122).
[165] LAG Düsseldorf, case 3 Ta 288/18 (n 120); *cf* BSG 14 Mar 2018, case B 12 KR 12/17 R, ECLI:DE:BSG:2018:140318UB12KR1217R0 (IT administrator): 'on eye level'.
[166] BAG, case 5 AZR 499/06 (n 119) para 24; more in detail, see text at n 395.
[167] BAG, case 9 AZR 305/15 (n 122).

of the performance – 'typical secondary obligations which characterise a large number of contractual relationships'. As for the fact that, in case of questions or problems, the company sometimes referred its customers directly to the IT home-worker, who could himself address customers directly if needed, the Court also found it to be an inconclusive indicator.

In this vein, more and more judgments have recently concluded that one and the same work practice could be executed in the context of an employment contract or an independent service contract (ie, self-employment).[168] According to the Bundessozialgericht (BSG, Federal Social Court), even the activity of co-piloting a plane could be rendered either as a freelancer or as an employee.[169]

3.4.2.5. Reintroducing the Contract into Classification

These techniques of clustering strain the principle of primacy of facts. As a result, 'the contracting partners' decision in favour of a certain contract type' (ie the wording of the contract as formulated by the business company) gains major importance in classification. Gerhard Reinecke even suspects that the reason why there have been so few judgments on classification since 2000 lies in the emphasis the Federal Labour Court has put on the contractual denomination of the work relationship.[170]

Another technique that tends to reintroduce the contractual determination against factual indicators is the use of contractual provisions as indicators. This is most visible when it comes to personal performance. Here, the Federal Labour Court looks predominantly at the contractual right to substitute the worker with another person, rather than at actual practices or even the feasibility of substitution. For example, the IT home worker's contract mentioned above had, in fact, not prohibited him from employing his own personnel. It was, however, out of discussion that he could do so, as he had specialist expertise and experience with the operating system. Yet, the Federal Labour Court held this as irrelevant:

> If it is legally possible for the person obliged to perform to use his own personnel, it is irrelevant whether and why he has not made use of this possibility.[171]

This leads us to how the relevant question of the primacy of facts principle has to be understood on a theoretical level.[172]

[168] BAG, case 9 AZR 851/16 (n 121); Reinecke, 'Neues zum Arbeitnehmerbegriff?' (n 1) 59; O Deinert, *Soloselbstständige zwischen Arbeitsrecht und Wirtschaftsrecht: Zur Notwendigkeit eines erweiterten Sonderrechts für Kleinunternehmer als arbeitnehmerähnliche Personen* (Nomos, 2015) para 23; criticism: Preis, '§ 611a BGB' (n 54) para 53.

[169] BSG 28 May 2008, case B 12 KR 13/07 R; *cf* BAG 16 Mar 1994, case 5 AZR 447/92, NZA 1994, 1132: co-pilots are employees if they are subjected to the pilot's instructions and listed in duty rosters.

[170] Reinecke, 'Neues zum Arbeitnehmerbegriff?' (n 1) 56; 59.

[171] BAG, case 9 AZR 305/15 (n 122).

[172] *cf* above 3.3.4.

3.4.2.5.1. Different Understandings of the Primacy of Facts as a Principle

On a conceptual level, primacy of facts has been understood in different ways in German labour law. At least three distinct approaches can be found. The first one, consistent with the ILO's terminology of 'disguised employment', treats the primacy of facts as an instrument to avoid circumvention of the law by businesses. In this vein, the wording of the contract will only be overruled if there is intention and purpose on the side of one party to the contract. However, abuse of freedom of contract has only been invoked once as an argument in this respect.[173]

The second approach considers the assessment of the facts to be an instrument that helps interpret the contract:

> If agreement and actual implementation contradict each other, the latter is decisive because conclusions can be drawn from the practical handling of the contractual relationships … as to which rights and obligations the contracting parties assumed, ie what they really wanted.[174]

Some scholars have even treated primacy of facts as an application of the *falsa demonstratio non nocet* rule,[175] ie as an interpretation of a contractual agreement according to the real wishes of the parties as far as both parties' wishes coincide with one another. However, this approach is difficult to work through if facts are inconsistent with the wording of the contract or even contradict it. The case of the Wheel-of-Death-artists is a good example of this problem, as the Federal Labour Court made a rather curious turn in order to harmonise contract and implementation.[176] When considering an agreement the artists had with the circus' tent master to participate in the circus' animation of audiences, which pointed to their being integrated into the organisation, the Federal Labour Court asked if 'the tent master had the authority to amend the contractual arrangements'. In other words, the Court asked if the facts could be attributed to the company's wishes and were therefore indicative of a change of the contractual will. One author recently even treated the factual indicators as changes being made to the contract.[177]

[173] Reinecke, 'Neues zum Arbeitnehmerbegriff?' (n 1) 60. See, however, an older Federal Labour Court decision (BAG 18 Febr 1956, case 2 AZR 294/54, BAGE 2, 289), which negated employee status to members ('sisters') of the German Red Cross (now revoked by BAG 21 Febr 2017, case 1 ABR 62/12, ECLI:DE:BAG:2017:210217.B.1ABR62.12.0, as a consequence of ECJ (*Betriebsrat der Ruhrlandklinik*), case C-216/15 (n 75), stating: 'Such an association, carried by a high moral seriousness and recognized in the whole cultural world, as the sisterhoods of the Red Cross represent it, cannot be regarded […] as a circumvention of labour law protection regulations and as a camouflage of an employment relationship.'

[174] BAG, case 9 AZR 98/14 (n 118) (Wheel of Death).

[175] K Riesenhuber, 'Auslegung und Dogmatik von § 611a BGB: Von der „tatsächlichen Durchführung" zum „faktischen Arbeitsverhältnis"?' [2018] *Juristische Schulung* 103; repeating the argument: K Riesenhuber, '"Arbeitsgleiche Durchführung" als "arbeitsrechtlicher Formenzwang"?: Zugleich eine Erwiderung auf Schwarze, RdA 2020, 38 ff.' [2020] *Recht der Arbeit* 226, against objections by R Schwarze, 'Noch einmal: § 611a Abs. 1 S. 6 BGB und der arbeitsrechtliche Formenzwang' [2020] *Recht der Arbeit* 231.

[176] BAG, case 9 AZR 98/14 (n 118) (Wheel of Death); in a similar vein: BAG case 10 AZR 282/12 (n 128); BAG, case 9 AZR 851/16 (n 121) para 31 (testing whether the persons authorised to conclude the contract were aware of the contractual practice deviating from the wording of the contract).

[177] Riesenhuber, 'Auslegung und Dogmatik' (n 176).

Notwithstanding this rather singular decision, the majority understanding in Germany still follows the third approach, which considers the primacy of facts as a means of safeguarding the binding character of labour law.[178] In this vein, the Federal Labour Court has used the formula of 'the legal business will of the parties',[179] a formula that enables looking at the business model at stake and its inherent features, rather than the wording of the contract. How this necessarily entails a typological approach[180] has been explained above (3.3).

3.4.2.5.2. Obligation to Perform

One last specific feature of German law complicates matters even further. German contract law considers a contract only to be complete if it creates mutual and reciprocal obligations for both parties (German lawyers here use the Greek term *synallagma* to designate contractual reciprocity). A long-term employment or service contract will always include an obligation to perform.

The Federal Labour Court has reinforced this principle for labour law in the context of so-called *Rahmenverträge* (framework agreements). In a framework agreement, the contracting parties only agree on the basic structure of their business relationship. Usually, framework agreements entail shift booking systems that enable workers to book assignments and single work activities on future, individual, one-time service contracts. As long as workers are free 'to decide whether and when to register on shift schedules and are obliged to perform the service only after registering' they would be considered self-employed.[181]

3.4.2.6. Descriptions of the Employee-like Person

For some independent contractors, German law offers partial social protection. Some employment and labour laws do not limit their applicability to employees, but extend to *arbeitnehmerähnliche Personen* (employee-like persons). For example, employee-like persons have been guaranteed rights to holiday leave,[182] health and safety protection,[183] data protection,[184] access to employment courts,[185] and

[178] Preis, '§ 611a BGB' (n 54), para 12; 25; *cf* para 24; Reinecke, 'Neues zum Arbeitnehmerbegriff?' (n 1) 60; Schwarze, 'Noch einmal' (n 176).

[179] BAG, case 9 AZR 305/15 (n 122); BAG, case 10 AZR 282/12 (n 128); *cf* BAG, case 7 AZR 497/89 (n 125) (on temporary agency employment).

[180] Against Preis, '§ 611a BGB' (n 54) para 53.

[181] LAG Berlin-Brandenburg, case 14 Sa 1501/18 (n 128); BAG 21 May 2019, case 9 AZR 295/18, NZA 2019, 1411 (translator); BAG 21 Nov 2017, case 9 AZR 117/17, NZA 2018, 448 (music teacher), para 26; BSG, case B 12 KR 16/13 R (n 128).

[182] Section 2 Bundesurlaubsgesetz (BUrlG, Federal Paid Leave Act).

[183] Section 2(2) Arbeitsschutzgesetz (ArbSchG, Occupational Health and Safety Act).

[184] Section 26(8) Bundesdatenschutzgesetz (BDSG, Federal Data Protection Act).

[185] Section 5(1 and 3) Arbeitsgerichtsgesetz (ArbGG, Labour Court Act).

collective bargaining,[186] but not to minimum wage[187] or protection against unfair dismissal.[188]

While the category of 'employee' refers to personal dependence (section 611a BGB), 'employee-like persons' are those who are 'economically dependent'. Economic dependence is tested as follows, according to section 12a(1) Tarifvertragsgesetz (TVG, Collective Bargaining Act), which I use as *pars pro toto* here:[189]

- The independent contractor works for one single client or receives a great part of their income from a single client (usually, this would have to be more than half of the total remuneration she earns[190]). The Federal Labour Court has also emphasised that the client must be directly responsible for the income generated, rather than 'merely granting an opportunity to earn'.[191]
- Services are rendered in person and mainly performed without the cooperation of employees or the help of other persons.
- The independent contractor needs social protection 'comparably to an employee' due to, for instance, the lack of organisational resources and means of production.[192]

Classification as an employee-like person also depends on an overall assessment of the individual case, for which the primacy of facts principle applies.

Notably, there are some inconsistencies concerning the relationship of 'economic dependence' as defining the employee-like person and 'entrepreneurial risks and chances' as an indicator for employment in the strict sense. For Wank, the difference is made clear by differentiating between circumstances of the contract itself (employment) and circumstances outside of the contract (labour market position of the worker). As he sees it, only the latter is a legal factor in determining economic dependence of employee-like persons.[193] However, with using the criteria of 'service rendered by the worker in person' and 'no capital/no own organisation' in some tests for employment and in other tests for employee-like person, the courts have used indicators for 'entrepreneurial opportunities and chances' indiscriminately for both classifications.

[186] Section 12a Tarifvertragsgesetz (TVG, Collective Bargaining Act).

[187] Section 22 Mindestlohngesetz (MiLoG, Minimum Wage Act).

[188] Sections 1 and 14 Kündigungsschutzgesetz (KSchG, Unfair Dismissal Act); for an overview, see Waas, 'Germany' (n 113) 273–74; Rebhahn, 'Arbeitnehmerähnliche Personen' (n 8).

[189] Case law: BAG 17 Oct 1990, case 5 AZR 639/89, BAGE 66, 113, 116; BAG 8 Sept 1997, case 5 AZB 3/97, BAGE 86, 267; BAG 16 July 1997, case 5 AZB 29/96, BAGE 86, 178 (Franchisee); BAG 21 Febr 2007, case 5 AZB 52/06, BAGE 121, 304 (midwife with cottage-hospital affiliation); likewise Bundesgerichtshof (BGH, Federal Court of Justice) BGH 4 Nov 1999 VIII ZB 12/98, NZA 1999, 53.

[190] When providing artistic, literary or journalistic services, one third would be enough, according to s 12a(3) TVG; *cf* M Franzen, '§ 12a TVG' in R Müller-Glöge, U Preis and I Schmidt (eds), *Erfurter Kommentar zum Arbeitsrecht*, 19th edn (Beck, 2019) para 8.

[191] BAG, case 5 AZB 52/06 (n 190).

[192] BAG case 5 AZB 29/96 (n 190).

[193] Wank, 'Arbeitnehmer-Begriff im neuen § 611a BGB' (n 57) 153; Wank, 'Telearbeit' (n 139) 230.

3.4.2.7. Descriptions of Homework

Another subcategory of independent civil-law contracts is homework. German law grants homeworkers rights to minimum wage and minimum conditions that are established by tripartite commissions (sections 17–22 Heimarbeitsgesetz (Homework Act, HAG)) and administratively controlled (sections 23–27 HAG). The law also establishes a certain protection against unfair dismissals (sections 29, 29a HAG), as well as minimum health and safety protection (sections 12–16a HAG) and an obligation for the client to equally distribute quantities of work among home workers 'considering their capabilities' (section 11 para 1 HAG).

The determination of the homework relationship is made according to the principle of primacy of facts.[194] Homework is defined as independent contracting in economic dependence, with specific qualities. In the event that it is not practiced in the context of a trade, but rather in the context of freelance profession, the application of homework law additionally requires a special need for social protection, based on 'the extent of the economic dependency' (section 1(2)(2 and 3) HAG):

> In particular, the number of auxiliary employees, the dependency on one or more clients, the possibilities of direct access to the sales market, the amount and type of own investments, as well as the turnover are to be taken into account.[195]

On the other side, the amount of time spent working, the level of earnings and the proportion of the income earned are irrelevant for classification, as is the level of qualification required for the work, or the participation of third persons (usually family members). The main test used for homework in German law (section 2(1)(1) HAG), then, is the lack of direct access to markets: The homeworker leaves the exploitation of the work results to the tradesman who directly or indirectly commissions the work.[196] Most famously, the IT worker mentioned above, whom the Federal Labour Court did not want to classify as an employee, was instead granted the rights of a homeworker.[197] In this concept, the lack of market access serves as an independent criterion, whereas for the employment category, it is merely a consequence of organisational integration.

3.4.2.8. Summary

This analysis of German law shows a variety of criteria and indicators that have been used for classification of employees, employee-like persons and/or homeworkers:

- subjection to instructions;
- organisational integration;

[194] O Deinert, 'Die heutige Bedeutung des Heimarbeitsgesetzes' [2018] *Recht der Arbeit* 359, 359–60.
[195] LAG Düsseldorf 23 Aug 1989, case 4 Sa 615/89, BB 1989, 2400.
[196] BAG, case 9 AZR 305/15 (n 122).
[197] BAG, case 9 AZR 305/15 (n 122); reviewed in detail by Deinert, 'Bedeutung des Heimarbeitsgesetzes' (n 198).

- (lack of) entrepreneurial opportunities;
- personal performance;
- economic dependence on the company;
- (lack of) access to markets.

The system of categories is based on distinguishing between the counter-concepts[198] of 'personal' and 'economic' dependence – therefore establishing 'dependence' as the basic determinant of labour law protection. The relationship between the two basic kinds of dependence is constructed as follows: An 'employee' is personally dependent from the 'employer' (and will usually also be economically dependent, without this being of any importance for her classification). An 'employee-like person', in contrast, is economically dependent, without being personally dependent.

The methodological instruments used by German courts tell us a lot about why it is so difficult to foresee courts' classification decisions and why adapting existing descriptions to new economic and social situations can be so difficult. First, courts rarely get serious about making overall assessments of a variety of indicators. Instead, each single fact is mostly evaluated against the legal criteria *before* conducting a clustering exercise. Secondly, clustering is carried out by drawing comparisons to specific images of 'typical employment' versus 'typical self-employment'. Yet, courts do not reveal the empirical and conceptual foundations of these 'typical' category descriptions. Instead, they refer to a seemingly intuitive picture of what these 'typical' categories entail. In doing so, courts practice a form of 'transcendental nonsense':[199] A person is an employee because she is a typical employee. While being 'typological', it would be misleading to call this methodology 'typological-functional'.[200] In their effort to compare the facts to typical work categories, courts have sometimes rather freely elaborated on the 'typical' characteristics of employment or self-employment without any reference to legal description whatsoever.[201] For these practices, one former judge has giving the following description (or caricature): 'I can't define a giraffe, but I recognise it immediately when I see one.'[202]

In light of this approach, cases of atypical employment necessarily present almost unsurmountable problems, which often leads them to be considered as self-employment (the easy way out). It is not a coincidence, then, that the formula 'one and the same work activity can be provided in the context of employment as well as in the context of independent contracting' has become more and more

[198] Preis, '§ 611a BGB' (n 54) para 10.

[199] FS Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 *Columbia Law Review* 809; for a critical discussion sese WB Kennedy, 'Functional Nonsense and the Transcendental Approach' (1936) 5 *Fordham Law Review* 272.

[200] For this term, see Nogler, 'Typologisch-funktionale Methode' (n 55).

[201] Hromadka, 'Auslegung des § 611a BGB' (n 110) 1586.

[202] Reinecke, 'Neues zum Arbeitnehmerbegriff?' (n 1) 58–59, referring to a conversation with Thomas Dieterich, former president of the Federal Labour Court and judge of the Federal Constitutional Court.

common.[203] Consequently, the contract has gained primary importance in the classification of work relationships, while the primacy of facts, a method intended to protect labour law against its circumvention, has been devalued. At least, this was the situation before digital work platform litigation came along.[204]

3.4.3. Exemplary Analysis of Further Issues in Classification

The German example of classifying work relationships provides only one of many collections of possible definitions, indicators and methods. In order to get a more comprehensive picture of the instruments and materials available to labour lawyers around the world, this section is dedicated to contrasting a few more examples, namely from the common law family (UK, US and Canadian law), as well as examples from Continental European backgrounds (Spanish and Portuguese law). The following section takes them as exemplary treatments of specific problems and issues of employment classification.

3.4.3.1. Personal Performance in the Foreground (UK Law)

UK law on employment classification goes back to the master/servant distinction in common law, which builds on rules that developed in contract and tort law to attribute liability. Here, the notion of 'control' was used in order to distinguish between a servant and an independent contractor, with 'control' understood as the servant being 'subject to the command of the master as to the manner in which he shall do his work'.[205]

At a certain point in time, courts started to develop complementary approaches.[206] The modern situation has been characterised as enabling the following tests:

- the 'control' test, which asks if 'the hirer of the services controls the worker with respect to the time and manner in which he performs his work';[207]

[203] Deinert, 'Neuregelung des Fremdpersonaleinsatzes' (n 115) 66; for examples *cf* above at 3.4.2.4.2.
[204] Below at 3.5.2.5.
[205] O Kahn-Freund, 'Servants and Independent Contractors' (1951) 14 *Modern Law Review* 504 for a case of an employer's vicarious liability for the misconduct of workers, in tort law. Nevertheless, Kahn-Freund, 506, fn 8 contrasts 'control' with, inter alia, 'subordination' to the employer's managerial power; historical perspectives: SF Deakin and F Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (Oxford University Press, 2005) 4 ff; R Sprague, 'Worker (Mis)classification in the Sharing Economy: Trying to Fit Square Pegs into Round Holes' (2015) 31 *ABA Journal of Labor & Employment Law* 53; S Deakin, 'The Contract of Employment: A Study in Legal Evolution' (2001). Working Paper 203.
[206] V. Lord Wilson in *Pimlico Plumbers Ltd. and another v Smith* [2018] UKSC 29 (= AllELR 2018, 641), at paras 14 and 45, citing Lady Hale, at para 146 in *Percy v Board of National Mission of the Church of Scotland* [2005] UKHL 73, [2006] 2 AC 28.
[207] Collins, 'Independent Contractors and the Challenge of Vertical Disintegration' (n 26) 369; see also Freedland and Kountouris, *Legal Construction* (*n 42*) 103 ff; Fudge, 'Fragmenting Work' (n 31) 619–20.

- the 'organisation' test, 'which asks whether the worker has been integrated into the organisation, by being graded, paid according to a job evaluation scheme, and required to conform to the employer's disciplinary code';[208]
- the 'business reality test', which focuses on the allocation of risks between the parties and, according to which, a worker who is 'in business on his own account', with his income depending upon productivity and skill, would be considered an independent contractor.[209]

In addition, more recent labour law legislation has introduced the term 'worker' as a new category to exist alongside the common law concept of 'employee'. A 'worker' in UK law (so-called 'limb (b) worker'), eg according to section 2(1)(b) Working Time Regulation, section 54(3)(b) National Minimum Wage Act, is

> an individual who has entered into or works under … any … contract, … whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.[210]

The new category has been said to compensate for too narrow of a classification of 'employee' in traditional tests.[211] Its definition, which is similar to the one used in UK collective labour law,[212] not only explicitly juxtaposes 'worker' and 'independent contractor', but focuses on personal performance.[213]

The UK Supreme Court's 2018 decision in the case of *Pimlico Plumbers v Smith* serves as a leading case here. It is also a good example of how legal tests have been used in employment classification in the UK, and how indicators for employment

[208] Collins, 'Independent Contractors and the Challenge of Vertical Disintegration' (n 26) 369; H Collins, 'Market Power, Bureaucratic Power, and the Contract of Employment' (1986) 15 *Industrial Law Journal* 1, 9–10; already defended by Kahn-Freund, 'Servants and Independent Contractors' (n 206) 507; Lyon-Caen, 'Défense' (n 152). For a recent tort law case which has also used these more 'modern' ideas, see *Various Claimants v Barclays Bank plc* [2017] EWHC 1929 (QB) (UK High Court), IRLR 2017, 1103.

[209] Collins, 'Independent Contractors and the Challenge of Vertical Disintegration' (n 26) 369; see also Freedland and Kountouris, *Legal Construction* (n 42), 103 ff; Fudge, 'Fragmenting Work' (n 31) 619–20; Lord Wilson at para 44 in *Pimlico* [2018] UKSC 29 (n 207): 'a focus upon whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls.'

[210] Going back to s 1(6)(a) of the Equal Pay Act 1970 and s 167(1) of the Industrial Relations Act 1971; *cf* B Jones and J Prassl, 'The Concept of 'Employee': The Position in the UK' in B Waas and GH van Voss (eds), *Restatement of Labour Law in Europe: Vol I: The Concept of Employee* (Hart Publishing, 2017) 753–54; 768–69 with a table showing the rights attributed to the categories employee, employee shareholder, worker and self-employed in UK law.

[211] Freedland and Kountouris, 'Legal Characterization' (n 7) 194 ff; Sutschet, 'Neuere' (n 24) 171–83.

[212] Section 296(1) of the Trade Union and Labour Relations (Consolidation) Act (TULRCA). On the differences, see Freedland and Kountouris, 'Some Reflections' (n 81).

[213] *Pimlico* [2018] UKSC 29 (n 207).

have been generated. The decision mentions the following indicators as useful for classification:

- 'tight control' over the worker, as reflected in the contractual 'requirements that he should wear the [company's] branded … uniform; drive its branded van [to which a tracker had been applied]; carry its identity card; and closely follow the administrative instructions of its control room';
- a 'grip on [the worker's] economy', demonstrated by the 'severe terms' used in the contract regarding when and how much the company was obliged to pay him; and by the explicit use of the terms 'wage', 'gross misconduct' and 'dismissal' in the contract.[214]

The most controversial issue in the *Pimlico* case was personal performance, as the worker in question, Mr Smith, was sometimes accompanied by an apprentice or brought another worker to assist him. The Court held that, due to the limited reach of their activities, this was mere assistance in performance and not substitution. Consequently, it acknowledged the existence of personal performance and classified Smith as a 'worker' (but not as an 'employee').

The recent focus on personal performance has bothered labour lawyers in the UK for some time already. It is not a coincidence that the UK government's December 2018 'Good Work Plan' emphasised personal performance when drawing conclusions from the Taylor Review, an independent review the government had commission into the country's employment framework in October 2016. The Plan recommended that control should gain more importance in classifying workers and that less focus be placed on 'the notional right – rarely in practice exercised – to send a substitute'.[215] At the time, the government agreed that legislation on these aspects could help keep businesses from trying to 'misclassify or mislead' their staff (however, it did not follow up on these plans).[216]

In UK law, personal performance is also the issue that has recently brought up the question of the role of contractual agreements. Hugh Collins noted in 1990 already that the 'elaborate interpretative exercise' the courts had been deploying in 'comparing the actual terms of the economic arrangement against the model contracts', had let the parties' determination of status slip into their interpretation as relevant factors.[217] Ultimately, this debate is about how the primacy of facts should be understood.[218] Is it meant to be an adequate solution to establish the mandatory character of employment protection rights?[219] Or is it just meant to

[214] *Pimlico* [2018] UKSC 29 (n 207) at paras 14–48, namely 48–49.

[215] UK Government, *Good Work Plan*, Dec 2018, 9.

[216] UK Government, *Good Work Plan* (n 216) 28–29; *cf* M Taylor, 'Good Work: The Taylor Review of Modern Working Practices' (London, England, 2017).

[217] Collins, 'Independent Contractors and the Challenge of Vertical Disintegration' (n 26) 376.

[218] See above 3.3.4.

[219] ibid, 377; Freedland and Kountouris, *Legal Construction* (n 42) 360 ff (classification as normative characterisation with a regulatory aspect); ACL Davies, 'Sensible Thinking About Sham Transactions: Commentary on Protectacoat Firthglow Ltd v Szilagyi * [2009] EWCA Civ 98' (2009) 38(3) *Industrial*

gather the parties' 'implied intentions … gleaned from the whole framework of terms of the economic relationship', with a view to possibly overriding the express contractual declarations?[220]

As far as personal performance is concerned, the debate has played out between one position that only considers the contractual power of substitution,[221] and a concurring position that takes into account if and how far that power has been exercised. The UK Supreme Court defended the latter position in the 2011 *Autoclenz* case, which concerned 20 valeters who, at the time in question, provided car-cleaning services to the company Autoclenz Ltd on the basis of a comprehensive written contract for independent services. Merely interpreting the contract only took the courts as far as the company that had drafted it had foreseen, as indeed, the contract was designed to contain all the answers to the question of the workers' classification as independent contractors. If finding this a 'sham' required 'that both parties intended it to paint a false picture as to the true nature of their respective obligations', the test would lead nowhere, or, in the words of Lord Clarke, it would be 'too narrow an approach to an employment relationship'.[222] Instead, Lord Clarke suggested:

> the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem.[223]

Consequently, the court classified the valeters as 'limb (a) workers' (ie employees in the strict sense). With good reason, Alan Bogg interpreted this as an acknowledgement of the fact that the contract had been 'presented to the worker[s] on a take-it-or-leave-it basis'. In his view, *Autoclenz* marked 'the emergence of a relatively autonomous common law of the personal employment contract'.[224]

In the 2018 *Pimlico* case, however, the UK Supreme Court again mainly relied on an interpretation of the contractual documents that it characterised as having been 'carefully choreographed to serve inconsistent objectives'.[225] By analysing the inconsistencies present in the contract, the Supreme Court ultimately only assessed which of the terms shed light on the 'true nature' of the contract[226] – without ever referring to instances of the contract's factual implementation.

Law Journal 318; AL Bogg, 'Sham Self-Employment in the Supreme Court' (2012) 41(3) *Industrial Law Journal* 328.

[220] As summarised by Collins, 'Independent Contractors and the Challenge of Vertical Disintegration' (n 26) 377.

[221] *Halawi v WDFG UK Ltd (t/a World Duty Free)* [2014] EWCA Civ 1387 (= [2015] 3 All ER 543) (CA), para 49.

[222] *Autoclenz Ltd. v Belcher and others* [2011] UKSC 41 per Lord Clarke, para 35.

[223] ibid.

[224] Bogg, 'Sham Self-Employment' (n 220).

[225] *Pimlico* [2018] UKSC 29 (n 207) at para 16.

[226] *Pimlico* [2018] UKSC 29 (n 207) at para 49.

By taking this approach, it could facilitate the ideal of freedom of contract once again gaining the upper hand in the UK interpretive arena. At least, this was the situation before digital work platform litigation came along.[227]

3.4.3.2. A Variety of Tests in a Federal System (US Law)

Unlike in other jurisdictions, US labour law plays out in a rather fragmented way, as different labour law statutes in different states tend to use different criteria for employee classification. In some states, misclassification statutes exist that are specific to an industry or that assign specific benefits and protections like workers' or unemployment compensation.[228] Notably, most US labour law legislation does not contain a detailed description of 'employee'.[229] As for US federal law, the Fair Labor Standards Act (FLSA), which sets minimum standards for individual employment relationships, uses the formula 'a person employed by an employer',[230] while the National Labor Relations Act (NLRA), which regulates collective labour law, defines the employee as 'any employee'.[231] Such descriptions usually require courts to refer back to what has been developed in common law, which tends to put notions of control at the centre of attention, while also differentiating between 'control' and the 'right to control'.[232] This way, a control test is used throughout the US as the starting point for employment classification.[233]

However, over the years, the notion of 'control' used in such control tests has shifted and come to be complemented by other tests. The most important shift concerns an understanding of control as evidence of the lack of a worker's entrepreneurial nature and independent status. The 'economic realities' test specifies

[227] See below at 3.5.2.2.

[228] SD Harris and AB Krueger, 'A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker"' (2015). Discussion Paper 10, 8; Sprague, 'Worker (Mis)classification' (n 206); JM Hirsch and JA Seiner, 'A Modern Union for the Modern Economy' (2018) 86(4) *Fordham Law Review* 1728, 1743 ff.

[229] WB Liebman and A Lyubarsky, 'Crowdworkers, the Law and the Future of Work: The U.S.' in B Waas and others (eds), *Crowdwork: A Comparative Law Perspective* (Frankfurt a. M. Bund-Verlag, 2017) 30–32.

[230] 29 U.S.C. § 203(g).

[231] 29 U.S.C. § 152(3) (1935); similarly, for example, the Employee Retirement Income Security Act of 1974 (ERISA) (29 U.S. Code § 1002(6)).

[232] Above at n 206; Sprague, 'Worker (Mis)classification' (n 206); E Kennedy, 'Freedom from Independence: Collective Bargaining Rights for "Dependent Contractors"' (2005) 26(1) *Berkeley Journal of Employment and Labor Law* 143; *cf Nationwide Mutual Ins Co v Darden* [1992] 503 U.S. 318 (US SC), on the Employee Retirement Income Security Act of 1974 (ERISA); the leading case on common law would be *Community for Creative NonViolence v Reid* [1989] 490 U. S. 730 (US SC) (Liebman and Lyubarsky, 'Crowdworkers' (n 230) 40–46).

[233] RR Carlson, 'Why the Law Still Can't Tell an Employee When It Sees One And How It Ought to Stop Trying' (2001) 22 *Berkeley Journal of Employment and Labor Law* 295, 305; Sprague, 'Worker (Mis) classification' (n 206); for an overview, see also T Goldman and D Weil, 'Who's Responsible Here?: Establishing Legal Responsibility in the Fissured Workplace' (2020). Working Paper 114, 15–19.

this endeavour.[234] It is supposed to determine whether the individual is free to make entrepreneurial decisions in her own economic interest.[235] Integration in the business is another economic aspect that complements the control test.[236]

Today, these criteria are used in a variety of tests that exist alongside common law tests of control, in particular (in the context of the FLSA) the so-called 'suffer or permit' test or the broader so-called 'ABC' test.[237] The latter was adopted, for example, by the California Supreme Court in its 2018 *Dynamex* judgment for the interpretation of California wage orders (and later codified as section 2750(3) of the California Labor Code), in order to expand application beyond what the 'suffer or permit' test allows.[238]

The great variety of tests (criteria) and factors (indicators) in the US context makes it difficult to identify any limited number of criteria and indicators.[239] Below, however, I compile a list that draws on two sources: the table Seth Harris and Alan Krueger set up in their review for the Hamilton Project, a non-profit economic policy initiative, and the list Wilma Liebman and Andrew Lyubarsky put together for comparative purposes.[240] Both summarise the indicators used in US Supreme Court jurisprudence for the term 'employee', referring to common law and federal statutes. Across all definitional approaches, they found the following indicators:

- Role of work: Is the work performed integral to the employer's business?
- Skills involved: Is the work necessarily dependent on special skills? This has been considered relevant for answering the question of whether a worker's managerial skills affect his or her opportunity for profit and loss.
- Investment: Does the employer provide the necessary tools and/or equipment and bear the risk of loss from those investments?
- Independent business judgment: Has the worker withdrawn from the competitive market to work for the employer?

[234] Sprague, 'Worker (Mis)classification' (n 206); M Linder, *The Employment Relationship in Anglo-American Law: A Historical Perspective* (Contributions in Legal Studies vol 54, Greenwood Press, 1989) 65; United States Commission on the Future of Worker-Management Relations (Dunlop Commission), *Final* (n 40) 63.

[235] Liebman and Lyubarsky, 'Crowdworkers' (n 230) 44–46, with a detailed account on the debates around the National Labor Relations Board (NLRB) on the 'rubric of entrepreneurialism'.

[236] Sprague, 'Worker (Mis)classification' (n 206).

[237] Liebman and Lyubarsky, 'Crowdworkers' (n 230) 44–46; 39 with an overview on approaches and tests; B Rogers, 'Employment Rights in the Platform Economy: Getting Back to Basics' (2016) 10 *Harvard Law & Policy Review* 479, 484–90; Linder, *The Employment Relationship* (n 235) 63–64.

[238] *Dynamex Ops. W. Inc. v Superior Court* [2018] 416 P.3d 1 (California SC). More on the ABC test, see below n 329.

[239] United States Commission on the Future of Worker-Management Relations (Dunlop Commission), *Final* (n 40) 64: 'regulatory morass'.

[240] Harris and Krueger, *Proposal for Modernizing Labor Laws* (n 229) 8; Liebman and Lyubarsky, 'Crowdworkers' (n 230) 40–46. Note that the Supreme Court may have used additional indicators not appearing in the list, such as the client's right to assign additional projects (*Community for Creative NonViolence* [1989] 490 U. S. 730 (n 233)).

- Duration: Does the worker have a permanent or indefinite relationship with the employer?
- Control: Does the employer set pay amounts or fee caps, working hours, and the manner in which work is performed?
- Benefits: Does the worker receive insurance, pension plan contributions, sick days, or other benefits that suggest 'employment'?
- Method of payment: Does the worker receive a guaranteed wage or salary as opposed to a fee per task?
- Intent: Do the parties believe they have created an employer–employee relationship?

The informal guidance issued by the Department of Labor between 2015 and 2017 on the application of the FLSA also included some counter-indicators and warnings against putting too much weight on certain indicators. The guidance mentioned, for example, that some factors could be found in employment and independent contracting alike, such as a relatively flexible work schedule or a lack of direct control in cases where work is performed away from the employer's premises.[241]

As for the methodology employed, the multifactor common law test, according to the Supreme Court, does not 'contain [a] shorthand formula for determining who is an "employee"', as a consequence of which 'all of the incidents of the employment relationship must be assessed and weighed with no one factor being decisive'.[242] However, with the tests '[offering] little guidance for future cases … because any balancing test begs questions about which aspects of "economic reality" matter, and why',[243] jurisprudence has been criticised for rather 'unimaginatively [checking] off these factors without embedding the test in the [respective] act's purpose'.[244]

3.4.3.3. Burden of Proof and the Typological Method (Spanish and Portuguese laws)

Spanish and Portuguese labour law are comparable in that they both rely on codified labour laws, which not only define different employment relationships, but

[241] D Weil, Administrator's Interpretation No. 2015-1, '"Suffer or Permit" Standard in the Identification of Employees Who Are Misclassified as Independent Contractors', U.S. Department of Labor, Wage and Hour Division (15 July 2015); *cf* Liebman, 'Debating' (n 5) 44–46.

[242] *Community for Creative NonViolence* [1989] 490 U. S. 730 (n 233).

[243] Rogers, 'Employment Rights' (n 238) 448, citing Judge Easterbrook in his concurring opinion on *Sec'y of Labor v Lauritzen* [1987] 835 F.2d 1529, 1539 (7th Circuit). The same judge is cited with 'A score of 5 to 3 decides a baseball game, but [the FLSA] does not work that way' in *Reyes v Remington Hybrid Seed Co* [2007] 495 F.3d 403, 407 (7th Circuit).

[244] M Linder, 'Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness' (1999) 21 *Comparative Labor Law & Policy Journal* 187, 207 ff.

also use indicators that are weighted with the help of a rule on burden of proof.[245] Their examples will be presented here to exemplify the specific methodological problems of this approach.

The legal basis for classification in Spanish labour law is Article 1(1) of the Estatuto de los Trabajadores (ET, the Workers' Statute), according to which the Workers' Statute

> shall apply to workers who voluntarily provide their services on the account and within the scope of organisation and management of another physical or legal person (employer or entrepreneur).

An interesting feature of this regulation is the combination of an economic factor (working on the employer's account) and the factor of organisational integration. Jurisprudence has called the two factors ajenidad (working on account of another) and dependencia (dependence, understood as organisational integration).[246]

Article 8(1)(2) ET then adds a legal presumption to the definition. However, the presumption does not use specific indicators. Rather, it mentions more or less the exact same criteria as in the Article 1(1) definition:

> [An employment relationship] shall be presumed to exist between everyone who provides a service on behalf and within the scope of organisation and direction of another and the one who receives it in exchange for remuneration.

Without even mentioning the burden of proof, an April 2018 judgment by the Spanish Supreme Court concerning the classification of teachers in occupational vocational training courses (on which there had been diverging decisions by local and regional courts) asserted that

> both dependencia and ajenidad are concepts of a rather high level of abstraction, which may manifest themselves differently according to activities and modes of production, and which, moreover, although their contours do not exactly coincide, are closely related to each other. Hence, in the resolution of litigious cases, the classification of an employment contract will be based on a set of indicators, ie facts that are indicative of one and the other.[247]

While Spanish law here does not seem to make too much of the presumption, Portuguese law uses a rather different technique.

[245] For more examples, see ILO, 'Employment Relationship' (n 25) 28–30.

[246] For an overview and details on Spanish law, see J García Murcia and IA Rodríguez Cardo, 'The Concept of "Employee": The Position in Spain' in B Waas and GH van Voss (eds), *Restatement of Labour Law in Europe: Vol I: The Concept of Employee* (Hart Publishing, 2017); A Todolí-Signes, 'Workers, the Self-employed and TRADEs: Conceptualisation and Collective Rights in Spain' (2019) 10(3) *European Labour Law Journal* 254.

[247] Tribunal Supremo (STS), Sala de lo Social (Spanish Supreme Court (Social Chamber)) 10 Apr 2018, Case 1773/2018 (*Instituto Nacional de la Seguridad Social, Tesorería General de la Seguridad Social v Premier Ceuta S.L.*) ECLI: ES:TS:2018:1773.

Article 11 of the Portuguese Código do Trabalho (CT, Labour Code) first defines an employment contract as one of subordination,[248] or literally:

> one by which a natural person undertakes, in return for payment, to perform his activity for another person or persons, within the scope of their organisation and under their authority.

Article 12 CT then contains a presumption[249] of an employment contract, provided that at least 'some' (understood to mean at least two[250]) of the following five criteria have been verified:

(a) the activity is carried out at a place belonging to or determined by the beneficiary (ie the customer/potential employer);
(b) work equipment and tools belong to the customer;
(c) the provider of the activity (ie the worker) observes the start and end times for the service that have been determined by the customer;
(d) in return for the activity, a specified amount is paid to the worker at specified intervals; and
(e) the worker performs managerial or supervisory functions in the customer's organisational structure.

If facts give rise to this (rebuttable) legal presumption, they can no longer be used in an overall assessment in the same way that such an assessment would be conducted in other legal systems.[251] In a 2017 judgment, the Portuguese Supreme Court explicitly juxtaposed the two approaches:

> The technique of the presumption of the existence of an employment contract, enshrined in Article 12 of the Labour Code, although inspired by the traditional indicator model, radically alters the scenario of proof of … the employment contract. In fact, contrary to the indicator model, which called for an overall weighing of the elements that characterise the concrete relationship established between the parties … the demonstration of the existence of an employment contract will now depend, and only, on the demonstration of 'some' of the indicators enshrined in … Article 12(1).[252]

In essence, the rebuttable presumption in Portuguese law uses indicators as prima facie evidence: As soon as the party alleging employment has proven the existence of two indicators, it is for the opposing party to demonstrate facts and counter-indicators. Only then would we arrive at a technique that could come close to the

[248] Supremo Tribunal de Justiça (Portuguese Supreme Court), 7 Sept 2017, Case 2242/14.2TTLSB.L1.S1; for an overview and details of the Portuguese legal situation, see JJ Abrantes and R Da Canas Silva, 'The Concept of "Employee": The Position in Portugal' in B Waas and GH van Voss (eds), *Restatement of Labour Law in Europe: Vol I: The Concept of Employee* (Hart Publishing, 2017).

[249] The presumption *iuris tantum* used in Art 12 of the Labour Code refers back to Art 350 of the Portuguese Civil Code.

[250] Supremo Tribunal de Justiça, 7 Sept 2017 (n 249); Abrantes and Da Canas Silva, 'Portugal' (n 249) 554.

[251] See, eg, above 3.3.2 for a general notion; 3.4.2.2 for German law; at n 243 for US law.

[252] *Supremo Tribunal de Justiça*, 7 Sept 2017 (n 249).

typological method, whereby the court is presented with all the facts relevant in the case in order to be able to undertake some kind of overall evaluation.

A recent decision by the Tribunal da Relação (Regional Labour Court) of Évora concerning the labour law classification of a journalist and photo reporter helps demonstrate how this method does indeed make a difference. After having stated facts pertinent to Article 12(a), (b) and (d) CT,[253] giving rise to the presumption of an employment relationship, the court proceeded to evaluate counter-indicators: the wording of the contract, the worker's registration as self-employed with the tax administration, and the non-payment of holidays. However, instead of following up with a global assessment of indicators and counter-indicators, the court went on to assess whether the counter-indicators should actually be considered as such, or whether they should rather be considered 'typical for situations in which the employer does not want to assume the existence of an employment contract'.[254]

This approach is interesting for two reasons. First, there was no question of facts having been disputed. The presumption did not work as a rule for burden of proof in the strict sense, but rather as a default rule for weighing indicators. Secondly, the presumption works in an indirect way. In light of the presumption, courts tend to test counter-indicators for evidence of a typical disguise of employment.

3.4.3.4. Economic Dependence as an Intermediate Category (Spanish and Canadian Law)

Spanish law is interesting for yet another reason: section 11 of the Self-Employed Workers' Statute (Act 20/2007) creates a third category of dependent self-employment (*trabajadores autónomos económicamente dependientes*, so-called TRADE workers). This category concerns natural persons who usually personally and directly carry out an economic or professional activity for income purposes, and who receive 75 per cent (or more) of their income from one single client. Another precondition for specific TRADE rights (such as unpaid holidays, parental leave, compensation in the case of unfair dismissal, and unemployment benefits) is that the TRADE worker does not make use of employees or subcontractors of her own, not even in relation to clients other than the primary client in question.[255]

[253] ie work in an interior space fully equipped by the client, use of the client's instruments and equipment as well as secretaries, chairs, computer, printer, laptop, sound study, microphones, cameras, software licensed to the client, cell phone paid for by the client, car with the client's logo.

[254] *Tribunal da Relação de Évora* (Regional Court of Évora, TRE) 12 Jul 2018, Case 1149/17.6T8PTG.E1.

[255] *Ley* 20/2007 *del Estatuto del trabajo autónomo* (Autonomous Work Act), 11 Jul 2007, BOE-A-2007-13409, specified by *Real Decreto* (Royal Order) 197/2009 of 23 Febr 2009, BOE-A-2009-3673; for overviews, see García Murcia and Rodríguez Cardo, 'Spain' (n 247), 673–74; E Sánchez Torres, 'The Spanish Law on Dependent Self-Employed Workers: A New Evolution in Labor Law' (2010) 31 *Comparative Labor Law & Policy Journal* 231; Soravilla and Herrezuelo, 'Schutz' (n 12); J-P Landa Zapirain, 'Regulation for Dependent Self-employed Workers in Spain: A Regulatory Framework for Informal Work?' in J Fudge, S McCrystal and K Sankaran (eds), *Challenging the Legal Boundaries of Work Regulation* (Hart Publishing, 2012); Todolí-Signes, 'Workers, the Self-employed and TRADEs' (n 247); MA Cherry and A Aloisi, 'Dependent Contractors in the Gig Economy: A Comparative Approach' (2017) 66(3) *American University Law Review* 635, 667–74; J Fudge, 'A Canadian Perspective

In their comparison of the Spanish TRADE category with Canadian and Italian third categories, Miriam Cherry and Antonio Aloisi conclude that the TRADE category – introduced as a subcategory of self-employment[256] – comes with 'burdensome' regulations added to the high dependency threshold, which only make it available to 'a small percentage of self-employed workers'.[257] In contrast, the Canadian third category, which is an intermediate category between employee and independent contractor known as 'dependent contractor', seems to work well as 'a safe harbour', by expanding the coverage of labour laws to an increasing number of workers.[258]

For the category of employee, Canadian law uses a definition based on common law notions. While the Canada Labour Code does not define the 'employee' in substantial terms ('any person employed by an employer'),[259] Canadian courts have used criteria that refer to control as well as economic factors (in this respect, similarly to US law).[260] However, in order to provide social protection to workers that the Canadian courts and adjudicators do not cover with this definition, the notion of 'dependent contractor' has been developed since the 1980s, based on a proposal by Canadian labour lawyer Harry Arthurs.[261] Today, according to section 3(1)(c) of the Canada Federal Labour Code,[262] a dependent contractor (*entrepreneur dépendant*), is a person

> who, whether or not employed under a contract of employment, performs work or services for another person on such terms and conditions that they are, in relation to that other person, in a position of economic dependence on, and under an obligation to perform duties for, that other person.

This concept is also used in several provinces[263] and has been described as testing the existence of

> an essentially exclusive relationship (80% being a rule of thumb for 'exclusive') over a lengthy period of time with one client such that the contractor is economically dependent on the continuation of that relationship.[264]

on the Scope of Employment Standards, Labor Rights, and Social Protection: The Good, the Bad, and the Ugly' (2010) 31 *Comparative Labor Law & Policy Journal* 253.

[256] Todolí-Signes, 'Workers, the Self-employed and TRADEs' (n 247).

[257] Cherry and Aloisi, 'Dependent Contractors' (n 256) 670–74; for a similar evaluation ('limited'/'modest success'): Landa Zapirain, 'Dependent Self-employed Workers' (n 256) 167.

[258] Cherry and Aloisi, 'Dependent Contractors' (n 256) 651–55; 676.

[259] For the purposes of collective labour law, see Canada Labour Code (R.S.C., 1985, c. L-2), s 3(1).

[260] Criteria are control, ownership of tools, chance of profit, risk of loss (G Davidov and B Langille, 'Beyond Employees and Independent Contractors: A View from Canada' (1999) 21 *Comparative Labor Law & Policy Journal* 7, 15–19; Liebman and Lyubarsky, 'Crowdworkers' (n 230) 102 ff; Kennedy, 'Freedom from Independence' (n 233) 153–55; Fudge, 'Canadian Perspective' (n 256) 260).

[261] HW Arthurs, 'The Dependent Contractor: A Study of the Legal Problems of Countervailing Power' (1965) 16 *University of Toronto Law Journal* 89; Davidov and Langille, 'Beyond Employees and Independent Contractors' (n 261) 22–24, also mentioning the US Supreme Court case of *NLRB v Hearst Publications* [1944] 322 U.S. 111.

[262] Applicable to employment that is subject to federal jurisdiction (i.e. basically work for the federal government); see Fudge, 'Canadian Perspective' (n 256) 254 on the Canadian Federal system.

[263] Kennedy, 'Freedom from Independence' (n 233) 154–55 (Ontario, Newfoundland, Manitoba and Saskatchewan); *cf* Ontario Labour Relations Act, 1995, S.O. 1995, ch 1, schedule A (version July 2019).

[264] GA Green, 'Employment Law and the Emerging Notion of the Dependent Contractor' (9 November 2018), http://www.mckercher.ca/resources/employment-law-and-the-emerging-

Although this definition seems to ask for a similarity of situation to that of employment,[265] and to rather formulate an add-on to the concept of 'employee' with a high dependency threshold,[266] in practice it seems to have at least partly fulfilled its promise to expand labour rights to persons that were not covered before.[267]

Harry Arthurs has also now proposed another extension of labour rights to what he calls 'autonomous workers' – a category which would include certain independent contractors 'who perform services comparable to those provided by employees and under similar conditions', and grant standard hours, wages, vacations and holidays. He has also suggested that those independent contractors who provide services to or on behalf of employers, but who are neither 'employees' nor 'dependent contractors' or 'autonomous workers', should be expressly excluded from coverage of any labour rights, thus creating a form of burden of proof against independent contracting.[268]

3.4.4. Summary and Conclusions

Many scholars have already stated that there seem to be no essential differences between jurisdictions,[269] as different jurisdictions use 'surprisingly'[270] similar descriptions of employment and third-category workers. This account confirms these findings, but with the caveat that the short analyses above do not pretend to amount to a comparative exercise in the strict sense. For such an exercise, deeper and more comprehensive analyses would be necessary, embedded in the legal context of the respective jurisdictions.[271] However, the aforementioned examples still tell us something about the dynamics associated with the legal exercise of classification.

notion-of-the-dependent-contractor?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original, summarising the jurisprudence of *Khan v All-Can Express Ltd.* [2014] BCSC 1429) (British Columbia SC); *Keenan (c.o.b. Keenan Cabinetry) v Canac Kitchens, a Division of Kohler Ltd ('Canac')* [2016] ONCA 79 (Ontario Court of Appeal); *Drew Oliphant Professional Corp v Harrison* [2011] ABQB 216) (Alberta Court of Appeal) and *Shaham v Airline Employee Travel Consulting Inc* [2018] NSSM 18 (Nova Scotia).

[265] *Canadian Union of Postal Workers v Foodora Inc* [2020] ONLRB (Ontario Labour Relations Board) Case No. 1346-19-R (Wilson), para 116; 118 (dependence 'roughly analogous to that of an employee'); Davidov and Langille, 'Beyond Employees and Independent Contractors' (n 262); see also Davidov, *Purposive Approach* (n 42) 140: no level of subordination required.

[266] Kennedy, 'Freedom from Independence' (n 233) 154.

[267] For a thorough evaluation, see ch 6, 6.3.4.

[268] H Arthurs, 'Fairness at Work: Federal Labour Standards for the 21st Century. Final Report of the Federal Labour Standards Review' (Gatineau, 2006) 65 (in particular, recommendation 4.4).

[269] Among the abovementioned authors (n 42), in particular: Nogler, *Concept of* '*Subordination*' (n 7) 464–65; Wank, AuR 2007, 244, 246–47; Rebhahn, 'Arbeitnehmerbegriff' (n 42) 155–56.

[270] Davidov, Freedland and Kountouris, 'Subjects of Labor Law' (n 7).

[271] For genuinely comparative reports, see Supiot, *Beyond Employment* (n 60); Countouris, 'Changing Law' (n 43); Nogler, *Concept of "Subordination"* (n 7); Rebhahn, 'Arbeitnehmerähnliche Personen' (n 8); Rebhahn, 'Arbeitnehmerbegriff' (n 43); Veneziani, 'Employment Relationship' (n 43); Freedland and Kountouris, *Legal Construction* (n 43); Davidov, Freedland and Kountouris, 'Subjects of Labor Law' (n 7); Davidov, *Purposive Approach* (n 43); B Waas, 'Crowdwork in Germany' in B Waas and others (eds), *Crowdwork: A Comparative Law Perspective* (Frankfurt a. M. Bund-Verlag, 2017).

3.4.4.1. Categories, Criteria and Indicators

In order to be later able to identify the problems digital platform work presents for employment classification, we can here leave aside the question of legal sources. Mostly, though not always, the criteria of worker categories are at least formulated by statutory instruments. While some legislators also describe individual indicators, these are mostly developed by the courts.

Insofar as the abstract criteria for description are concerned, we find the following criteria for employment throughout different legal systems:

- **Subordination**, ie the fact that the work is carried out according to the instructions of another party, is the central element of 'employment' in most legal systems. To assess the existence of subordination, instructions on working time, place of work and the specific work activities are the issues that seem to be most relevant.
- **Control** is a term used in common law traditions that seems to be mostly understood in a similar way to subordination[272] – although the perspective is less on hierarchical ordering than on monitoring during work or post-work.
- **Personal performance** is often a criterion of 'employment' requiring indication that the work is carried out personally by the worker.
- **Organisational integration**, ie the integration of the worker in a work organisation or an undertaking of the client/employer, is relevant in many legal systems, although in different ways.[273] The use of uniform clothing or of the employer's tools often serve as indicators here, as well as hierarchical coordination of workflows and the division of work, or the fact that the activity is central to the business of the client/employer.[274]

[272] *cf* Davidov, Freedland and Kountouris, 'Subjects of Labor Law' (n 7); Waas, 'Crowdwork in Germany' (n 272) 150.

[273] In Italy, since 2019, it is used as an alternative way of employment classification ('*etero-organizzazione*'); see Art 2(1) Disciplina organica dei contratti di lavoro, last modified by Art 1(1a) Decreto Legge 3 Sept 2019, no 101 (si applica la disciplina del rapporto di lavoro subordinato anche ai rapporti di collaborazione che si concretano in prestazioni di lavoro esclusivamente personali, continuative e le cui modalità di esecuzione sono organizzate dal committente anche con riferimento ai tempi e al luogo di lavoro. Le disposizioni di cui al presente comma si applicano anche qualora le modalità di esecuzione della prestazione siano organizzate mediante piattaforme anche digitali = the rules governing employment relationships shall also apply to collaborative relationships resulting in exclusively personal, continuous work whose mode of performance is organised by the principal also with reference to the time and place of work. … shall also apply where the manner of performance of the service is organised by means of platforms, including digital platforms); Ales, 'Italy' (n 16) 371 ff; M Del Conte, 'Re-structuring the Standard Employment Relationship: Italy and the Increasing Protection Contract' in E Ales, J Kenner and O Deinert (eds), *Core and Contingent Work in the European Union: A Comparative Analysis* (Hart Publishing, 2017) (who thinks the Jobs Act has 'cleared up' the 'cloudy area between self-employment and subordination'); Cherry and Aloisi, 'Dependent Contractors' (n 256) 656–66.

[274] For indicators, *cf* Bayreuther, 'Arbeitnehmereigenschaft' (n 137) 247.

Looking at organisational integration can facilitate the identification of subordination because it allows for an assessment of hierarchy without having to search for direct instructions. Hence, the kind of organisational power that comes with integration can be used as an indicator of subordination, or it can be tested independently of subordination.[275]

In addition, integration has also sometimes been seen as an indicator of economic dependence.

- **Entrepreneurial opportunities**, sometimes referred to as 'business realities' or 'economic realities', directly address the profit opportunities and economic risks to which the worker is subject.

  This criterion plays a role in several legal contexts, but in varying ways. For example, Mark Freedland and Nicola Kountouris have shown that personal performance can also come close to evaluating entrepreneurial opportunities.[276] Meanwhile, Rolf Wank sees a lack of entrepreneurial opportunities as an indicator of organisational integration.[277] Under the heading of an 'economic' perspective, the issue of entrepreneurial opportunities may also be seen as indicative of economic dependence.

- **Economic dependence** mostly refers to the fact that the worker receives the bulk of her income from only one client. But the term 'economic dependence' has also been identified with concepts of entrepreneurial opportunities and organisational integration.[278]

For the classification exercise, it is not only relevant which criteria and definitions are used, but also how they interrelate and which facts and indicators can be assigned to which of these criteria. This is a major issue particularly in those jurisdictions that do not rely on a 'binary divide'[279] between 'employment' and 'independent contracting', but which include a third category that often leads to a significantly smaller array of entitlements.[280] These third categories are sometimes constructed as a genuinely intermediate category between employment and independent contracting, are sometimes considered *aliud* to both of them, or are sometimes constructed as a subcategory to either employment or independent contracting.

[275] Collins, 'Market Power, Bureaucratic Power, and the Contract of Employment' (n 209) ('dual source of the subordination').

[276] Freedland and Kountouris, *Legal Construction* (n 42) 376.

[277] R Wank, *Arbeitnehmer und Selbständige* (CH Beck, 1988); Wank, 'Personelle Reichweite' (n 114).

[278] Davidov, *Purposive Approach* (n 42) 140. The ECJ's *FNV Kunsten* decision (n 82) has led some scholars to believe that the ECJ may in the future want to qualify economically dependent persons as employees (Felipe Temming, 'Zum Anwendungsbereich der Vorschriften über die internationale Zuständigkeit für individuelle Arbeitsverträge' (2015) IPRax 509–517; *cf* analysis above at 3.4.1.3).

[279] Freedland and Kountouris, *Legal Construction* (n 42) 103.

[280] Further examples beyond the German, Spanish and Canadian examples explained above at 3.4.2.6 and 3.4.3.4, are referenced above at nn 8–10.

These third categories mostly use economic dependence as the defining element and criterion, which is often tested with the following indicators:

- First, the worker performs the work in person and without employees of his or her own (ie is a solo self-employed worker).
- Secondly, most of the worker's income is earned with a single client (mostly measured by the share of income from the work for a single client, sometimes also by the duration of the relationship between worker and client).[281]

As a consequence of the detailed definitions of employment and third categories, independent contracting is mostly a residual category.[282]

Lastly, we should not forget about the legal and institutional contexts of labour law classification. Employment classification can have very different legal consequences depending on the legal system in question. These consequences, ie the bundle of rights and obligations associated with employee classification, may also be taken into account when categorising, be it explicitly (as a functional argument) or implicitly.[283] The same is true for the institutions in which labour law regulation is embedded,[284] and the procedures which can give rise to classification (individual litigation, public agency litigation, administrative decisions, etc).

3.4.4.2. The Typological Method and its Pitfalls

One methodological feature that has been used for classifying work relationships in most legal systems is the principle of primacy of facts. This principle is meant to uncover situations of what has been variously termed 'misclassification', 'disguised employment', 'sham contract' or 'false self-employment', ie when the contractual designation of a work relationship does not match the reality of that relationship. The principle gives rise, at least implicitly, to a typological method insofar as it makes it necessary to assess all the facts of a case and integrate them in a general assessment of the work relationship. However, the method presupposes that the 'type' against which the facts of the case must be checked provides a clear picture for determining which of the facts characterise the case and which of them are only ancillary. For this purpose, courts and adjudicators have used notions of 'typical employees', 'typical independent contractors' and even 'typical disguised employment'. In line with the epigraph at the top of this chapter, judges

[281] Examples for the first alternative above text at n 191, n 256 and n 265; for the second alternative, see the Italian criteria of the duration of the relationship and the coordination between work activity and corporate goals (Borzaga, 'Wirtschaftlich abhängige Selbständige' (n 12) 100–01).

[282] N Countouris and V de Stefano, 'Executive Summary of the Report "New Trade Union Strategies for New Forms of Employment"' (2019) 10(3) *European Labour Law Journal* 183; R Dukes and W Streeck, 'From Industrial Citizenship to Private Ordering?: Contract, Status, and the Question of Consent' (Köln, 2020) 20; for the Italian definition of the concept, see Ales, 'Italy' (n 16) 351; *cf* Arthurs' idea of defining it explicitly (above at n 269 and below ch 6, at n 91).

[283] Freedland and Kountouris, *Legal Construction* (n 42) 7.

[284] ibid, 46.

do not seem to need legal definitions to recognise an employee or an independent contractor when they see one.

It comes as no surprise, then, that such descriptions of 'typical' work relationships do not fit atypical work relationships. Jurisdictions differ quite substantially in the degree to which they ascribe importance to the contract or to facts and social practices in classifying work relationships.[285] In view of the above findings, however, it is safe to conclude that in many jurisdictions, courts have reacted to the problem of atypical work by resorting to the contractual designation rather than the facts of the case. For example, personal performance can be measured by asking if the work 'is' performed by the worker, or if it 'must be' performed by the worker according to the contract. Misclassification can be assessed by looking at inconsistencies between contract and facts, or just by looking at inconsistencies in the contract. Indicators assessed as conceivable in all kinds of work relationships may give rise to giving the company a choice between categories.

In theoretical terms, a discussion on the function of the typological method lies behind these approaches of valuing the contract over facts. The primacy of facts principle is a labour law example of an anti-circumvention rule that can serve different functions: seeking out fraud or enforcing rules.[286] In view of the binding character of employment law and the unequal power relations between workers and companies, only the latter approach is compatible with the function of labour law. But this understanding seems to be in retreat as the courts increasingly grapple with instances of atypical work relationships.

Disenfranchising the typological method does not, however, provide a way out of the dilemma. Attempts at using specific indicators to assign the burden of proof to the (presumptive) employer have tended to lead back to a typological approach. At least, this is what the Portuguese and Spanish examples discussed above show. In both contexts, the effect of the burden-of-proof rules comes down to shifting the perspective of the general assessment. While German courts, for example, will ask if a certain work practice is also imaginable in a situation of self-employment, Portuguese courts will ask if the facts pointing towards self-employment are not incompatible with the existence of an employment relationship.[287]

Before elaborating ideas for adding a functional approach to the typological method in chapters four and five, the following section will show how all these descriptions, indicators and methods play out when it comes to assessing digital platform work.

[285] Davidov, Freedland and Kountouris, 'Subjects of Labor Law' (n 7). *cf* Freedland and Kountouris, *Legal Construction* (n 42) 103; 132 for the different functions the contract fulfils in the European continental model and in English common law.

[286] Fudge, 'Fragmenting Work' (n 31) 642–43 (she translates Teubner's approach developed for corporate law into the labour law context); M-L Morin, 'Labour Law and New Forms of Corporate Organization' (2005) 144(1) *International Labour Review* 5, 10; Davidov, *Purposive Approach* (n 42) 154–56; on the respective debates in general, see above at 3.3.4, in German law above at 3.4.2.5.1 and in English law text at n 218–21.

[287] Above at 3.4.3.3.

3.5. Jiggling the Peg: Digital Platform Work as Employment?

It has been suspected for some time that the tests courts employ for determining labour law classifications reflect 'the social constructions of an earlier age'. Otto Kahn-Freund, for example, suspected this as early as 1951.[288] While he could still identify the control test (which was then predominantly used) with 'a mainly agricultural society, or the early stages of industrial revolution', tests have since been refined to include focuses on organisational integration, entrepreneurial opportunities and business realities. However, in 1990, Hugh Collins saw labour law categories as now mirroring 'the social reality of the employment relation in advanced industrialised societies'.[289] Are we still using a twentieth-century test to classify workers in the twenty-first-century economy?[290] On the other side, many see a lot of what characterised nineteenth-century work, or at least twentieth century Taylorism, in the contingent relationships of digital platform workers today. In other words, they find digital platform work relationships to be 'nothing new under the sun'.[291]

This is, after all, the task and routine of lawyers and legal academics: to work with rules that have been developed a long time ago and try to apply them to new realities. Assessing new developments against old standards is part of the typical work of lawyers. Thus, instead of looking at the *results* of the application of labour law classification to digital work platforms, the following sections will analyse the *arguments* and *topics* that have been used in the process of such applications, in order to identify what sticks out when trying to put the peg of digital platform work into the holes of existing labour law categories. The following sections will:

- show which features of digital platform work legal scholars have been discussed as indicators for classifying digital platform work as employment (3.5.1);
- give an overview of the classification of digital platform work in jurisprudence and summarise how specific platforms have been classified (3.5.2); and
- analyse the controversial features and indicators of digital platform work that should make us think about reconstructing the models and ideas used for classification (3.5.3).

[288] Kahn-Freund, 'Servants and Independent Contractors' (n 209) 505.

[289] Collins, 'Market Power, Bureaucratic Power, and the Contract of Employment' (n 209) 10.

[290] Sprague, 'Worker (Mis)classification' (n 206).

[291] Prassl, *Humans as a Service* (n 3) 73; see Finkin, 'Beclouded Work' (n 14); J Woodcock and M Graham, *The Gig Economy: A Critical Introduction* (Polity, 2020) 3–10; B Fabo, J Karanovic and K Dukova, 'In Search of an Adequate European Policy Response to the Platform Economy' (2017) 23(2) *Transfer European Review of Labour and Research* 163, 171–72; J Prassl and M Risak, 'Uber, Taskrabbit & Co: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork' (2016) 37(3) *Comparative Labor Law & Policy Journal* 619; P Thompson and K Briken, 'Actually Existing Capitalism: Some Digital Delusions' in K Briken and others (eds), *The New Digital Workplace: How New Technologies Revolutionise Work* (Macmillan Education; Palgrave, 2017) 251.

3.5.1. Indicators for Employment in Digital Platform Work

This first subsection serves as a link between the aforementioned cross-national overview of indicators and the ensuing evaluations of specific platforms in a variety of jurisdictions. It tentatively compiles the indicators and arguments used either in favour of or against employment classifications in the academic debate. This is followed by an assessment of different types of platforms with an analysis of corresponding jurisprudence (3.5.2).

3.5.1.1. Subordination: Instructions and Control

Common criteria for employment are instructions and unilateral directions on work activities. Translated into the world of digital work platforms, the indicators suggested for testing instructions and directions include asking: if platforms programme the activities more or less in detail,[292] if work steps are guided by digital interfaces,[293] or if time limits for activities exist.[294] In fact, empirical evidence shows that the programming of tasks via apps is usually quite pronounced, as the general use of an app commonly enforces certain work steps to be taken (app-based management),[295] workers ending up as a mere cog in the wheel that is powered by [the digital work platform].[296]

A second issue is (ex-post or on-the-job) control, which is a particularly relevant indicator in common law systems. Scholarship and jurisprudence have both mentioned a platform's monitoring of work activities as a relevant indicator of subordination, such as the existence of a permanent communicative connection or a direct monitoring of activities, for example, via screenshots, time-tracking apps, interactive check lists or GPS.[297]

However, all these indicators of subordination are not easy to qualify. In order to qualify as an indicator, the instructions would, in many jurisdictions, have to refer to central and not only incidental issues of the work activities. They would have to be at the core of, or of vital importance to, the implementation of the contract. But empirical evidence shows that platforms almost always give workers

[292] Deinert, 'Neuregelung des Fremdpersonaleinsatzes' (n 115) 68; W Däubler and T Klebe, 'Die neue Form der Arbeit – Arbeitgeber auf der Flucht?' [2015] *Neue Zeitschrift für Arbeitsrecht* 1032, 1035.

[293] M Risak, '(Arbeits-)Rechtliche Aspekte der Gig-Economy' in M Risak and D Lutz (eds), *Arbeit in der Gig-Economy: Rechtsfragen neuer Arbeitsformen in Crowd und Cloud* (ÖGB-Verlag, 2017).

[294] Harris and Krueger, 'Proposal for Modernizing Labor Laws' (n 229).

[295] M Ivanova and others, 'The App as a Boss?: Control and Autonomy in Application-Based Management' (2018). Arbeit|Grenze|Fluss. Work in Progress interdisziplinärer Arbeitsforschung 2 for food-delivery; *cf* Sprague, 'Worker (Mis)classification' (n 206).

[296] *Canadian Union of Postal Workers v Foodora Inc.* [2020] ONLRB Case No. 1346-19-R, para 107, referring to food-delivery platform Foodora.

[297] R Krause, 'Digitalisierung der Arbeitswelt – Herausforderungen und Regelungsbedarf: Gutachten B' in Deutscher Juristentag (Ständige Deputation) (ed), *Verhandlungen des 71. Deutschen Juristentags Essen 2016* (CH Beck, 2016) B 104-05; Waas, 'Crowdwork in Germany' (n 272) 152; Däubler and Klebe, 'Neue Form der Arbeit' (n 293) 1035; Sprague, 'Worker (Mis)classification' (n 206).

the freedom to connect or disconnect, as well as to accept or deny requests and tasks. Consequently, there are usually no specific obligations incumbent on workers as to the 'if' and 'when' of work.[298] While traditional employers in Fordist environments control the personality of the worker by controlling the complete work process, digital work platforms tend to limit their control to predefining and structuring work activities, and then give quite some formal freedom to workers in choosing when and how much work they take on, as well as how they go about it.

This is why scholars often modify indicators for subordination in assessing digital platform work and direct their attention towards indirect ways of giving instructions or controlling, eg towards the mechanisms by which platforms try to establish trust and towards certain standards or 'quality' of service for customers. After all, even control mechanisms such as app-based management and digital tracking are often institutionalised in the form of rating and feedback mechanisms.

An example of modifying indicators in this way can be seen in how the indicator of 'sanctions of low- or non-performance' has been handled. Digital platform workers are usually not sanctioned directly, but rather incur certain disadvantages if they do not follow guidelines. In turn, they also gain advantages if they comply. The activities of digital platform workers are usually evaluated through feedback, rating and reputation systems, which impact on future assignments, payments, etc.[299] In some cases, rates and payment are calculated by means of algorithms. If algorithmic standards are not transparent, workers will often try to adapt their working practices by guessing and gaming.[300] On some crowdworking platforms using creative work, availability is crucial, while the assignment of tasks or the success of bids is unpredictable, which can lead to 'platform colonisation' into the lives of workers.[301] Accordingly, such feedback mechanisms have increasingly been referred to as indicators of subordination.[302]

[298] Ivanova and others, *App as a Boss* (n 296), for food delivery (Deliveroo and Foodora); Rogers, 'Employment Rights' (n 238) 493 for Uber; evidence in case law, see below 3.5.2.

[299] For food delivery: Ivanova and others, *App as a Boss* (n 296); for crowdworking: D Schönefeld, 'Kontrollierte Autonomie: Einblick in die Praxis des Crowdworking' in I Hensel and others (eds), *Selbstständige Unselbstständigkeit: Crowdworking zwischen Autonomie und Kontrolle* (Nomos, 2019); evidence in case law, see below 3.5.2; On the notions of direct/indirect management, see more in ch 5, 5.2.1.

[300] J Bronowicka and M Ivanova, 'Resisting the Algorithmic Boss: Guessing, Gaming, Reframing and Contesting Rules in App-Based Management' in PV Moore and J Woodcock (eds), *Augmented Exploitation: Artificial Intelligence, Automation and Work* (Pluto Press, 2021); *cf* M Manriquez, 'Work-Games in the Gig-Economy: A Case Study of Uber Drivers in the City of Monterrey, Mexico' in SP Vallas and A Kovalainen (eds), *Work and Labor in the Digital Age* (Emerald Publishing Limited, 2019); E Vogl, *Crowdsourcing-Plattformen als neue Marktplätze für Arbeit: Die Neuorganisation von Arbeit im Informationsraum und ihre Implikationen* (Rainer Hampp Verlag, 2018) 79.

[301] P Schörpf and others, 'Triangular Love–Hate: Management and Control in Creative Crowdworking' (2017) 32(1) *New Technology, Work and Employment* 43.

[302] V de Stefano, 'Crowdsourcing, the Gig-Economy and the Law (Introduction)' (2016) 37(3) *Comparative Labor Law & Policy Journal* 1; W Däubler, 'Steigende Schutzdefizite im Arbeitsrecht?' (2016) 23(2) *Industrielle Beziehungen* 236; Cherry, 'Beyond Misclassification' (n 2); Harris and Krueger, 'Proposal for Modernizing Labor Laws' (n 229) 10; Lingemann and Otte, 'Arbeitsrechtliche Fragen' (n 27) 1045; Stefano, 'Crowdsourcing' (n 303 above); E Kocher and I Hensel, 'Herausforderungen des

3.5.1.2. Obligation to Perform

A key indicator used in scholarship and jurisprudence to test subordination in digital platform work has been whether the platform assigns tasks, and pursuant to that, whether workers are free to reject assignments or not. At least in the German legal context, which defines contracts according to the specific performance constituting the object of the contract,[303] it has been hard to accept mere expectations by platforms/clients or economic incentives as equivalent to a contractual obligation to fulfil.[304]

3.5.1.3. Organisational Integration

Indicators of organisational integration for digital platform work often resemble those used to determine subordination. However, digitalisation has made place and time less important for organisational anchoring.[305] Instead, long-term commitments, informational dependence and a permanent communicative connection, ie the obligatory use of an app and the provision of working tools, have all been named as possible indicators of organisational integration in digital platform work.[306]

The fact that platforms act as regulators by setting the rules for any interaction between users can also be assessed under the umbrella concept of organisational integration. In general, any mechanism by which a platform controls the quality of products and services can be seen as entailing organisational integration of workers. Indicators for the platform governing the assignment and coordination of tasks

Arbeitsrechts durch digitale Plattformen – ein neuer Koordinationsmodus von Erwerbsarbeit' [2017] *Neue Zeitschrift für Arbeitsrecht* 984; Risak, '(Arbeits-)Rechtliche Aspekte' (n 294); J-A Defromont, 'Plateformes, Crowdsourcing, et Principes des Life Time Contracts' in L Ratti (ed), *Embedding the Principles of Life Time Contracts: A Research Agenda for Contract Law* (eleven international publishing, 2018) 240; Deutscher Gewerkschaftsbund (DGB, German Trade Union Confederation), Position zur Plattformarbeit, March 2021 ('disciplining' by reputation and rating systems).

[303] Above at 3.4.2.5.2.

[304] S Walzer, *Der arbeitsrechtliche Schutz der Crowdworker: Eine Untersuchung am Beispiel ausgewählter Plattformen* (Nomos, 2019) 144–45; R Krause, 'Die Share Economy als Herausforderung für Arbeitsmarkt und Arbeitsrecht' in J Dörr, N Goldschmidt and F Schorkopf (eds), *Share Economy: Institutionelle Grundlagen und gesellschaftspolitische Rahmenbedingungen* (Mohr Siebeck, 2018) 162; C Schubert, 'Beschäftigung durch Online-Plattformen im Rechtsvergleich' (2019) 118 *Zeitschrift für Vergleichende Rechtswissenschaft* 341, 367; critical views: Harris and Krueger, 'Proposal for Modernizing Labor Laws' (n 229) for the US context.

[305] Preis, '§ 611a BGB' (n 54) para 10, 13; *cf* KV Stone, *From Widgets to Digits: Employment Regulation for the Changing Workplace* (Cambridge University Press, 2004).

[306] K Kezuka, 'Crowdwork and the Law in Japan' in B Waas and others (eds), *Crowdwork: A Comparative Law Perspective* (Frankfurt a. M. Bund-Verlag, 2017) 219 (for Japanese law); Liebman, 'Debating' (n 5) 89 on US-American law; Wank, 'Telearbeit' (n 139) 231; A Degner and E Kocher, 'Arbeitskämpfe in der „Gig-Economy"?: Die Protestbewegungen der Foodora- und Deliveroo-Riders und Rechtsfragen ihrer kollektiven Selbstorganisation' (2018) 51(3) *Kritische Justiz* 247; empirical evidence in food-delivery work: Ivanova and others, 'App as a Boss' (n 296); T Dullinger, 'Essenszustellung: foodora' in M Risak and D Lutz (eds), *Arbeit in der Gig-Economy: Rechtsfragen neuer Arbeitsformen in Crowd und Cloud* (ÖGB-Verlag, 2017).

can be important here, such as the testing and/or training of workers with a view to assigning adequate tasks.[307] Most platforms give at least some introductions or tutorials, while others classify workers according to performance levels[308] or use games as competitive tools to sort workers.[309] Platforms will usually employ such instruments if the work provided by platform workers is integral or even central to the platform's business – an aspect that has with good reason been suggested as an independent indicator for organisational integration.[310]

3.5.1.4. (Lack of) Entrepreneurial Opportunities

Economic dependence, organisational integration and lack of entrepreneurial opportunities are very closely linked in some legal systems as indicators of employment and, in a comparative view, are often used almost interchangeably. Indicators that can be specifically attributed to this aspect refer to the position of the worker in an organisation as opposed to a competitive market, such as the determination of prices, fees and pay by the platform.[311] This is a difficult issue to assess, however, as 'setting' fees or prices occurs on all kinds of markets with a certain degree of imbalance. Yet, digital work platforms often use additional, indirect mechanisms to regulate prices, for example by restricting the registration of new workers or increasing prices during periods of high demand.[312]

In some instances, the degree of financial investment by workers has been mentioned as a possible indicator for entrepreneurial opportunities or the lack thereof.[313] In this vein, Freedland and Kountouris have suggested testing if, '[a]t the end of the working day, the driver will have received payments that, if broken down, overwhelmingly derive from the units of personal work and labour

[307] E Kocher, 'Crowdworking: Ein neuer Typus von Beschäftigungsverhältnissen?: Eine Rekonstruktion der Grenzen des Arbeitsrechts zwischen Markt und Organisation' in I Hensel and others (eds), *Selbstständige Unselbstständigkeit: Crowdworking zwischen Autonomie und Kontrolle* (Nomos, 2019); Harris and Krueger, 'Proposal for Modernizing Labor Laws' (n 229), 8; Liebman and Lyubarsky, 'Crowdworkers' (n 230) 85.

[308] D Schönefeld and others, 'Jobs für die Crowds: Werkstattbericht zu einem neuen Forschungsfeld' (Frankfurt (Oder), 2017). Arbeit Grenze Fluss. Work-in-progress interdisziplinärer Arbeitsforschung; S Hill, *Raw Deal: How the 'Uber Economy' and Runaway Capitalism Are Screwing American Workers* (St. Martin's Press, 2017) 111 on TaskRabbit (assigning jobs based on matching customers and contractors by an algorithm).

[309] Vogl, *Crowdsourcing* (n 301) 79.

[310] Sprague, 'Worker (Mis)classification' (n 206); S Fredman and D Du Toit, 'One Small Step Towards Decent Work: Uber v Aslam in the Court of Appeal' (2019) 48 *Industrial Law Journal* 260, 274; Harris and Krueger, 'Proposal for Modernizing Labor Laws' (n 229) 8; Bayreuther, 'Arbeitnehmereigenschaft' (n 137).

[311] Prassl and Risak, 'Uber, Taskrabbit & Co' (n 292) 28; Harris and Krueger, 'Proposal for Modernizing Labor Laws' (n 229) 10; Biegoń, Kowalsky and Schuster, *Schöne neue Arbeitswelt?* (n 27) 10–11; Defromont, 'Plateformes' (n 303) 239; Deutscher Gewerkschaftsbund (DGB, German Trade Union Confederation) (n 303).

[312] Ivanova and others, 'App as a Boss' (n 296) for food-delivery.

[313] Rogers, 'Employment Rights' (n 238) 493.

provided rather than from the fraction of capital deployed or consumed for and in the course of the performance'.[314]

Another aspect that belongs under the heading of 'entrepreneurial opportunities' is the degree to which a worker achieves results (ie, creates products or services) that no longer need to be processed by the platform. Achieving such results can be seen as an indicator of his or her independent action on a market, hence an indicator for entrepreneurial opportunities and independent contracting rather than employment.[315]

3.5.1.5. Economic Dependence

The indicators most commonly mentioned for economic dependence refer to situations in which workers earn the bulk of their income on a single platform, which is still quite rare in digital platform work.[316]

However, there may also be other aspects of economic dependence to consider in the context of digital platforms. Although most platforms allow workers to work with multiple platforms simultaneously[317] (an indicator hardly conclusive for the establishment of independent contracting),[318] they often have mechanisms in place to incentivise long-term worker commitment, such as platform-specific reputation and ranking instruments that can make it economically stupid to abandon the platform.[319]

3.5.1.6. Homework

In jurisdictions where the category of homework exists, it has been suggested as an adequate category for crowdwork.[320] In German law, this classification can be

[314] Freedland and Kountouris, 'Some Reflections' (n 81) 68–69.

[315] Wank, 'Telearbeit' (n 139) 231.

[316] For Crowdworking: Däubler and Klebe, 'Neue Form der Arbeit' (n 293) 1036; Krause, 'Digitalisierung der Arbeitswelt' (n 298) B 105; Waas, 'Crowdwork in Germany' (n 272); for food-delivery riders in Berlin: Degner and Kocher, 'Arbeitskämpfe' (n 307); For Uber drivers: Sprague, 'Worker (Mis)classification' (n 206); A Peticca-Harris, N deGama and MN Ravishankar, 'Postcapitalist Precarious Work and Those in the 'Drivers' Seat: Exploring the Motivations and Lived Experiences of Uber Drivers in Canada' (2019) 27(1) *Organization* 36 (drawing on the experiences of 31 Uber drivers in Toronto, Canada); Walzer, *Crowdworker* (n 305) 152–53.

[317] Harris and Krueger, 'Proposal for Modernizing Labor Laws' (n 229) 10, 13; for case-law evidence below at 3.5.2.

[318] *Canadian Union of Postal Workers v Foodora Inc.* [2020] ONLRB Case No. 1346-19-R, para 111; see also ch 7, at n 109.

[319] Däubler and Klebe, 'Neue Form der Arbeit' (n 293) 1036; Biegoń, Kowalsky and Schuster, *Schöne neue Arbeitswelt?* (n 27) 6; 10–11; M Risak and D Lutz, 'Gute Arbeitsbedingungen in der Gig-Economy – was tun?' in M Risak and D Lutz (eds), *Arbeit in der Gig-Economy: Rechtsfragen neuer Arbeitsformen in Crowd und Cloud* (ÖGB-Verlag, 2017); for the general economic background and aspects of competition law: J Crémer, Y-A de Montjoye and H Schweitzer, 'Competition Policy for the Digital Era: Final Report' (Brussels 2019) 57 ff.

[320] For the German debate: Kocher, 'Crowdworking' (n 308); Giesen and Kersten, 'Arbeit 4.0' (n 126) 110. Doubts: Deinert, *Soloselbstständige* (n 169) para 24; W Däubler, *Digitalisierung und Arbeitsrecht:*

based on the fact that the result of the work is not being traded by crowdworkers themselves, but instead handed over to a business platform that can be seen as 'commissioning' the work. As German homework regulation has often been interpreted as only applying to persons who work in economic dependence for one single client,[321] an extension to persons working for several clients at the same time has been suggested *de lege ferenda*.[322]

3.5.1.7. Personal Performance

If personal performance is used as criterion for employment, the main indicator relevant for establishing if the contract is to be performed personally is whether a worker may or may not appoint a substitute to perform the task. This is particularly relevant in UK law, where the indicator is part of the statutory description of a 'limb (b) worker'.[323] Although some digital work platforms restrict substitutions, those that do not often also show some interest in the personality of the workers, as indicated by the incidence of reputation systems as well as training and testing – this could be considered an indicator for this criterion of employment.

3.5.2. Clustering: The Current Status in Jurisprudence

At the end of the day, it will be individual cases that show whether labour law is fit to deal with digital work platforms – that is, assessments of specific platforms in specific economies at specific places and times. The following analysis of case law will therefore be based on descriptions of individual cases, along with the courts' reasoning in these cases, with a view to identifying possibly novel approaches. To date, a number of scholars have compiled lists of relevant judgments. In particular, we must thank Ignasi Beltran and Nicola Kountouris for covering litigation in a variety of jurisdictions.[324] This section focuses on important decisions

Internet, Arbeit 4.0 und Crowdwork, 6th edn (Bund-Verlag, 2018) § 18, para 61; W Brose, 'Von Bismarck zu Crowdwork: Über die Reichweite der Sozialversicherungspflicht in der digitalen Arbeitswelt' [2017] *Neue Zeitschrift für Sozialrecht* 7, 14; Krause, 'Digitalisierung der Arbeitswelt' (n 298) B 105; Däubler and Klebe, 'Neue Form der Arbeit' (n 293) 1036; Waas, 'Crowdwork in Germany' (n 272) 170; U Preis, 'Heimarbeit, Home-Office, Global-Office: Das alte Heimarbeitsrecht als neuer Leitstern für die digitale Arbeitswelt?' [2017] *Soziales Recht* 173; see also ILO, 'Promoting' (n 7) 8–9.

[321] Walzer, *Crowdworker* (n 305) 152 ff; 162.

[322] Deinert, 'Bedeutung des Heimarbeitsgesetzes' (n 195) 367; on the role of ILO Convention 177 see T Klebe and J Heuschmid, 'Collective Regulation of Contingent Work: From Traditional Forms of Contingent Work to Crowdwork-A German Perspective' in E Ales, J Kenner and O Deinert (eds), *Core and Contingent Work in the European Union: A Comparative Analysis* (Hart Publishing, 2017) 201.

[323] Freedland and Kountouris, *Legal Construction* (n 42) 29; above at n 211).

[324] Overviews: I Beltran, 'Employment Status of Platform Workers: National Courts Decisions Overview – Argentina, Australia, Belgium, Brazil, Canada, Chile, France, Germany, Italy, Nederland, Panama, Spain, Switzerland, United Kingdom, United States & Uruguay' (9 December 2018); International Lawyers Assisting Workers Network (ILAW) (ed), *Taken for a Ride: Litigating the Digital Platform Model* (Issue Brief 2021) 37 ff (Part II); see also MA Cherry, 'Regulatory Options for Conflicts

in jurisdictions that have been covered in the above analysis of labour law classification rules.

3.5.2.1. California (Uber and Lyft)

US law has always been prominent in the debate on classifying work relationships on digital platforms. It is in the US, after all, that the gig economy has been inventing and developing the new business models we now all grapple with, and it is there that digital work platforms first flourished and first provoked labour law litigation. US platforms for micro-crowdwork (eg Amazon Mechanical Turk and Crowdflower) have served as catalysts for the discussion, but analyses and litigation have tended to focus on transport, with Uber and its main competitor on the US market, Lyft, in the centre of attention.[325]

By now, the classification of digital platform work has been litigated in California, Pennsylvania, New York and Washington. The diverse judgments in such cases dealt with class actions, decisions of the National Labor Relations Board (NLRB), a City of Seattle Ordinance, and unemployment insurance. Recently, on the day of the November 2020 US elections, Proposition 22, a legislative initiative for which Uber, Lyft and Doordash mobilised record amounts of money, succeeded in undoing a September 2019 California Act (AB 5) that had been intended to explicitly subject workers on transport and delivery platforms to labour law.[326] The backdrop of these developments is the recurrent statement that the guidance provided by traditional employee classification tests has not been clear enough: 'various actors [point] in different directions'.[327] This section will look at what the Californian courts and legislator(s) have come up with.

of Law and Jurisdictional Issues in the On-demand Economy' (2019); V de Stefano and others, 'Platform Work and the Employment Relationship' (March 2021). Working Paper 27; B Waas, 'Zur rechtlichen Qualifizierung von Beschäftigten in der "Gig Economy": Ein Blick in das Ausland' [2018] *Arbeit und Recht* 548; Marie-Anne Valéry, Rapport in the case of the Cour de Cassation (Take Eat Easy) (below n 365) 45–54.

[325] For an overview on US jurisprudence, see Deepa Das Acevedo's compilation on gigeconomyresources.com/cases; D Das Acevedo, 'The Rise and Scope of Gig Work Regulation' in D Das Acevedo (ed), *Beyond the Algorithm: Qualitative Insights for Gig Work Regulation* (Cambridge University Press, 2021) 15–32; *cf* Cherry, 'Beyond Misclassification' (n 2); Liebman, 'Debating' (n 5) 229; Liebman and Lyubarsky, 'Crowdworkers' (n 230) 47 (CrowdFlower, Uber, Lyft).

[326] Official voter information guide, voterguide.sos.ca.gov/propositions/22/ and text of the proposition on https://yeson22.com/wp-content/uploads/2020/02/Protect-App-Based-Drivers-Services-Act_Annotated.pdf; MA Cherry, 'Proposition 22: A Vote on Gig Worker Status in California' [Febr 2021] *Comparative Labor Law & Policy Journal* Dispatch No. 31. On AB 5, see below n 329.

[327] Rogers, 'Employment Rights' (n 238) 491; 496 on Uber and Lyft; *cf* 515 with a suggestion for legislators. See however, California judgments of 2015 acknowledging the status of Uber and Lyft as employers of drivers (*Cotter v Lyft Inc* [2015], 60 F.Supp.3d 1067, 1078 (US District Court, Northern District of California) (denying summary judgment) (finally settled March 16, 2017, Case No. 3:13-cv-04065-VC); *O'Connor v Uber Technologies, Inc.* [2015] 82 F. Supp. 3d 1133 (US District Court, Northern District of California).

In 2019, AB 5 changed section 2775 of the California Labor Code by codifying the criteria and indicators of the California Supreme Court's *Dynamex* decision, which had introduced the so-called 'ABC test' for employment classification.[328] AB 5 introduced a presumption that one who 'provid[es] labor or services for remuneration' is an employee, as long as 'the hiring entity' does not demonstrate that all three 'ABC' conditions are satisfied (section 2775(b)(1)). These conditions are:

(A) The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
(B) The worker performs work that is outside the usual course of the hiring entity's business.
(C) The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

This categorisation relies on a presumption using indicators of control/subordination, organisational integration and entrepreneurial freedom. In view of the variety of indicators present in US law, this does not seem so novel at all.[329]

When applied by the California First District Court of Appeal in the *People v Uber* decision of 22 October 2020, which upheld a preliminary injunction against Lyft and Uber based on the AB 5 rules,[330] the judgment described the work with the Uber app as follows:

> Riders [customers] log into their accounts with Uber … through [the app] and request a ride from one place to another. They are matched with nearby drivers [workers] who are available to give them a ride. … The 'Platform Access Agreement' for Uber's 'Rides' platform specifies that the parties' [driver-Uber] relationship 'is solely as independent business enterprises'.
>
> Uber's agreement with drivers recites that Uber has no right to direct or control the drivers; rather, under the agreement allowing drivers to use the Rides platform – ie, the driver app and associated services – the drivers decide whether to use the app and whether to accept, decline, ignore, or cancel a ride request. Before accepting a ride request, drivers are given a prospective rider's ratings, as well as information about the pickup location, requested destination, estimated trip duration, and estimated net fare, and riders may designate a preferred driver as a 'favorite.' Although Uber provides navigation software, drivers may use any route they or their passengers choose on a ride. Uber does not limit the number of drivers who use its Rides platform, and it does not schedule them to drive at any particular time. Drivers need not accept any minimum

[328] *Dynamex* [2018] 416 P.3d 1 (n 239); California Assembly Bill (AB) 5 (2019); TC Kohler, 'Jüngste Rechtsentwicklungen in den USA: Rechtliche Prüfung des Arbeitnehmerstatus: Test und Kodifizierung durch AB-5 2019-2020' [2019] *Arbeit und Recht* 458.
[329] *cf* above at 3.4.3.2.
[330] *People v Uber Technologies, Inc* [2020] Case A 160706 (California First District Court of Appeal).

> number of rides to use the platform, and they may use any other platform or app in addition to Uber's. Uber does not interview drivers, collect resumes, or conduct reference checks.
>
> [Uber] ensures drivers meet certain standards before authorizing them to use the [Rides] platform and hold themselves out as Uber … drivers. Uber drivers are required to pass criminal background and driving record checks, and they must agree that their vehicles will be properly registered and maintained. … Uber … prohibit[s] drivers … from accepting street hails, bringing their friends along while providing rides, or receiving payment for rides in cash. [Uber offers] incentives for drivers to drive at times when or in areas where there is higher demand. [Uber] may monitor or collect information about drivers' locations, communications with riders, and driving habits, such as speeding, braking, and acceleration. Drivers and riders rate each other, and [Uber] may use low ratings to deactivate drivers. [Uber addresses] riders' complaints.
>
> [Uber does not compensate] drivers for time they are logged on the apps but are not transporting passengers; they do not provide overtime premiums or paid rest periods; they do not reimburse drivers for the expenses necessary to do their work, such as vehicle maintenance, a mobile phone and data usage, or gasoline.
>
> Riders pay fares through … Uber's apps, and … Uber deduct[s] a fee for each ride and remit[s] the remainder of the payment to the driver. Uber … set[s] the base fare rates and time and distance rates.
>
> Uber has recently made changes to its business practices … Drivers need not accept Uber's base fare (or 'surge' fare for busier times) but may set a multiplier to the base fare of their choosing, within limits set by Uber.

While the court acknowledged that this business model is 'different from that traditionally associated with employment, particularly with regard to drivers' freedom to work as many or as few hours as they wish, when and where they choose, and their ability to work on multiple apps at the same time', it found Uber (and Lyft, for that matter) to be employing the drivers according to the ABC test. It held as 'most pertinent' that:

> Uber … solicit[s] riders, [screens them] and set[s] standards for vehicles that can be used. [Uber] track[s] and collect[s] information on drivers when they are using the apps, and … may use negative ratings to deactivate drivers. Riders request rides and pay for them through [the] app, and the drivers' portions are then remitted to them. … The drivers provide the services necessary for [Uber's business] to prosper.

Aspects of organisational integration (standards for vehicles), the use of indirect forms of control (collecting of information for a feedback system), and indicators for access to a market (payment system) are decisive here. The incidental statement that Uber and the drivers were in the same business, ie that Uber itself offered transport and taxi services, was a central argument in this analysis.

Provision 22, which was intended to remake this application of employment law to Uber, Lyft and delivery companies and effectively revoke the effects of AB 5, then introduced sections 7452–7462 to the California Business and Professions Code, thereby situating platform drivers outside of employment law, but providing certain specific minimum standards. The application of these rules on 'App-Based

Drivers and Services' is conditional on companies (ie platforms) not unilaterally prescribing working time, not requiring the driver to accept rideshare services, and not restricting the driver from using other apps or working in another business. The burden of proof still rests with the platforms. Here, the criteria that still enable employment classification exactly contradict the innovation of AB 5 by focusing on traditional indicators of control, obligation to perform, and personal performance. In this way, the legislator suggests that traditional employment criteria will not fit digital work platforms in transport and delivery.

3.5.2.2. The UK Supreme Court on Uber

The UK Supreme Court has now also declared itself on Uber's business model, in an important February 2021 judgment that upheld the Employment Tribunal and Court of Appeal's classification of Uber drivers as 'limb (b) workers' in the terms of, eg section 230(3)(b) Employment Rights Act 1996. In addition, the Supreme Court also confirmed the Employment Tribunal's finding that the drivers were working for Uber at any time they were logged into the app and ready, willing and allowed to accept trips.[331]

The work relationship with the app is described slightly differently in the UK case than in the California case:

> [Uber] identifies the nearest available driver who is logged into the app and informs him (via his smartphone) of the [passenger's] request. At this stage the driver is told the passenger's first name and Uber rating … and has ten seconds in which to decide whether to accept the request. … driver and passenger are put into direct contact with each other through the Uber app, but this is done in such a way that neither has access to the other's mobile telephone number.
>
> The Uber app incorporates route planning software and provides the driver with detailed directions to the destination. The driver is not bound to follow those directions but departure from the recommended route may result in a reduction in payment if the passenger complains about the route taken.
>
> The fare is then calculated automatically by the Uber app, based on time spent and distance covered. At times and places of high demand, a multiplier is applied resulting in a higher fare. Drivers are permitted to accept payment in a lower, but not a higher, sum than the fare calculated by the app (although, in the unlikely event that a driver accepts a lower sum, the 'service fee' retained by Uber BV is still based on the fare calculated by the app).

[331] *Uber BV & Others v Aslam & Others* [2021] UKSC 5; A Bogg, 'For Whom the Bell Tolls: "Contract" in the Gig Economy' [2021] *Oxford Human Rights Hub*; *cf Aslam, Farrar & Others v Uber B.V. & Others* [2018] EWCA Civ 2748; *Y Aslam and J Farrar & Others v Uber B.V. & Others* [2016] Cases 2202550/2015 & Others (Employment Tribunal London); Fredman and Du Toit, 'One Small Step' (n 311) 261–70; I Lloyd, 'Uber Drivers in London: "To Be Or Not To Be" An Employee?: Why the Employment Tribunal in England qualified Uber drivers as employees in Aslam, Farrar and Others vs. Uber' [2016] *Computer Law Review International* 161 on the Employment Tribunal decision.

> The Uber app generates a document described as an 'invoice' addressed on behalf of the driver to the passenger (showing the passenger's first name but not their surname or contact details). However, the passenger never sees this document, which is not sent to the passenger but is accessible to the driver on the Uber app and serves as a record of the trip and the fare charged. Uber BV makes a weekly payment to the driver of sums paid by passengers for trips driven by the driver less a 'service fee' [20%] retained by Uber BV. … Drivers are prohibited by Uber from exchanging contact details with a passenger or contacting a passenger after the trip ends other than to return lost property.
>
> [As part of the Uber 'onboarding' process] the applicant must also take part in … 'an interview, albeit not a searching one', and watch a video presentation about the Uber app and certain Uber procedures. … A 'Welcome Packet' of material issued by Uber London to new drivers included numerous instructions as to how drivers should conduct themselves.
>
> Individuals approved to work as drivers are free to make themselves available for work, by logging onto the Uber app, as much or as little as they want and at times of their own choosing. They are not prohibited from providing services for or through other organisations, including any direct competitor of Uber … Drivers are … not provided with any insignia or uniform and in London are discouraged from displaying Uber branding of any kind on their vehicle.
>
> Uber operates a ratings system … The driver's ratings from passengers are … monitored and … drivers … whose average rating is below 4.4 become subject to a graduated series of 'quality interventions' aimed at assisting them to improve. If their ratings do not improve to an average of 4.4 or better, they are 'removed from the platform' and their accounts 'deactivated'. … drivers whose acceptance rate for trip requests falls below [80%] receive warning messages … If the driver's acceptance rate does not improve, the warnings escalate and culminate in the driver being automatically logged off the Uber app for ten minutes if the driver declines three trips in a row.[332]

In its legal assessment, the UK Supreme Court questioned if the drivers fell under the definition of 'worker' (ie if they '[performed] work or services for another [person]', namely Uber). A large part of the judgment is devoted to an evaluation of the contractual terms with respect to this definition. This had already been an important issue in the judgments of both the Employment Tribunal London (which found that Uber had resorted to 'fictions, twisted language and even brand new terminology') and the Court of Appeal ('[t]here is a high degree of fiction in the wording … of the standard form agreement between UBV and each of the drivers').[333] The Supreme Court's judgment is important in that it not only confirms these assessments, but also sharpens the principle of primacy of facts for UK labour law by recognising the potential of such contracts for manipulation on the side of the employer. It takes a cue from the *Autoclenz* case's questioning of

[332] *Uber & Others v Aslam & Others* (UKSC, n 332) paras 6–29.

[333] *Aslam and Farrar v Uber B.V.* (n 332) (CA); *Aslam and Farrar v Uber B.V.* (n 332) (Employment Tribunal London); Fredman and Du Toit, 'One Small Step' (n 311) 261–70.

the contract[334] which it puts into the context of employment legislation's purpose: 'to give protection to vulnerable individuals who have little or no say over their pay and working conditions because they are in a subordinate and dependent position in relation to a person or organisation which exercises control over their work'. Therefore, the Court reads labour legislation as precluding employers from contracting out of their obligations.[335] The UK Supreme Court even states 'that it would be inconsistent with the purpose of this legislation to treat the terms of a written contract as the starting point in determining whether an individual falls within the definition of a "worker"'.[336]

As a consequence, the court had to examine 'the economic substance of the work arrangements' instead of the contract.[337] In the course of this examination in relation to Uber, it emphasised five aspects that justified classification of Uber drivers as workers:[338]

- Uber's setting of fares and, based on these fares, drivers' pay.
- Uber's imposing of the contractual terms.
- The 'constraint' put on drivers' autonomy to accept or deny rides by imposing 'penalties' for low acceptance rates.
- Influencing drivers' performance by using a feedback system based on passengers' ratings …, which may lead to a termination of the relationship.
- Uber's active prevention of drivers from establishing relationships with passengers beyond individual rides.

These criteria come down to identifying subordination and dependency in relation to Uber with the lack of an 'ability to improve their economic position through professional or entrepreneurial skill'. The court reinforces this description by also pointing to the fact that Uber depends on the drivers in order to be able to perform its contractual obligations to passengers. In other words, it found the drivers' work to be central to Uber's business.[339]

(How unstable this development is, may be evidenced by a judgment of the UK Court of Appeal of June 2021 that concerned collective bargaining rights of Deliveroo riders. The court held the riders to be self-employed, because it considered their substitution rights to be genuine. The case was decided exclusively by reference to the (lack of an) obligation to provide services personally, the court being disabled by the scope of the review to consider the material issues of the Uber judgment.[340])

[334] *Autoclenz* [2009] EWCA Civ 1046 (n 223).
[335] *Uber & Others v Aslam & Others* (UKSC, n 332) paras 79–82.
[336] *Uber & Others v Aslam & Others* (UKSC, n 332) para 76.
[337] Bogg, 'For' (n 335).
[338] *Uber & Others v Aslam & Others* (UKSC, n 332, paras 94–100.
[339] *Uber & Others v Aslam & Others* (UKSC, n 332) para 56.
[340] *Independent Workers Union of Great Britain v CAC* [2021] EWCA Civ 952, paras 83–84 distinguishing the Uber case (the CA judgment came down shortly before completion of this book and is therefore here only superficially analysed).

3.5.2.3. The Spanish Tribunal Supremo on Glovo

In Europe and South America, litigation on the classification of digital platform work has mainly been directed against not only taxi services (eg, Uber and LeCab), but even more often against food-delivery platforms such as Glovo, Deliveroo, Take Eat Easy, Foodora and Foodinho.[341] Spain (said to be 'one of the countries with the highest levels of judicialisation of … classification of platform working'[342]) is an interesting case because food-delivery platform Glovo had chosen the Spanish labour law status of 'economically dependent autonomous workers' (the TRADE category)[343] for its riders. Thus, in employment classification cases against Glovo, the Spanish courts had to draw the line not only between employment and independent contracting, but also between employment and economic dependence. Following divergent decisions by lower courts and labour inspectors on these issues,[344] the Spanish Supreme Court in September 2020 finally overturned the previous Madrid judgments that had accepted the TRADE category and classified Glovo moto-riders as employees in the strict sense.[345]

This is how the Spanish Supreme Court described Glovo's work and business model:

> The working system meant selecting a time slot, activating availability on their mobile phone, and from then on orders came in, which they accepted automatically or manually. The allocation of orders was carried out by Glovo's algorithm. Riders could refuse orders at any time without suffering penalties; they could also decide when to start and end their working day as well as select the orders they wanted to take.
>
> The time slots available to workers depended on their rating. To this end, Glovo classified riders into three categories: beginner, junior and senior. The rating system assessed the efficiency demonstrated in the performance of recent orders, the availability at peak hours ('diamond hours') and customers' rating. Points were deducted if a rider was not ready in the time frame reserved to her, and there was a procedure in place for riders to justify absence. If a delivery rider had not accepted any order for more than three months, she could be downgraded.
>
> The riders were geolocated during the performance of services, but were free to choose the route to follow to each destination.
>
> They were paid by a certain amount per order, plus an additional amount for mileage and waiting time. If an order was cancelled once the rider had accepted it, she would be paid half her percentage on the service.

[341] Beltran (n 325); Waas, 'Rechtliche Qualifizierung' (n 325).
[342] A Todolí-Signes, 'Notes on the Spanish Supreme Court Ruling that Considers Riders to be Employees' [2020] *Comparative Labor Law & Policy Journal* Dispatch No. 30.
[343] Above 3.4.3.4.
[344] A Barrio, 'Contradictory Decisions on the Employment Status of Platform Workers in Spain' [2020] *Comparative Labor Law & Policy Journal* Dispatch No. 20.
[345] Tribunal Supremo (Sala de lo Social) 25 Sept 2020, Case STS 2924/2020 (*Glovo*), ECLI:ES:TS:2020:2924; overturning decisions by Tribunal Superior de Justicia de Madrid (Madrid Court of Appeal) 19 Sept 2019 (Case 195/2019) and, incidentally, by Juzgado de lo Social 39 (Madrid) (Madrid Labour Court No 39) 3 Sept 2018, Case 1353/2017; *cf* Todolí-Signes, 'Notes on the Spanish Supreme Court Ruling' (n 343).

> Invoices were drawn up by Glovo. The worker provided the mobile phone and the motorbike; she was also liable to customers for any damage or loss of goods during transport. If she had to buy products for a customer, she could use a credit card provided by Glovo.[346]

Considering that the facts of the case had to prevail over the *nomen iuris* and the contractual denomination, and that the assessment had to be made on the individual case, taking all circumstances into account,[347] the following indicators proved decisive for the Supreme Court's classification of Glovo riders as employees:[348]

- Notwithstanding the formal options to refuse orders, choose time slots and work on different platforms, the court found these to be conditional on Glovo's rating system, which incentivises being as available as possible. The court also emphasised the ways in which the platform deliberately uses and exacerbates the competition between riders for shifts and orders: Only by having more riders available than strictly necessary, can the platform ensure that all orders are performed.[349]
- The court considered rating by customers to be a form of control, as well as the determination of all work activities via instructions (deadlines for deliveries, prohibitions of the use of corporative symbols, etc) and via the app. Contrary to the Madrid labour court's finding that the app's GPS geolocation was only a way to count the mileage for the rider's payment,[350] the Supreme Court viewed it as another instance of control.
- Glovo paid compensation for riders' waiting time.
- As for ajenidad (working on account of another),[351] the Supreme Court mentioned a variety of indicators which all amounted to the realisation that the platform is a service provider and not a mere intermediary: Only Glovo holds the necessary business information on participating shops and customers' orders.
- Although the riders bear risks and are responsible for moto-bikes, mobile phones and damages/losses (indicators pointing against an employment relationship), the court found there to be no trade-off between risks and opportunities. The lack of entrepreneurial opportunities was evidenced by the fact that the platform directly appropriates the results of the riders' work and that the means of production (ie the app) remains in the hands of the platform, against which the economic import of phone and bike can be disconsidered.

[346] *Tribunal Supremo* (n 346) para 16 (my compilation, no literal rendition).
[347] *Tribunal Supremo* (n 346) para 9.1.
[348] *Tribunal Supremo* (n 346) paras 18–20.
[349] On these management techniques, with the examples of Foodora and Deliveroo: Ivanova and others, *App as a Boss* (n 296).
[350] *Juzgado de lo Social* 39 (Madrid) (n 346).
[351] On these concepts, see above text at n 247.

In making its decision, the Supreme Court made good use of former jurisprudence. In particular, the criteria of ajenidad lent themselves well to the purpose of determining aspects of economic access to markets. As far as the aspect of dependencia (dependency) was concerned, however, the reference to indirect mechanisms of control proved novel for the Spanish context. It is not a coincidence, then, that the Supreme Court's judgment starts by stressing that 'a new economic reality' makes it necessary to adapt the rules of dependencia and ajenidad to 'the social reality of the time in which they are to be applied'.[352]

3.5.2.4. Further Jurisprudence on Transport and Delivery Platforms

The Spanish Supreme Court's *Glovo* decision follows a line of judgments in different jurisdictions that show a tendency to accept employment status for workers on food-delivery platforms. For example, in January 2020, the Italian Corte di Cassazione acknowledged employee status for *Foodinho/Glovo* riders due to '*etero-organizzazione*' (organisational integration),[353] giving rise to an order by the Italian labour inspectorate in February 2021 against all major food-delivery platforms.[354] In the Netherlands, contradictory decisions in relation to food-delivery platforms (in particular Deliveroo) have been reported.[355] As for Australia, the Australian Fair Work Commission found riders with the food-delivery platform Foodora to be employees.[356] And in Canada, the Ontario Labour Relations Board (ONLRB) found Foodora riders working in Toronto and Mississauga to be 'dependent contractors' and therefore eligible to be unionised.[357]

In June 2020, the Canadian Supreme Court decided that Uber could not refer drivers to arbitration in The Hague, Netherlands, because the respective arbitration clause in the contract was considered unconscionable, due to the significant inequality of bargaining power stemming from the weakness and vulnerability of the workers.[358] Yet, also in relation to Uber, federal courts in Brazil, the platform's

[352] *Tribunal Supremo* (n 346) para 7.2 (with a reference to Art 3.1 Civil Code/Código Civil).

[353] Corte di Cassazione (Federal Appeal Court) 24 Jan 2020, Case 1663/2020 (*Foodinho/Glovo*), confirming the decision of the Corte di Appello di Torino (Appeal Court Turin) 4 Febr 2019, Case 26/2019; see also the judgment of the Tribunale di Palermo (Palermo Labour Court) 24 Nov 2020, Case 3570/2020 on Foodinho/Glovo, acknowledging employee status as subordinate for the first time in Italy (A Aloisi, 'Demystifying Flexibility, Exposing the Algorithmic Boss:: A Note on the First Italian Case Classifying A (Food-Delivery) Platform Worker as an Employee' [2021] *Comparative Labor Law & Policy Journal* Dispatch No 35); while Aloisi considers employee status in subordination as the only full status, the Corte di Cassazione saw *etero-organizzazione* as equivalent (no 'third category').

[354] Stefano and others, *Platform Work* (n 325) 22.

[355] N Zekic, 'Contradictory Court Rulings on the Status of Deliveroo workers in the Netherlands' [2019] *Comparative Labor Law & Policy Journal* Dispatch No. 17; *cf* below n 385 on an Amsterdam case.

[356] *Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836.

[357] *Canadian Union of Postal Workers v Foodora Inc. d.b.a Foodora* [2020] ONLRB, Case No 1346-19-R, CanLII 16750 (ONLRB); for the notion of 'dependent contractor' see above at 3.4.3.4.

[358] *Uber Technologies Inc v Heller* 2020 SCC 16. As the case was only decided on a review of documentary evidence, the court did not declare itself on the existence of an employment relationship.

second most important market, have judged in favour of classifying drivers as 'independent contractors'.[359]

Out of the wealth of further judgments that deal with classifying work relationships on digital work platforms, this section takes a closer look at the widely discussed French Cour de Cassation's decisions on Take Eat Easy and Uber, as well as the European Court of Justice's order on the Yodel delivery platform for further analysis.

3.5.2.4.1. The French Cour de Cassation on *Take Eat Easy* and *Uber*

After contradicting decisions of lower courts, the French Cour de Cassation decided in November 2018 on worker classification on the food-delivery platform Take Eat Easy, followed by a judgment on Uber in March 2020. In both cases, it finally classified workers on the platforms as employees.[360]

In its *Take Eat Easy* decision, the court started by expressing the principle of primacy of facts in clear words that actually seemed to set the contract aside without further ado. This was the result of an understanding in French labour law of employment classification as a question of *ordre public*, which is not up to derogation by private convention:

> The existence of an employment relationship depends neither on the will expressed by the parties nor on the name of their agreement, but on the *de facto* conditions in which the workers' activity is carried out.[361]

Later, the court described the work modus of Take Eat Easy's (bicycle) riders as follows:

> [A] system of bonuses (the 'Time Bank' bonus depending on the waiting time in restaurants and the 'KM' bonus linked to an above-average mileage) on one side and, on the other side, penalties (('strikes') for failures in performance, late withdrawal from a shift, connection of less than 80% on the shift), failure to answer the … phone during

[359] Brazilian Superior Tribunal de Justiça (Supreme Court, STJ), 4 Aug 2019, Case 2019/0079952-0 (*Uber*); *Tribunal Superior do Trabalho* (Federal Labour Court) 13 Febr 2020, Case RR-1000123-89.2017.5.02.0038; PD de Araújo and others, 'Uber in Brazil: Glory and Consequence' in A Zeynep and Ö Isık (eds), *Global Perspectives on Legal Challenges Posed by Ride-Sharing Companies: A Case Study of Uber* (Springer Nature, 2021); on Turkey: I Önay and ET Çolgar, 'A Legal Perspective on Uber in Turkey' in A Zeynep and Ö Isık (eds), *Global Perspectives on Legal Challenges Posed by Ride-Sharing Companies: A Case Study of Uber* (Springer Nature, 2021).

[360] Cour de Cassation (Chambre sociale) (Appeal Court, Social Chamber) 28 Nov 2018, Case 1737 (Appeal 17-20.079, *Take Eat Easy*), ECLI:FR:CCASS:2018:SO01737; *Cour de Cassation (Chambre sociale)*, 4 Mar 2020, Case 374 (Appeal 19-13.316, *Uber*), ECLI:FR:CCAS:2020:SO00374; M Engler, 'Fahrradkuriere als Arbeitnehmer: Entscheidung der Cour de Cassation vom 28.11.2018 – Take Eat Easy' [2019] *Zeitschrift für Europäisches Privatrecht* 504; R Buschmann, 'Anmerkung zu Cour de Cassation v. 4.3.2020 no 374 (Uber-Fahrer*innen als Arbeitnehmer*innen)' [2020] *Arbeit und Recht* 233; I Daugareilh, 'Der Widerstand der französischen Richter gegen die Sirenen der Uberisierung der Wirtschaft' [2020] *Arbeit und Recht* 352.

[361] Cour de Cassation (*Take Eat Easy*) (n 361); Advocate General Catherine Courcol-Bouchard, Written opinion on case 374 of 4 March 2020 (appeal 19-13.316).

> the shift, inability to repair a puncture, driving without a helmet, 'no-show' on registered shifts, connection without being registered and, most severely, insulting support or a customer or keeping customer details, the accumulation of significant delays in deliveries and driving a motor vehicle. Penalties consisted in the loss of bonus, being summoned 'to discuss the situation …' and even deactivation of the account.
>
> The app was equipped with a geolocation system enabling the company to monitor the rider's position in real time and to record the total number of kilometres travelled.[362]

These two aspects – the disciplinary mechanism and the geolocation – were sufficient for the Cour de Cassation to state the existence of directional power and control over the performance of the service.[363]

While this approach was still considered fairly conventional with regards to French legal doctrine, the Cour de Cassation's Uber judgment two years later initiated a far more innovative legal approach.[364] The Uber judgment highlighted quite different aspects of the work relationship by summarising the main indicator for subordination 'in cases where the employer unilaterally determines the terms and conditions of performing the job'.[365] Indeed, 'working within an organised service' became the leitmotif of the judgment, in which work for Uber was assessed as follows:

> Far from freely deciding on the organisation of his operations, seeking out a clientele, or choosing his suppliers, [the driver] … joined a transportation service set up and entirely organised by Uber BV, which exists only through this platform. The use of this transportation service did not lead to the obtainment of a proprietary client base for [the driver] who is not free to set his fares or to determine the terms and conditions for conducting his transportation service business which are entirely governed by Uber BV. …
>
> [F]ares are set contractually based on Uber platform's algorithms using a predictive mechanism. This mechanism imposes a particular route on the driver. …
>
> [S]tipulations incite drivers to remain connected in the hope of performing a ride and thus to constantly remain at the disposal of Uber BV throughout the duration of the connection … The contract terms imply that the destination … is sometimes unknown to the driver when replying to a request made by the Uber platform. …
>
> [Sanctions:] cancelation rates could lead to loss of access to the account or … to the [app] in the event of customer reports of 'problematic behaviour', without any mechanisms for ascertaining allegations.[366]

[362] Cour de Cassation (*Take Eat Easy*) (n 361); the Court here reproduces the findings of the Paris Cour d'Appel (Appeal Court).

[363] For the legal framework in France, see eg F Kessler, 'The Concept of 'Employee': The Position in France' in B Waas and GH van Voss (eds), *Restatement of Labour Law in Europe: Vol I: The Concept of Employee* (Hart Publishing, 2017).

[364] See Marie-Anne Valéry, Rapport in the case of the Cour de Cassation (*Uber*), www.courdecassation.fr/IMG/20200304_rapport_ano_19-13.316.pdf, 22.

[365] Cour de Cassation (*Uber*) (n 361) paras 9–14.

[366] Cour de Cassation (*Uber*) (n 361) paras 9–14.

The court very clearly foregrounded the indirect mechanisms of positive and negative incentives for certain behaviours, with a specific emphasis on the driver becoming part of Uber's organisation of a transport service. From there, it drew a direct line to assessing the platform work in its economic context and as an 'economic reality', thereby defining 'subordination' not by the usual 'triptych' of direction-control-sanction, but by the organisational integration of the worker into an organised service.[367]

3.5.2.4.2. The European Court of Justice on *Yodel*

In contrast to the national court decisions reviewed above, the European Court of Justice has been more hesitant in its approach to classifying digital platform work relationships. When confronted with a case partly akin to platform work for the first time in April 2020, the ECJ ruled on the Yodel delivery service by a reasoned order[368] instead of a formal judgment, so little did it consider it useful to think about modifying or innovating new criteria for classifying work relationships on platforms.[369] The case concerned a self-employed courier working for a parcel delivery company (which did not operate as a digital platform) and his possible reclassification as a 'worker' in the context of the Working Time Directive 2003/88/EC.[370]

The ECJ, as always, started by referring to the national court's responsibility for assessing, in each individual case, 'all the factors and circumstances characterising the relationship between the parties'.[371] Once again, it defined the notion of 'worker' by using the *Lawrie-Blum* criteria, and the notion of 'disguised employment' by using the *FNV Kunsten* criteria, again giving the impression that the definition of 'undertaking' in competition law is just the flipside of the 'employee'/'worker' in labour law.[372] However, it is in this context that the Court forayed into further elaborating on the 'features which are typically associated with the functions of an independent service provider', eg 'more leeway in terms of choice of the type of work and tasks to be executed, of the manner in which that work or those tasks are to be performed, and of the time and place of work, and more freedom in the recruitment of his own staff'.[373]

[367] Valéry (n 365) 24; 34.
[368] Rules of Procedure of the Court of Justice [2012] OJ L265/1, Art 99.
[369] Case C-692/19 *B v Yodel Delivery Network* [2020] ECLI:EU:C:2020:288; R Buendia, 'The Court of Justice of the European Union's Order on B v Yodel Delivery Network' [2020] *Comparative Labor Law & Policy Journal* Dispatch No. 24; A Aloisi, '"Time Is Running Out": The Yodel Order and Its Implications for Platform Work in the EU' (2020) 13(2) *Italian Labour Law e-Journal* 67; M Risak, 'Arbeitnehmer*innen-Begriff in der Gig-Economy: Anmerkung zu EuGH C-692/19 (Yodel Delivery Network)' [2020] *Arbeit und Recht* 526; D Mangan, 'Employment Status: The Curious Case of the Delivery Person' (2020) 6(3) *International Labor Rights Case Law* 327.
[370] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ L 299/9.
[371] Case C-692/19 (n 370) para 28.
[372] For this analysis, see above at 3.4.1.3.
[373] Case C-692/19 (n 370) paras 28; 31–32.

With this background, it comes as no surprise that the tests the ECJ gave to the national courts are only subsidiarily directed towards identifying the existence of subordination. The primary examination, according to the ECJ, should be to ascertain whether the worker's alleged independence is merely notional or does appear to be fictitious. For this analysis, it suggests asking if the person in question is afforded discretion to:

- use subcontractors or substitutes to perform the service which he has undertaken to provide;[374]
- accept or not accept the various tasks offered by his putative employer, or unilaterally set the maximum number of those tasks;
- provide his services to any third party, including direct competitors of the putative employer, and
- fix his own hours of 'work' within certain parameters and to tailor his time to suit his personal convenience rather than solely the interests of the putative employer.[375]

As a result, the ECJ continued its method of defining the worker in such a way as to put the burden of argumentation on the worker's side.

3.5.2.5. The German Bundesarbeitsgericht on (Micro-)Crowdwork

In contrast to transportation and food delivery, crowdwork has hardly ever been the object of litigation.[376] Hence, the German Bundesarbeitsgericht (Federal Labour Court, BAG) seems to be the first court of high instance to have ruled on an instance of crowdworking. The case concerned a digital work platform which, among other things, offers to control the presentation of branded products in retail outlets and at petrol stations for its business clients. When a worker on the platform claimed unfair dismissal, the BAG in December 2020 rather surprisingly established the platform worker's status as an 'employee'. In its decision, it described the work on behalf of the platform as follows:

> The company [platform], inter alia, makes offers to other companies to control the presentation of their branded products in retail outlets and at petrol stations. Orders of its customers are broken down into a large number of individual micro-orders and then brokered via an app to its crowdworkers who carry out the checks.

[374] The rationale of this argument is explained in para 39: 'The putative employer can exercise only limited control over the choice of subcontractor or substitute …, and cannot give precedence to any personal choices and preferences.'; Mangan, 'Employment Status' (n 370) 332 particularly stresses this point.

[375] Case C-692/19 (n 370) paras 36; 43; 45.

[376] A US class action against CrowdFlower in which workers claimed they were misclassified as independent contractors and paid less than the legal minimum wage, led to a settlement of 585,507 USD (*Otey et al v Crowdflower, Inc et al* [2014] WL 1477630 (N.D. Cal. 2014); Case 3:2012cv05524 (N.D. Cal. 2015); *cf* summary on lawprofessors.typepad.com/files/here.pdf).

> The plaintiff had been working for the defendant as a crowdworker since … 2017. With an average weekly workload of approximately 20 hours, he earned an average monthly remuneration of 1,749.34 EUR [the parties disagree over the inclusion of VAT].
>
> After activating the app, it showed him open 'jobs' within a radius of up to 50 km from his current location. For this purpose, the app used the GPS data of his smartphone. He could set a smaller radius and also determine whether jobs would be displayed to him all the time or only when the app was switched on. … [J]ob offers could be accepted regularly in a time window of two to four weeks … With increasing dwell time of the offer, the remuneration for its performance increased.
>
> The plaintiff [worker] predominantly carried out 'tool checks' (mainly in petrol stations, and equipped with letters of legitimation by the respective customer). In addition, he carried out so-called 'mystery checks' in which he did not identify himself as working for the platform. The job offers contained specifications on the place and time of the activity as well as a precise description of the individual steps to be taken in the execution of the job. In addition to stating the expected time required, the job description specified a time frame within which the job was to be carried out (usually two hours). If the order was not completed within the time frame, it was offered again on the platform. In a period of eleven months, the plaintiff completed 2,978 orders.
>
> [Completed jobs were] credited with experience points on the [worker's] user account in addition to the remuneration. This enabled [him] to improve his individual user status and take on a higher number of jobs (on the highest level, crowdworkers could accept 15 jobs at the same time and determine the order in which they were processed).[377]

The Court used the opportunity of this case to clarify the meaning of the principle of primacy of facts in German law by stating that it 'takes into account the mandatory nature of labour law. Mandatory statutory provisions for employment relationships cannot be waived by the parties giving their relationship a different designation'.[378] At the end of the judgment, the Federal Labour Court summarised the criteria it applied in classifying the crowdworker. It found an employment relationship to exist if:

- the crowdworker is obliged to personal performance;
- the work activity is simple in nature and its implementation is predetermined in terms of content; and
- the app is specifically used as an instrument of heteronomy (*Fremdbestimmung*) when awarding contracts for individual tasks.

In the Crowdworker case in question, the Court found indicators for all these prerequisites to be met. First, it found that 'according to … the General Terms and Conditions …, neither is the user account set up for the respective person

[377] BAG 1 Dec 2020, case 9 AZR 102/20, NZA 2021, 552, ECLI:DE:BAG:2020:011220.U.9AZR102.20.0, paras 2–7.

[378] BAG, case 9 AZR 102/20 (n 378) para 39.

transferable nor may several user accounts be created for the same person'.[379] Secondly, it found that the crowdworker did not have any significant scope for decision-making in the execution of the accepted assignments, ie in the event of a legal relationship already having been established. Instead, tasks had to be completed via the app, which specified in detail how he had to carry out the activities and which work steps he had to perform. Finally, the Court found that the platform 'directs the users' [crowdworkers'] behaviour by cutting and combining the orders according to its needs'.

The Court put significant effort into describing the specific mechanisms of this indirect form of heteronomy (*Fremdbestimmung*). As a single micro-job is not of significant economic importance, it found the bundling and access to an 'attractive portfolio of offers' to be of utmost importance to crowdworkers. Accordingly, the Court noted they would have to constantly check the app and keep themselves ready for service in order to be able to take advantage of favourable offers. In this respect, it found the platform's 'level system', which uses the incentive function of the rating system (described by a managing director as 'gamification'), to be instrumental in giving such advantages.[380]

The way the German Federal Labour Court assigned these specific mechanisms to the criteria and descriptions of the 'employee' category in section 611a(1) BGB is indicative of the novelty of the approach. Indeed, this was the first time since the codification of the notion of 'employee' that the Court clarified the relationship between the two central concepts of the norm: 'bound by instructions' and 'heteronomy'. According to the Court, these terms

> are closely related and partly overlap …. The obligation to follow instructions is the narrower criterion that essentially characterises the type of contract …. Only if there are no instructions whatsoever is there usually no employment relationship.
>
> The criterion of heteronomy … is particularly evident in the integration of the employee into the employer's work organisation … A long-term and continuous cooperation does … at most [qualify as] economic dependence, which in itself is not capable of establishing an employment relationship …. Rather, for an employment relationship to be assumed, the principal must have taken organisational measures by which the employee – even if not directly instructed, but indirectly directed – is encouraged to continuously accept work assignments and to personally complete them within a certain time frame according to precise specifications.[381]

In this legal context, it clarified, the incentive system of a platform can give rise to employment in the understanding of section 611a BGB. Contrary to former jurisprudence,[382] it is now the incentives instead of direct instructions, and the organisational context instead of formal obligations, that function as indicators.

[379] BAG, case 9 AZR 102/20 (n 378) para 46.
[380] BAG, case 9 AZR 102/20 (n 378) paras 48–54.
[381] BAG, case 9 AZR 102/20 (n 378) paras 31–36.
[382] See summary and assessment above at 3.4.2.4 and 3.4.2.8.

This shift towards looking at the way in which a company organises the work in order to be able to position itself on a market is remarkable. In this judgment, the Federal Labour Court even explicitly referred to the reason why subordination and the control and management of a steady workforce is important for a company: because it establishes a reliable framework for planning (*Planungssicherheit*). The Court established that it now considers this as 'typical' for a work organisation with employees and sees an equivalent in the use of incentives to encourage workers 'to continuously accept a certain order quota'.[383]

3.5.3. Summary: Features of Employment Classification in Digital Platform Work

Digital platform work is 'atypical' work, which is one of the reasons why there is no obvious result for worker classification exercises. Even identical or similar business models sometimes choose diverging legal forms for their work relationships. For example, while food-delivery platform Deliveroo (when still active in Berlin) changed its employment contracts to independent contracting and almost exclusively worked with self-employed riders, its competitor Foodora (now taken over by Lieferando in Berlin) at the same time offered the exact same service of food-delivery by bicycle with the help of employees.[384] In its judgment determining the classification of Uber drivers in the UK, the London Employment Tribunal also held this to be an option, at least in theory:

> None of our reasoning should be taken as doubting that the Respondents [Uber] *could* have devised a business model not involving them employing drivers. We find only that the model which they chose fails to achieve that aim.[385]

On this basis, the analysis here is not supposed to give a final and definitive assessment of employment classification for different digital platforms. However, the above close look at academic assessments and jurisprudence shows that it is always the same characteristics of digital work platforms' business models that have inspired labour lawyers to take a new look at categories, criteria and indicators.

[383] BAG, Case 9 AZR 102/20 (n 378) para 36.

[384] Ivanova and others, *App as a Boss* (n 296) with a legal assessment of differences due to contractual choices; Deliveroo's decision (in 2018) not to extend the existing employment contracts and instead offer delivery staff a 'partner agreement' as independent contractor did not hold up before the Amsterdam District Court (*Rechtbank*), Case 7044576 CV EXPL 18-14763 [15 Jan 2019] ECLI:NL:RBAMS:2019:198. In Berlin, home cleaning services have also been offered in employment (platform Book-A-Tiger) and in independent contracting (platform Helpling).

[385] *Aslam, Farrar and Others v Uber* (n 332) (Employment Tribunal London) para 97.

3.5.3.1. The Angles That Jut Out

To date, four characteristics of digital platform work have played a pivotal role in classifying digital platform work as employment:

(a) App-based Management[386]

A recurrent factor that has been identified as a mechanism of 'control' or 'binding by instructions' is the obligatory use of platform apps and related specific soft- and hardware. Such apps will usually indicate and detail every step a worker must follow in order to complete tasks and perform activities.

(b) Rating and Feedback Mechanisms

Perhaps the most important shift in perspective concerns the reputation systems used by digital work platforms. Courts have put significant effort into describing the ways in which platforms feed data and statistics into rating, reputation and feedback mechanisms in order to create incentives for workers and thereby influence their behaviour (this could be analysed as an instance of 'governance by numbers'[387]).

Some authors and courts have used the term 'sanctions' in order to describe the consequences of negative feedback. Often, however, workers do not feel the effects of negative feedback in a direct way, but indirectly insofar as their access to tasks, shifts and/or work conditions are negatively affected.

(c) Qualification Requirements and the Assignment of Tasks to Particular Workers

Some platforms use feedback and rating systems to get information on the work and build up knowledge about workers. These practices are intimately linked with an aspect of digital work platforms that has been underrated in previous employment classification exercises: Platforms often try to assign tasks or work packages to those workers the platform considers most apt for the task.[388] Establishing a certain level of work quality is yet another purpose for which feedback systems have been used. In parallel, direct ways of training workers (tutorials, etc) are sometimes in place. This interest in controlling products and services is also what is ultimately behind platforms' strategies of either not allowing or at least discouraging the substitution of workers.[389]

[386] For the term *cf* Ivanova and others, *App as a Boss* (n 296); Stefano and others, *Platform Work* (n 325) use the term 'control of technology' (they use the methodology I had proposed in E Kocher, 'Market Organization by Digital Work Platforms: At the Interface of Labor Law and Digital Law' *Comparative Labor Law & Policy Journal* forthcoming, with slightly different results).

[387] A Supiot, *Governance by Numbers: The Making of a Legal Model of Allegiance* (Hart Publishing, 2017); S Mau, *Das metrische Wir: Über die Quantifizierung des Sozialen* (Suhrkamp, 2017).

[388] In the case of Deliveroo's activities in Berlin, even close-to-hierarchical structures among riders (with the institution of 'senior riders') have been established (Bronowicka and Ivanova, 'Resisting' (n 301)).

[389] Ivanova and others, *App as a Boss* (n 296) found that bikers on food-delivery platforms would rather cancel on short notice than hand over their log-in access to someone else and thereby risk their statistics being hurt; see also Dullinger, 'Essenszustellung' (n 307).

Feedback systems and qualification requirements form parts of a strategy aimed at having a workforce on hand that can guarantee the platform's ability to perform any orders customers may place. And this is the gist of what many of the criteria that novel approaches rely on are after: They assess the work relationship by taking a close look at the platform's business model vis-à-vis their customers, ie consumer or business clients.

(d) Access to Markets

The fact that digital work platforms control access to customers and markets gives rise to some other important features that have become the focus of novel approaches to classifying their work relationships. The most obvious aspect is that platforms usually control both access to the workers (the crowd) and access to customers. Exclusive billing by platforms is the most obvious proof of the control they exert over their relationships to customers, and it has played an even more important role in jurisprudence than their unilateral fee-setting.

In this context, the widespread lack of transparency for workers becomes functional, though it does disable some feedback systems' potential for behavioural instructions. While workers feed an enormous amount of data into the system, they are often deprived of information that would be key for their own rational decision-making. Food-delivery and taxi platforms sometimes do not even tell their workers the ultimate destination of a drive or ride, let alone give them direct access to customers. Sometimes, workers are expressly prohibited from making direct contact with customers.

On the other hand, platforms try to keep their working crowd as stable and as big as possible. They often take steps to regulate the balance of available work and workers.[390] In addition, the lack of transparency in feedback mechanisms is often designed to generally induce workers to keep themselves available at all times and to participate as much as possible. Notwithstanding contractual rights to work with multiple platforms simultaneously, reputational feedback systems bind workers to platforms, with the reputational profits accrued by workers functioning as economic glue.

This is where shifts in the legal assessment of digital platform work have been most visible: In contrast to traditional classification exercises, the economic positions of platforms and platform workers have come to play a major role in courts' classification of digital platform work relationships. In this respect, courts have begun to give particular consideration to aspects of organisational integration of workers into the platform organisation, on the one side, and their lack of independent market access and entrepreneurial opportunities, on the other.

[390] Ivanova and others, *App as a Boss* (n 296).

3.5.3.2. Points of Departure

Some of these mechanisms – app-based service, reputational feedback, and the building up of exclusive relationships with clients – are also rather typical for independent services. For example, feedback is inherent in markets and the reputation built up on a market can be crucial for independent contractors' economic position. Their work is always subject to some kind of quality assessment, accompanied by the potential fear of losing further assignments. Some direct measuring of the work and its quality may even be needed in independent contracting, for example in order to calculate fees.[391] Geolocation could well be used for such purposes, in particular if the geographic position is vital for an optimal service.[392] Deadlines will usually also be set for a freelancer's services. Even the unilateral 'setting' of fees or prices is quite common on markets with a certain imbalance.[393]

To find a way out of this impasse, the German Bundesarbeitsgericht (BAG, Federal Labour Court) has tried to identify what makes the difference between an instruction vis-à-vis a self-employed person (typically factual and result-oriented) and an instruction under an employment contract (person-related, process- and procedure-oriented).[394] This differentiation comes down to naming organisational aspects, which confirms the significance of the abovementioned aspects of market access and organisational integration when it comes to classifying digital platform work.

If we look at the different ways reputational systems work for platform workers and for 'typical' freelancers and entrepreneurs, we can see that this is not a coincidence. Customers have to gather information on the quality of a freelancer's work indirectly, while a freelancer receives information on a customer's (and, in turn, the market's) quality expectations partly by trial and error, and partly by qualification processes (professional standards). In the case of digital platform work, it is only one actor – the platform – who defines criteria for rating and sorting towards platform workers. Even the criteria of customer feedback are determined by platforms. With this framework in mind, it makes sense to put the market position and organisational form of the platform at the centre of the legal analysis. We will come back to this topic later, when reviewing theories of labour law classification in chapters four and five.

However, these novel dynamics only come into view if the perspective of classification exercises is shifted and the search is directed towards aspects of employment instead of aspects of self-employment. The analysis of jurisprudence above shows that whether the scales end up tipping towards employment

[391] Brose, 'Von Bismarck zu Crowdwork' (n 321) 11.
[392] Valéry (n 365) 25.
[393] The legal admissibility of price fixing would then be a question for competition law (*cf* below ch 7, 7.6.3.1).
[394] BAG, case 9 AZR 102/20 (n 378) para 35; on the general approach, see above text at nn 128–130.

or self-employment in a particular case often depends on the point of departure, ie on the default option from which the assessment starts.

Some legislators have tried to use rules for burden of proof to direct perspectives in classification assessments.[395] In other jurisdictions, courts have had to change their view on the role of contracts in order to take a close look at organisational features. For English and German jurisprudence in particular, digital platform litigation has occasioned new suspicion and mistrust towards contractual denominations and, consequently, new approaches to the primacy of facts principle.[396]

3.5.3.3. 'The Lady Doth Protest Too Much'

In general, the principle of primacy of facts has been a firm anchor in litigation concerning digital work platforms. The repeated conjuring of independent contracting in the text of the contracts, and the confusing artificiality of contractual constructions[397] have made it easier for courts to set the contractual situation aside and even overcome the three-way contractual nexus which sometimes construes performance obligations as only between platform workers and customers, leaving the platform only with the obligations of the 'user contracts'.[398] The Employment Tribunal London once expressed its astonishment over one of these contractual texts by saying:[399]

> [We could not] help being reminded of Queen Gertrude's most celebrated line (in Shakespeare's play Hamlet): The lady doth protest too much, methinks.

Some contractual constructions have posed yet another problem: Should we analyse the general (long-term) user contract between worker and platform or the individual assignment of tasks (which will usually be the subject of single service contracts)?[400] The indicators mentioned above will only work properly if

[395] Above at 3.4.3.3 and text at n 288.
[396] Above at 3.5.2.5 and 3.5.2.2, contrasting with 3.4.2.8 and 3.4.3.1.
[397] Freedland and Kountouris, 'Some Reflections' (n 81) 68–69; Prassl, *Humans as a Service* (n 3) 96 on Taskrabbit; Fredman and Du Toit, 'One Small Step' (n 311) 270–71; International Lawyers Assisting Workers Network (ILAW) (ed), *Taken for a Ride* (n 325) 27–28; E Kocher, 'Die Spinnen im Netz der Verträge: Geschäftsmodelle und Kardinalpflichten von Crowdsourcing-Plattformen' [2018] *Juristenzeitung* 862, with examples from (the German platforms) Clickworker and AppJobs on the legal relationship between platform and business clients/consumers; *cf Autoclenz* [2009] EWCA Civ 1046 (n 223) para 104: 'The elaborate protestations in the contractual documents that the men were self-employed were odd in themselves.' *cf* critiques of the plurality of actors on the platforms' side in the case of Uber: GN Diega and L Jacovella, 'Ubertrust: How Uber Represents Itself to Its Customers Through its Legal and Non-Legal Documents' (2016) 5(4) *Journal of Civil & Legal Sciences* 199; Fredman and Du Toit, 'One Small Step' (n 311) 270–71; J Tomassetti, 'Algorithmic Management, Employment, and the Self in Gig Work' in D Das Acevedo (ed), *Beyond the Algorithm: Qualitative Insights for Gig Work Regulation* (Cambridge University Press, 2021) 130–43.
[398] On the contractual constructions, see above ch 1, n 43 ff.
[399] *Aslam, Farrar and Others v Uber* (n 332) (Employment Tribunal London) para 87.
[400] On the contractual constructions, see above ch 1, n 43 ff.

the assignments are seen in a long line of work activities and are therefore 'linked together to form a uniform (permanent) employment relationship' in terms of economic considerations.[401] Otherwise, the indicators could simply establish the existence of extremely short, fixed-term employment relationships in the context of a general framework agreement.[402]

3.5.3.4. Lessons for Digital Work Platforms in General?

Jurisprudence has almost exclusively assessed food-delivery and transportation platforms, ie very specific location-based offline labour platforms. This may be due in part to the fact that transport and food-delivery work are highly visible in the public space and therefore easily become objects of public debate. In the case of Uber's business model, controversies are also due to strong competition in and regulation of the sector.

Even in this limited segment of digital platform work, we see quite some relevant differences between business models, terms, and conditions, with many platforms adapting to different national regulatory frameworks. Overall, this segment covers an important, but quite unique range of what digital work platforms have to offer. As a result, litigation and connected legal debates on digital work platforms take place on a quite limited empirical basis. Are there any lessons to be learnt for digital platform work in general? Can we draw any conclusions for offline household, repair or care services, for micro-crowdwork, for contest-based or interactive crowdwork – or for YouTube – at all?

Some doubts remain at this point. On one side, in contrast to transport/taxi and delivery services, scholars have categorised complex crowdwork mostly as independent contracting.[403] On the other side, we have seen that transport and delivery services have already led to a reinvention of indicators for employment. On a higher level of abstraction, the mechanisms of indirect control via incentives that have become relevant in transport and delivery service litigation characterise all forms of digital work platforms. Hence, it is no coincidence that the German Bundesarbeitsgericht used these same aspects of work organisation in a case classifying micro-crowdwork. We will have to see how these analogies fare in the following theoretical and economic analysis in chapters four and five, when the notion of indirect control is contextualised in labour law theories.

[401] BAG case 9 AZR 102/20 (n 378) paras 52–54.

[402] This is what some authors have been analysing: Risak, '(Arbeits-)Rechtliche Aspekte' (n 294); A Rosin, 'Platform Work and Fixed-term Employment Regulation' [2020] *European Labour Law Journal* 1; *cf* Waas, 'Crowdwork in Germany' (n 272) 152; on the German notion of 'framework agreement, see above text at n 182.

[403] Risak, '(Arbeits-)Rechtliche Aspekte' (n 294); Liebman and Lyubarsky, 'Crowdworkers' (n 230) 89 (on Upwork); 93 (on Topcoder); Scientific department of the Bundestag (Wissenschaftlicher Dienst des Bundestags), WD 6 – 3000 – 156/14, 5–6; differently: Kocher and Hensel, 'Herausforderungen des Arbeitsrechts' (n 303).

3.6. Results: Transcendental Nonsense?

The analyses in this chapter have shown that the indicators traditionally used to establish employment have had to be adapted to fit the specific characteristics of digital platform work. Here, four features of digital platform work stand out:

- app-based management;
- rating and feedback mechanisms;
- the qualification of workers and assignment of tasks; and
- most importantly, the economic positions of platforms and workers, considering access to markets and organisational integration.

At least the second and third of these indicators refer to forms of indirect control that are not reflected in traditional indicators of employment. Upon closer look, a reappraisal and reinvention of indicators, criteria and descriptions of employment, or at least some creative reinterpretation, was necessary to make the employment category fit for digital work platforms.

These shifts have taken place rather implicitly, which has been possible due the 'terminological fog'[404] surrounding the classification of employment relationships. Classification mostly comes down to assessing a case according to the facts that make up its specific and 'typical' features, and then measuring those facts against what a 'typical' employment and/or a 'typical' independent contracting relationship is supposed to look like, in the eyes and minds of the lawyers and judges assessing the case. In this sense, the epigraph at the top of this chapter seems to adequately describe the rather intuitive activity of judges when classifying workers. Not only did 'mid-Victorian judges ha[ve] little difficulty recognizing a proletarian when they saw one,'[405] but today's judges also admit to being unable to define an employee and nevertheless capable of '[recognising one] immediately when [they] see one.'[406]

It is hard to argue about – either in favour of or against – such foggy notions. Indeed, employment classification sometimes resembles a circular operation that Felix Cohen termed 'transcendental nonsense':[407] Courts classify workers as employees and grant them employment rights because they are like employees and seem to deserve these rights. In a similar vein, classification exercises have in recent years been increasingly accused of 'purposelessness' and 'irrationality'.[408] Carlson, who was of the opinion that 'the law still can't tell an employee when it

[404] Freedland and Kountouris, *Legal Construction* (n 42) 325–26.
[405] Linder, *The Employment Relationship* (n 235) 233.
[406] Reinecke, 'Neues zum Arbeitnehmerbegriff?' (n 1) 58–59, referring to a conversation with Thomas Dieterich, former president of the Federal Labour Court and judge of the Federal Constitutional court. For the context, see above at n 203.
[407] Cohen, 'Transcendental Nonsense' (see text above at n 200).
[408] Linder, 'Dependent and Independent Contractors' (n 245) 190; 230.

sees one', therefore suggests that 'it ought to stop trying' (and instead assign rights and obligations on a case-by-case basis).[409]

Before adopting such a radical position, the following chapters will retrace and attempt to recover purposes, concepts and normative points from labour law,[410] in order to find a functional approach to complement the typological method.[411] This is, after all, what the principle of primacy of facts asks us to do. It is built on the assumption that there are some socio-economic features of a work relationship that companies and employers cannot easily change and thereby manipulate. To this end, chapter four looks at the functional ideas behind employment categories, while chapter five explains the socio-economic models upon which they are built.

[409] Carlson, 'Why the Law Still Can't Tell' (n 234).

[410] *cf* the endeavours of Deakin, 'Contract of Employment' (n 206); Carlson, 'Why the Law Still Can't Tell' (n 234) 9; Davidov and Langille, 'Beyond Employees and Independent Contractors' (n 261); Davidov, *Purposive Approach* (n 42).

[411] Nogler, 'Typologisch-funktionale Methode' (n 55).

4

Theoretical Foundations of Employment Classification

This is not the first book on the search for new approaches to labour law categories. It builds on a body of scholarship that has been continuously deconstructing and reconceptualising labour law for many years. In recent years, academics and policy actors have increasingly attempted to solidify ideas by remodelling legislation and proposing codification. Examples include the 2017 French academic proposal for a new Labour Code,[1] the 2017 Italian trade union Charter of Universal Workers' Rights,[2] and the 2017 Workers (Definition and Rights) Bill that, in spring 2021, is currently being read in the UK Parliament.[3] The German legislature did finally codify an authoritative notion of the employment relationship in 2017,[4] and the EU Commission has at least attempted codification.[5]

One could write whole books on reconceptualising labour law from scratch, and, in fact, whole books have been written on this topic. The aim of this chapter, however, is far more modest. By revisiting a variety of theoretical approaches to employment classification, it seeks to find purposes and functional ideas that may explain and justify employment categories. In doing so, it identifies ideas that could potentially show a way forward in reappraising existing categories in light of the challenges posed by digital work platforms.

The chapter starts off by sketching approaches that reconceptualise labour law by suggesting new ways to categorise work relationships, ultimately embedding labour law in human rights as bottom lines (4.1). The chapter then proceeds to look at what characterises labour law at its core, beyond general human rights, which is the employment relationship (4.2). Finally, it analyses the specific power relationships to which labour law is designed to answer (4.3).

[1] E Dockès (ed), *Proposition de code du travail* (Dalloz, 2017) Arts L. 11-1–L. 11–18.

[2] Confederazione Generale Italiana del Lavoro (CGIL), Carta dei diritti universali del lavoro – Nuovo statuto di tutte le lavoratrici e di tutti I lavoratori, http://www.cgil.it/admin_nv47t8g34/wp-content/uploads/2016/03/Carta_dei_diritti_Testo_Definitivo.pdf (2016).

[3] https://publications.parliament.uk/pa/bills/cbill/2017-2019/0114/HCB%20114.pdf; KD Ewing, JQC Hendy and C Jones, 'The Universality and Effectiveness of Labour Law' (2019) 10(3) *European Labour Law Journal* 334.

[4] Above ch 3, 3.4.2.1.

[5] Above ch 3, 3.4.1.3. On legislative debates elsewhere, including the US, see below ch 6, 6.1.2.3.

4.1. Deconstruction and Reconceptualisation of Categories

4.1.1. The Supiot Report: Four Circles

The Supiot Report of 2001 is an influential attempt to deconstruct and reconceptualise general ideas of labour law. It was the work of a comparative research group of European labour lawyers lead by Alain Supiot,[6] prepared for the European Commission ahead of its 2006 Green Paper 'Modernising labour law to meet the challenges of the 21st century'. The Green Paper posed and initiated consultations around a number of questions, including:

> Is there a need for a 'floor of rights' dealing with the working conditions of all workers regardless of the form of their work contract?[7]

Overall, the Green Paper was intended to bring the 'flexicurity approach'[8] into European labour law and was positioned in a general debate on atypical and non-standard employment. It created a lot of controversy among the Member States,[9] not least due to its controversial and ambivalent presentation of the flexicurity approach.

While the Green Paper was highly controversial, was not followed up and, therefore, basically failed in its aims, the Supiot Report continues to inspire regulatory ideas to this day, particularly through its concept of 'social drawing rights'.[10] As for categorisation and a possible 'floor of rights', the Supiot Report developed the concept of '*statut professionel*' as part of a proposal for regulating work conceptualised in four circles: In the innermost circle was dependent employment in the narrow sense, then any professional activity, non-professional (unpaid) work, and

[6] A Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (A report prepared for the European Commission. with María Emilia Casas, Jean de Munck, Peter Hanau, Anders L. Johansson, Pamela Meadows, Enzo Mingione, Robert Salais, Paul van der Heijden tr, Oxford University Press, 2001); A Supiot and others, 'A European Perspective on the Transformation of Work and the Future of Labor Law' (1999) 20(4) *Comparative Labor Law & Policy Journal* 621; W Däubler, 'Steigende Schutzdefizite im Arbeitsrecht?' (2016) 23(2) *Industrielle Beziehungen* 236.

[7] European Commission, 'Modernising Labour Law to Meet the Challenges of the 21st Century: Green Paper' (COM(2006) 708 fin), question 8.

[8] T Wilthagen and F Tros, 'The Concept of "Flexicurity": A New Approach to Regulating Employment and Labour Markets' (2004) 10(2) *Transfer European Review of Labour and Research* 166; M Kronauer and G Linne (eds), *Flexicurity: Die Suche nach Sicherheit in der Flexibilität* (Hans-Böckler-Stiftung, edition sigma, 2005).

[9] For reflections in the German debate *cf* for example U Preis, 'Grünbuch und Flexicurity: Auf dem Weg zu einem modernen Arbeitsrecht?' in H Konzen and others (eds), *Festschrift für Rolf Birk zum siebzigsten Geburtstag* (Mohr, 2008); R Wank, 'Das Grünbuch Arbeitsrecht: Eine Perspektive für das europäische Arbeitsrecht?' (2007) 62(7–8) *Arbeit und Recht* 244.

[10] Supiot, *Beyond Employment* (n 6) 56–57; 222; U Mückenberger, 'Ziehungsrechte: Ein zeitpolitischer Weg zur "Freiheit in der Arbeit"' (2007) 60(4) *WSI-Mitteilungen* 195; E Kocher and others, *Das Recht auf eine selbstbestimmte Erwerbsbiographie: Arbeits- und sozialrechtliche Regulierung für Übergänge im Lebenslauf* (Nomos, 2013) 53–54; 346–50.

in the outermost circle, any work activity (the first three denominated with the French term *statut professionel*).[11] In June 2017, the Confederation of German Trade Unions' Hans Böckler Foundation established a commission called 'Arbeit der Zukunft' ('Work of the Future'), which took up the idea of Supiot Report's four circles.[12] The commission's final report in 2018, 'Let's Transform Work!', translated the circles as encompassing, from innermost to outermost: employees, economically dependent 'employee-like' persons, all other workers (including the self-employed), and, lastly, everyone working in any other situation of structural imbalance.[13]

On a closer look, however, this attempt to operationalise the Supiot Report's four-circle concept shares the problems built into it. The Supiot report names work categories and even explains which rights and obligations ought to be assigned to each of them. For example, the innermost circle, according to the report, should be linked to the complete set of labour and employment rights. Moving outward, it suggests that professional workers (not easily to be identified with employee-like persons) should have health and safety rights, while unpaid work should be protected through specific social (security) rights and, finally, any work activity in the outermost circle should entail the provision of 'universal rights'. This tiering is intuitively attractive. However, it does not come with a conceptual explication or descriptions or definitions of the circles. The fact that the original French term '*statut professionel*' has proved so hard to translate,[14] is indicative of the vagueness of these categories.

Despite these weaknesses, what has stuck is the Supiot report's affirmative answer to the European Commission's initial question[15] that, indeed, there is a need for universal rights independently of contractual forms and models.

[11] Supiot, *Beyond Employment* (n 6) 24–28; 52–55; the summary, in particular, focuses on the integration of unwaged/unpaid work into the model (221–22). On the translation 'membership of the labour force', see n 14.

[12] T Goldman and D Weil, 'Who's Responsible Here?: Establishing Legal Responsibility in the Fissured Workplace' (2020). Working Paper 114 also use the 'concentric circle' metaphor for their design, though strangely without mentioning the Supiot report.

[13] K Jürgens, R Hoffmann and C Schildmann, *Let's Transform Work!: Recommendations and Proposals from the Commission on the Work of the Future* (Hans-Böckler-Stiftung, 2018) 26 ff; P Davies and M Freedland, 'Employees, Workers, and the Autonomy of Labour Law' in H Collins, P Davies and R Rideout (eds), *Legal Regulation of the Employment Relation* (Kluwer Law International, 2000) 272. See also E Sánchez Torres, 'The Spanish Law on Dependent Self-Employed Workers: A New Evolution in Labor Law' (2010) 31 *Comparative Labor Law & Policy Journal* 231, 239 who attributes the introduction of the TRADE category in Spanish law (ch 3, 3.4.3.4) to the Supiot report's 'Four Circles of Social Law Theory'; for a discussion, see also J Fudge, 'A Canadian Perspective on the Scope of Employment Standards, Labor Rights, and Social Protection: The Good, the Bad, and the Ugly' (2010) 31 *Comparative Labor Law & Policy Journal* 253, 253; 265; on the origins and role models of the Spanish regulation *cf* J-P Landa Zapirain, 'Regulation for Dependent Self-employed Workers in Spain: A Regulatory Framework for Informal Work?' in J Fudge, S McCrystal and K Sankaran (eds), *Challenging the Legal Boundaries of Work Regulation* (Hart Publishing, 2012) 159–60; for a wholly different model of 'four circles', see I Lianos, 'The Way Forward' in B Waas and C Hießl (eds), *Collective Bargaining for Self-Employed Workers in Europe: Approaches to Reconcile Competition Law and Labour Rights* (Wolters Kluwer, 2021) 307.

[14] Supiot, *Beyond Employment* (n 6) 24, fn 1 ('membership of the labour force' as an approximation for the English language).

[15] Above at n 7.

4.1.2. Freedland and Kountouris: The Personal Work Nexus

Mark Freedland and Nicola Kountouris, in their 2011 book *The Legal Construction of Personal Work Relations*, also started with the Supiot Report's idea, albeit without a policy orientation, but with more of a conceptual approach in mind.[16] Consequently, their reconceptualisation of labour law concepts comes out quite unique, revolving around the terms 'profile', 'relation' and 'nexus'. These concepts are constructed in such a way that they zoom in from the 'personal work profile' of an individual worker, established in a complex network of 'personal work relations', to the base element of the 'personal work nexus', which may, but need not be, contractual.[17]

Freedland and Kountouris explicitly designed their taxonomy for the purpose of assigning specific legal effects, ie to link legal categories to legal consequences. They take a comparative approach from a common-law perspective. In order to develop neutral or 'baggage-free' analytical concepts, they view the elements of 'personal work relation' and 'personal work nexus' as detached from any link to contract.[18] The notion of 'personal work relation', designed as a framing and organising concept, therefore combines ideas of contract and relationship. The result is a new cognitive map that is polycentric instead of binary,[19] encompassing a mosaic or mobile system of elements. Instead of classifying contracts and describing categories, it puts the person of the worker in the centre of attention,[20] which enables the concept to fulfil similar functions to the Supiot Report's '*statut professionel*' category.[21]

In this concept, 'work' is where there is personality in work. The involvement of the person and, hence, the personality of the worker in the performance of work, is at the core of the mosaic. This definition even makes for a bottom line of employment classification because

> [it] goes to the exclusion of those service providers who are not operating mainly and predominantly on the basis of their personal work, but rather primarily through their

[16] MR Freedland and N Kountouris, *The Legal Construction of Personal Work Relations* (Oxford University Press, 2011) (with an explanation of the relationship to the Supiot Report on 24–28); MR Freedland and N Kountouris, 'The Legal Characterization of Personal Work Relations and the Idea of Labour Law' in G Davidov and B Langille (eds), *The Idea of Labour Law* (Oxford University Press, 2011).

[17] Freedland and Kountouris, *Legal Construction* (n 16) 34–37; 267–84; 348.

[18] ibid, 309–23; *cf* 284–90; for the comparative analysis of the relationship of contract and regulation *cf* 83–103; 132–47; G Davidov, M Freedland and N Kountouris, 'The Subjects of Labor Law: "Employees" and Other Workers' in M Finkin and G Mundlak (eds), *Research Handbook in Comparative Labor Law* (Edward Elgar, 2015).

[19] S Deakin, 'What Exactly Is Happening to the Contract of Employment: Reflections on Mark Freedland and Nicola Kountouris's Legal Construction of Personal Work Relations' (2013) 7(1) *Jerusalem Review of Legal Studies* 135.

[20] Freedland and Kountouris, *Legal Construction* (n 16) 338–41.

[21] ibid; Freedland and Kountouris, *Legal Construction* (n 16) 6; 21; 24–28; 54; on p 341 however, the 'personal work profile' is mentioned as the relevant mirroring concept; similarly, Freedland and Kountouris, 'Legal Characterization' (n 16) 200.

> ability to organise other factors of production (and often the factors of production of others), labour and capital in particular. The ability to do so … makes the person akin to an employer or a commercial entrepreneur, … even where some degree of personal work may be present in the actual activity performed.[22]

I will come back to this characterisation later. For the moment, my focus is on Freedland and Kountouris' general approach, which resembles the Supiot Report's arguing for a set of universal rights, but in defence of the personality of workers, identified by the terms 'dignity', 'capability' and 'stability'.[23]

4.1.3. Embedding Labour Law in Human Rights Approaches

Both the Supiot Report and Freedland and Kountouris' reconceptualisations argue for abandoning binary systems of labour law classification. However, neither of them provides guidelines or normative ideas for new categories. Instead, the wealth of these analyses lies in their identifying basic elements of work that they argue should give rise to universal rights, independently of contractual status.[24] These comprehensive concepts are ultimately capable of identifying commonalities shared by any kind of work, and of justifying universal rights at work. Consequently, they define a basic element that they then link with a human rights approach. Ultimately, they embed labour law within universal human rights, an approach that Harry Arthurs has defended as 'fundamental, not merely statutory or contractual; universal, not merely class-based and parochial; principled, not merely pecuniary'.[25]

Embedding labour law within universal human rights is also envisioned with the phrase 'labour should not be regarded merely as a commodity or article of commerce'[26] or, rather, 'labour is a fictive commodity'.[27] By emphasising that work

[22] Freedland and Kountouris, *Legal Construction* (n 16) 376; reaffirmed in M Freedland and N Kountouris, 'Some Reflections on the 'Personal Scope' of Collective Labour Law' (2017) 46(1) *Industrial Law Journal* 52, 67–68.

[23] Freedland and Kountouris, *Legal Construction* (n 16) 208–09; 338–41; 370–90.

[24] M Linder, *The Employment Relationship in Anglo-American Law: A Historical Perspective* (Contributions in Legal Studies vol 54, Greenwood Press, 1989) 239 ff follows this line of thinking into a development 'from Contract to Status to Universal Social Right'.

[25] H Arthurs, 'Labour Law After Labour' in G Davidov and B Langille (eds), *The Idea of Labour Law* (Oxford University Press, 2011) 23–24.

[26] Treaty of Versailles of 1919, Art 427; Declaration concerning the aims and purposes of the International Labour Organisation (Declaration of Philadelphia) of 1944, No a); reaffirmed by the ILO's Centenary Declaration for the Future of Work, 2019.

[27] J Fudge, 'Labour as a "Fictive Commodity"' in G Davidov and B Langille (eds), *The Idea of Labour Law* (Oxford University Press, 2011); from a historical perspective: S Evju, 'Labour is not a Commodity: Reappraising the Origins of the Maxim' (2013) 4(3) *European Labour Law Journal* 222; F Hendrickx, 'Foundations and Functions of Contemporary Labour Law' (2012) 3(2) *European Labour Law Journal* 108, 110–16.

is inseparable from the person performing it, the phrase puts human dignity at the centre of attention, while at the same time acknowledging the empirical fact that labour law 'underpins the creation of labour power as a commodity, and regulates the resulting social and economic relations'.[28]

This is why Amartya Sen's 'capabilities approach' has been attractive for such embedding endeavours.[29] As labour law scholar Judy Fudge has noted, it 'provides a framework for debating which labour and social rights ought to be considered fundamental'.[30] Built on ideas of fairness and personal development, it emphasises that a job is more than just a source of income[31] and, at the same time, keeps an explicit albeit rather vague distance from issues of economic performance ('accumulation of human capital'[32] and 'employability'[33]). In this way, it is able to identify the specific claims and questions that human rights must confront in the area of work.

4.1.4. To the Core

However, the reconceptualisation of labour law by way of human rights has always been disputed.[34] Moreover, the inclusion of dignity in Freedland and Kountouris' set of normative ideas created a fair amount of controversy.[35] It is true that human rights and dignity can be constructed as a basis for all of labour

[28] Deakin, 'What Exactly Is Happening' (n 19); on these double aspects of the term *cf* Fudge, 'Fictive Commodity' (n 27).

[29] AK Sen, *The Idea of Justice* (The Belknap Press of Harvard University Press, 2011); A Supiot, 'En guise de conclusion: la capacité, une notion à haut potentiel' in S Deakin and A Supiot (eds), *Capacitas: Contract law and the institutional preconditons of a market economy* (Hart Publishing, 2009); SF Deakin and F Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (Oxford University Press, 2005) 342 ff; Arthurs, 'Labour Law After Labour' (n 25) 24–25; B Langille, 'Labour Law's Theory of Justice' in G Davidov and B Langille (eds), *The Idea of Labour Law* (Oxford University Press, 2011); linking the approach with the ILO's decent rights agenda: R-C Drouin, '"Capacitas" and Capabilities in International Labour Law' in S Deakin and A Supiot (eds), *Capacitas: Contract law and the institutional preconditons of a market economy* (Hart Publishing, 2009) 152–60; *cf* also B Langille, 'Human Development: A Way out of Labour Law's Fly Bottle' in H Collins, G Lester and V Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press, 2018).

[30] Fudge, 'Fictive Commodity' (n 27) 126–27.

[31] H Collins, 'Theories of Rights as Justifications for Labour Law' in G Davidov and B Langille (eds), *The Idea of Labour Law* (Oxford University Press, 2011) 149.

[32] For this term, see Arthurs, 'Labour Law After Labour' (n 25) 24–25.

[33] HU Otto and K Schneider (eds), *From Employability Towards Capability* (Inter-Actions, 2009).

[34] For a general account of this debate, see E Kocher, 'Solidarität und Menschenrechte – Zwei verschiedene Welten?' in H Lindemann and others (eds), *Erzählungen vom Konstitutionalismus: Festschrift für Günter Frankenberg* (Nomos, 2012); *cf* Langille, 'Labour Law's Theory of Justice' (n 29) 107; J Fudge, 'The New Discourse of Labor Rights: From Social to Fundamental Rights?' [2007] *Comparative Labor Law & Policy Journal* 29; Collins, 'Theories of Rights' (n 31) 140–52.

[35] C McCrudden, 'Labour Law as Human Rights Law: A Critique of the Use of 'Dignity' by Freedland and Kountouris' in A Bogg and others (eds), *The Autonomy of Labour Law* (Bloomsbury, 2017); J Prassl, *The Concept of the Employer* (Oxford University Press, 2015) 275–89.

law if sufficiently thick concepts are used.[36] But if we use common concepts of human and universal rights grounded in political theory, we find human rights approaches going back to liberal theories that lead to a floor of rights as minimum standards. Ultimately, these approaches and theories are unable to provide foundations for all of labour law.[37]

We come to a similar result if we look at human rights approaches from an empirical socio-legal point of view, such as the one sketched out in chapter two's analysis of legal discourses as discursive formations or regulatory domains.[38] From this perspective, human rights and labour rights are defined as much by the tension between individual and collective rights as they are by the different historical and institutional frameworks and actors that constitute them.[39] Labour law discourses, in the strict sense, show quite a unique ability to capture economic realities and power, to promote social solidarity and social justice (ie, a fair distribution of wealth and power),[40] and to address market failures by way of social, economic and collective rights.[41]

Concepts of a 'labour constitution'[42] would analyse these issues as part of a comprehensive concept defined by its integrating of norms, institutions and actors as well as its concern for socio-economic dynamics. The standard employment relationship is a central element in such concepts, along with the legal categories that try to fix it in time. Indeed, the standard employment relationship featured prominently in the labour constitutions that were developed in institutional ensembles and political compromises 'fashioned out of the post-war capital-labour compromise in industrialised democracies'.[43]

[36] P Gilabert, 'Dignity at Work' in H Collins, G Lester and V Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press, 2018).

[37] J Atkinson, 'Human Rights as Foundations for Labour Law' in H Collins, G Lester and V Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press, 2018) (departing from John Rawls' and Joseph Raz' approaches); *cf* A Eleveld, 'Argumentative Strategies in the Defence of Labour Law: The Promises of Republican Theory' in A Blackham, M Kullmann and A Zbyszewska (eds), *Theorising Labour Law in a Changing World: Towards Inclusive Labour Law* (Hart Publishing, 2019) 210–11 (with a critique of the capability approach as not being sufficiently able to address issues of power and domination).

[38] Above ch 2, 2.1.–2.3.

[39] Arthurs, 'Labour Law After Labour' (n 25) 23–24.

[40] Hendrickx, 'Foundations and Functions' (n 27) 110; 115–18.

[41] J Fudge, 'Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation' (2006) 44(4) *Osgoode Hall Law Journal* 609, 639–40; Fudge, 'Fictive Commodity' (n 27) 124–25; Fudge, 'New Discourse' (n 34); Collins, 'Theories of Rights' (n 31) 140–52.

[42] R Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (Oxford University Press, 2017); on the concept of 'social law' E Eichenhofer, 'Soziales Recht: Bemerkungen zur Begriffsgeschichte' [2012] *Soziales Recht* 76; on Sinzheimer's approaches S Blanke, *Soziales Recht oder kollektive Privatautonomie?: Hugo Sinzheimer im Kontext nach 1900* (Mohr Siebeck, 2005); U Zachert, 'Hugo Sinzheimer: Praktischer Wissenschaftler und Pionier des modernen Arbeitsrechts' (2001) 54(2) *Recht der Arbeit* 104.

[43] J Fudge, 'The Future of the Standard Employment Relationship: Labour Law, New Institutional Economics and Old Power Resource Theory' (2017) 59(3) *Journal of Industrial Relations* 374.

This is not to say that the embedding of labour rights within human rights cannot answer some important questions with regard to universal standards; we will come back to this later.[44] However, a human rights approach can only lead so far. If we want to know more about the category of employment, we must look beyond universal rights to the specific rationales at the core of labour law, ie at the selective goals that engender full sets of specific labour rights and obligations.[45] At this point, we are not looking for a 'floor of rights' for 'all workers regardless of the form of their work contract',[46] but for purposes and justifications for specific categories of employment.

4.2. Justifying Labour Rights

4.2.1. Purposes, Functions and Vulnerabilities

A 2018 book edited by Hugh Collins, Gillian Lester and Virginia Mantouvalou collects attempts to justify the existence of labour law by grounding it in philosophical foundations.[47] The book organises contributions according to the following basic values and purposes: freedom, dignity, and human rights; distributive justice and no exploitation; workplace democracy and self-determination; and social inclusion (understood as distributive justice not based on equality, but on political theory, engendering minimum standards rather than equal standards).[48]

The book disproves the hypothesis that political philosophy is of no avail to labour law due to the latter being constituted by power relations.[49] It also shows that regulations' goals and purposes can be articulated at different levels. Harry Arthurs's foreword to the book uses the terms 'idealist' and 'materialist'[50] to indicate two important strands of thinking about the purposes of labour law: one looking at positive values, the other at power, subordination and resistance. In a similar albeit slightly different way, Frank Hendrickx has differentiated between labour law's 'foundations' (connected with values and purposes) and 'functions'

[44] Below ch 7, 7.1.2 and 7.2.

[45] G Davidov, 'The Goals of Regulating Work: Between Universalism and Selectivity' [2014] *University of Toronto Law Journal* 1; G Davidov, *A Purposive Approach to Labour Law* (Oxford University Press, 2016) 68–71.

[46] European Commission, *Modernising Labour Law* (n 7).

[47] This is how the editors explain their approach: H Collins, G Lester and V Mantouvalou, 'Introduction: Does Labour Law Need Philosophical Foundations?' in H Collins, G Lester and V Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press, 2018) 3–6.

[48] ibid, 27; H Collins, 'Justifications and Techniques of Legal Regulation of the Employment Relation' in H Collins, P Davies and R Rideout (eds), *Legal Regulation of the Employment Relation* (Kluwer Law International, 2000).

[49] Eleveld, 'Strategies' (n 37) 208.

[50] H Arthurs, 'Foreword: Mining the Philosophers' Stone: Sixteen Tons and What Do You Get? Another Day Older and Deeper in Doubt' in H Collins, G Lester and V Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press, 2018).

(ways through which labour law may lead to those purposes).[51] And Guy Davidov has structured his comprehensive analysis of what a 'purposive approach to labour law' may come down to in parallel, along two main axes: purposes of 'advancing values and interests', on one side, and 'addressing vulnerabilities', on the other.[52]

It is the second 'materialist' viewpoint, I posit, that is really at the heart of labour law as a socio-legal field, discursive formation or regulatory domain of its own. What really distinguishes the *proprium* of labour law from other areas of law is its sensibility for the vulnerabilities that labour markets create: vulnerabilities characterised by market failures and an unfair distribution of wealth and power. In order to realise the normative values of labour law, socio-economic barriers must be overcome. It is in the overcoming of such barriers that labour law finds its specific functions.

There have been different attempts at structuring the socio-economic challenges to which labour law tries to find answers.[53] Guy Mundlak, for example, has identified three functions of labour law, namely:[54]

- overcoming market failures (such as information asymmetry, inelasticity in labour supply, collective action problems, low trust, high transaction costs, externalities);
- redistribution in view of the unfair distribution of wealth and power between capital and labour; and
- 'intra-labour distribution' (the distribution of opportunities among workers[55]).

However, the second and third functions he mentions are organised according to a different degree of abstraction than the first function, which addresses labour law's 'historical tasks of risk allocation and diffusion',[56] thereby positioning it in institutional contexts and wider policy perspectives. These perspectives do not provide answers as to the operating principles of labour law, ie granting rights to workers, burdening companies with obligations, and thereby regulating the legal

[51] Hendrickx, 'Foundations and Functions' (n 27) 110.

[52] Davidov, *Purposive Approach* (n 45) chs 3 and 4; *cf* G Davidov, 'Re-Matching Labour Laws with Their Purpose' in G Davidov and B Langille (eds), *The Idea of Labour Law* (Oxford University Press, 2011); Davidov, *Purposive Approach* (n 45); Davidov, 'Goals of Regulating Work' (n 45); G Davidov, 'Freelancers: An Intermediate Group in Labour Law?' in J Fudge, S McCrystal and K Sankaran (eds), *Challenging the Legal Boundaries of Work Regulation* (Hart Publishing, 2012) 179–80. On proposals for structuring normative purposes, see below at nn 83–84; for Davidov's proposal nn 58–59.

[53] *cf* the problem-oriented socio-economic approach to goals as defended by Fudge, 'Fragmenting Work' (n 41) 639–40; *cf* J Fudge, E Tucker and L Vosko, 'The Legal Concept of Employment: Marginalizing Workers: Report for the Law Commission of Canada' (2002), 104; Dukes, *Labour Constitution* (n 42).

[54] G Mundlak, 'The Third Function of Labour Law: Distributing Labour Market Opportunities among Workers' in G Davidov and B Langille (eds), *The Idea of Labour Law* (Oxford University Press, 2011).

[55] Mundlak here explicitly advocates incorporating the last perspective more consciously (ibid, 317), an approach I have defended as an 'Othering of labour law' (E Kocher, 'Das andere des Arbeitsrechts' [2016] *Arbeit und Recht* 334).

[56] See Deakin, 'What Exactly Is Happening' (n 19).

relationship between workers and companies. Rather, it is mainly the first function of overcoming market failures that justifies such regulation.[57]

Similarly, and with a view to identifying the function of labour law in individual work relationships, Davidov uses the term 'vulnerabilities'.[58] He recognises vulnerabilities in subordination (democratic deficits) and dependence (an inability to spread risks). He even makes the case for using this systematisation as the basis for regulation, suggesting that each one of these vulnerabilities 'should trigger at least some protection. But the existence of both vulnerabilities clearly points to the need to apply labour laws'.[59] We will re-encounter these two categories, subordination and dependence, later when identifying different sources of power at the base of the vulnerabilities to which labour law reacts.[60]

4.2.2. The Constitutional Law Method of Justifying Regulation in the Name of Social Justice

The reason why naming vulnerabilities is so important for justifying labour law as an instrument to promote certain values has to do with the way most legal systems in capitalist economies are constructed: They depart from a default position in favour of 'free' markets and, consequently, a presumption in favour of private law rules.[61] In view of this default position, the regulatory system of labour law must justify itself. Any such justification, in turn, must assume that the goals and values of dignity and social justice cannot be effectively achieved without law interfering in the labour market, due to market imperfections and the resulting vulnerabilities created for workers.

While common-law scholars tend to think about purposes and vulnerabilities by referring to general philosophical or socio-economic considerations, the theoretical starting points are quite different in civil-law systems, or, more precisely, in those legal systems that structure regulation according to a hierarchy of legal norms, with human rights and constitutional rights at the top of the hierarchy. Davidov has already mentioned these differences, noting that in legal systems

[57] This representation may seem a little crude, but I am afraid this is not the place to go into detail as for the legitimisation of anti-discrimination law and social policies in labour law (see ch 2, 2.2 and more in detail ch 7, 7.2.1; also, eg, S Fredman, *Discrimination law*, Clarendon law series, 2nd edn (Oxford University Press, 2011); M Kelman, 'Market Discrimination and Groups' (2001) 53 *Stanford Law Review* 833); ND Zatz, 'Discrimination and Labour Law: Locating the Market in Maldistribution and Subordination' in H Collins, G Lester and V Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press, 2018); M Renner, 'Paradigmen des Antidiskriminierungsrechts' [2010] *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 161.

[58] Davidov, *Purposive Approach* (n 45) 34–48.

[59] G Davidov, 'The Status of Uber Drivers: A Purposive Approach' (2017) 6(1–2) *Spanish Labour Law and Employment Relations Journal* 6.

[60] Below at 4.3 and at nn 111 ff.

[61] Davidov, *Purposive Approach* (n 45) 21–23.

based on (written) constitutions, labour law must be justified with regard to constitutional rights, lest it be challenged as unconstitutional.[62] Accordingly, this section will give a (very) short impression of how this plays out in EU law before moving on to explain in slightly more detail how German constitutional law has framed labour law's purposes and workers' vulnerabilities to date.

4.2.2.1. EU Law: Freedom to Conduct Transnational Business as the Default Rule

Since the EU Member States could not agree on an EU Constitution,[63] we are left with treaties that fulfil constitutional functions but are not named as such. These are the Treaty on the Functioning of the European Union (TFEU), the Treaty on European Union (TEU), and the Charter of Fundamental Rights of the European Union (CFR). The default legal position of the EU (the former European Economic Community), according to its economic functions, protects the freedom to conduct transnational economic activity in the common market.[64] Laws on social protection, including labour law, have been repeatedly challenged in light of the freedom of establishment (Article 49) and the freedom to provide services (Article 56) established in the TFEU.[65] Recently, the European Court of Justice added the 'freedom to conduct a business' to this list, according to a 'militant understanding' of Article 16 of the EU Charter of Fundamental Rights.[66] This presumption in favour of economic freedoms is accentuated by the fact that the EU is often more concerned with determining the competences of the EU vis-à-vis the

[62] ibid, 19–20.

[63] The Treaty establishing a Constitution for Europe (signed in Rome on 29 October 2004) failed after negative referendums in France and the Netherlands (*cf* G de Burca, 'After the Referenda' (2006) 12(1) *European Law Journal* 6).

[64] F Rödl, 'Arbeitsverfassung' in A Von Bogdandy and J Bast (eds), *Europäisches Verfassungsrecht: Theoretische und dogmatische Grundzüge*, 2nd edn (Palgrave Macmillan, 2009); E Kocher, 'Stoppt den EuGH?: Zum Ort der Politik in einer europäischen Arbeitsverfassung' in A Fischer-Lescano, F Rödl and CU Schmid (eds), *Europäische Gesellschaftsverfassung: Zur Konstitutionalisierung sozialer Demokratie in Europa* (Nomos, 2009); M Freedland and J Prassl (eds), *Viking, Laval and Beyond* (Hart Publishing, 2016) 14 – all on the occasion of the *Viking* and *Laval* decisions (Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECLI:EU:C:2007:772; Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECLI:EU:C:2007:809).

[65] eg S Weatherill, 'Viking and Laval: The EU Internal Market Perspektive' in M Freedland and J Prassl (eds), *Viking, Laval and Beyond* (Hart Publishing, 2016) 27–29; E Kocher, *Europäisches Arbeitsrecht*, 2nd edn (Nomos Verlag, 2020) § 1, paras 34–38.

[66] Case C-426/11 *Mark Alemo-Herron and Others v Parkwood Leisure Ltd* [2013] ECLI:EU:C:2013, paras 31–35; M Freedland and J Prassl, 'An Introduction' in M Freedland and J Prassl (eds), *Viking, Laval and Beyond* (Hart Publishing, 2016) 15; the ECJ has followed up on *Alemo-Herron* slightly less militantly in Joined Cases C-680 and 681/15*Asklepios Kliniken Langen-Seligenstadt GmbH v Ivan Felja* and *Asklepios Dienstleistungsgesellschaft mbH v Vittoria Graf* [2017] ECLI:EU:C:2017:317, para 26; Case C-201/15 *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis* [2016] paras 66–70; *cf* Case C-283/11 *Sky Österreich v Österreichischer Rundfunk* [2013] EU:C:2013:28, paras 42–48.

Member States than with social policies, as such. The ECJ's case law on fundamental (market) freedoms mostly concerns national labour laws and their justification in view of transnational business.

It is in this context that the ECJ first acknowledged social purposes and the protection of workers as justifications and rationales for national labour laws.[67] Here, the role of the CFR, particularly its solidarity chapter,[68] still remains to be determined.[69] As far as EU norms of social policy are concerned,[70] however, the ECJ has been willing to insist more strictly on Member States making EU labour law rules effective by activating EU fundamental rights and taking into account that 'the worker must be regarded as the weaker party in the employment relationship'.[71]

4.2.2.2. German Law: Freedom of Contract as the Default Rule

German labour law has been increasingly influenced by a constitutional approach advanced as much by the Bundesverfassungsgericht (BVerfG, Federal Constitutional Court) as by the Bundesarbeitsgericht (BAG, Federal Labour Court). These doctrinal constructions start, however, not with the conceptualisation of labour law, but with a constitutional presumption in favour of freedom of contract and private autonomy, 'on the basis of which, as a structural element of a

[67] In particular, ECJ jurisprudence on the application of national minimum standards on posted workers: Joinded Cases C-62 and 63/81 *Société anonyme de droit français Seco and Société anonyme de droit français Desquenne & Giral v Etablissement d'assurance contre la vieillesse et l'invalidité* [1982] ECLI:EU:C:1982:34; Joined Cases C-49/98 and 50/98, 52/98 – 54/98, 68/98 – C-71/98 *Finalarte Sociedade de Construção Civil Ldª v Urlaubs- und Lohnausgleichskasse der Bauwirtschaft, Urlaubs- und Lohnausgleichskasse der Bauwirtschaft v Amilcar Oliveira Rocha, Urlaubs- und Lohnausgleichskasse der Bauwirtschaft v Tudor Stone Ltd, Urlaubs- und Lohnausgleichskasse der Bauwirtschaft v Tecnamb-Tecnologia do Ambiante Ldª, Urlaubs- und Lohnausgleichskasse der Bauwirtschaft v Turiprata Construções Civil Ldª, Urlaubs- und Lohnausgleichskasse der Bauwirtschaft v Duarte dos Santos Sousa Portugaia, Urlaubs- und Lohnausgleichskasse der Bauwirtschaft v Santos & Kewitz Construções Ldª, Portugaia Construções Ldª v Urlaubs- und Lohnausgleichskasse der Bauwirtschaft, Engil Sociedade de Construção Civil SA v Urlaubs- und Lohnausgleichskasse der Bauwirtschaft* [2001] ECLI:EU:C:2001:564, paras 41–54; Case C-577/10 *Wolff & Müller GmbH & Co KG v José Filipe Pereira Félix* [2004] C-60/03, ECLI:EU:C:2004:610; *European Commission v Kingdom of Belgium* [2012] ECLI:EU:C:2012:814, para 45 ('including self-employed service providers'); Kocher, *Europäisches Arbeitsrecht* (n 65), Ch 7, para 18 and references above n 64.

[68] Chapter IV, Arts 27–38.

[69] S Clauwaert and I Schömann, 'The protection of fundamental social rights in times of crisis: A trade union battlefield' in W Däubler and R Zimmer (eds), *Arbeitsvölkerrecht: Festschrift für Klaus Lörcher* (Nomos, 2013); for a concrete proposal for doctrinal construction, see Kocher, 'Stoppt den EuGH?' (n 64).

[70] Ie Directives on the basis of Art 153 TFEU.

[71] Kocher, *Europäisches Arbeitsrecht* (n 65) Ch 5, paras 79–82; most pointedly in the recent decisions Case C-619/16 *Sebastian W. Kreuziger v Land Berlin* [2018] ECLI:EU:C:2018:872, para 41; Case C-684/16 *Max-Planck-Gesellschaft zur Förderung der Wissenschaften e.V. v Tetsuji Shimizu* [2018] ECLI:EU:C:2018:874, paras 48–51; Case C-55/18 *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE* [2019] ECLI:EU:C:2019:402, paras 44–45; on the effects of fundamental rights also Case C-414/16 *Vera Egenberger gegen Evangelisches Werk für Diakonie und Entwicklung e.V.* [2018]ECLI:EU:C:2018:257.

liberal social order, the contracting parties shape their legal relations on their own responsibility'.[72] The Bundesverfassungsgericht holds Article 2(1) of Germany's Grundgesetz (GG, Basic Law) to protect freedom of contract, private autonomy and economic activity – including the employers' and economic undertakings' freedom of occupation (Article 12(1) GG), which protects, inter alia, the employer's interest in employing whomever he or she wants.[73]

On this basis, and although the Bundesverfassungsgericht states that constitutional law is 'neutral' to economic models,[74] labour law is under constant challenge. Answers to these challenges have mainly involved pointing to the inequality of bargaining powers between companies and workers. In this context, social protection is justified if directed towards guaranteeing workers' rights to personal freedom and private autonomy (Article 2(1) GG):

> [T]he individual employee is typically in a situation of structural inferiority when concluding employment contracts … [The structural imbalance] exists not only when an employment contract is concluded but also in the existing employment relationship. … The individual employee is typically disproportionately more dependent on his or her employment relationship than the employer is on the individual employee.[75]
>
> Insofar as private autonomy is not able to unfold its regulating power because a contracting party can unilaterally set contractual provisions by virtue of its dominance, state regulations must intervene in a compensatory manner in order to ensure the protection of fundamental rights.[76]

The Bundesverfassungsgericht had established such general principles in two leading cases, neither of which concerned labour law, at the beginning of the 1990s. In the 1990 *Handelsvertreter* (commercial agent) case, which examined a competition clause in a commercial agent's contract, the Court established the terms of lack of 'approximate equilibrium' between the parties and 'social and economic imbalance', as justification to invalidate contractual clauses and establish a right of commercial agents to receive compensation if bound by a competition clause.[77] In the 1993 *Bürgschaft* (surety) case, the Court invalidated a surety given by a daughter for her bankrupt father, on the basis of lacking 'contractual parity' (*gestörte Vertragsparität*).[78] Here it coined the term 'structurally unequal bargaining

[72] BVerfG 27 Jan 1998, case 1 BvL 15/87, BVerfGE 97, 169 (*Kleinbetriebsklausel I*); *cf*), has been questioned, for example, by T Groß, 'Die expansive Anwendung der Grundrechte zugunsten von Wirtschaftsunternehmen' [2019] *Kritische Justiz* 76.

[73] BVerfG case 1 BvL 15/87 (n 72).

[74] BVerfG 20 Jul 1954, joined cases 1 BvR 459/52 & others, BVerfGE 4, 7, 17–18 (*Investitionshilfe*); BVerfG 1 Mar 1979, joined cases 1 BvR 532/77 & others, BVerfGE 50, 290, 338 (*Mitbestimmung*); W Abendroth, 'Aussprache über: Begriff und Wesen des sozialen Rechtsstaates' [1954] *Veröffentlichungen der Vereinigung deutscher Staatsrechtslehrer* 85, H Ridder, *Die soziale Ordnung des Grundgesetzes: Leitfaden zu den Grundrechten einer demokratischen Verfassung* (Westdeutscher Verlag, 1975) 94–126.

[75] BVerfG 23 Nov 2006, Case 1 BvR 1909/06, NZA 2007, 85, para 50.

[76] BVerfG, 6 June 2018, Case 1 BvL 7/14, BVerfGE 149, 126, para 42.

[77] BVerfG 7 Febr 1990, Case 1 BvR 26/84, BVerfGE 81, 242 (*Handelsvertreter*).

[78] BVerfG 19 Oct, Case 1 BvR 567/89, BVerfGE 89, 214 (*Bürgschaft*). The judgment served as the starting signal for the development of detailed case law on sureties by family members (for a comparison of

power', which has given rise to a large body of doctrinal and jurisprudential work on consumer and labour protection, placing limits on 'the law of the stronger'.[79] These terms and concepts have gone on to justify social protection in German labour law.[80]

The general reasoning comes down to the following: In order to protect the freedom, autonomy, dignity and other fundamental rights of employees, the barriers inherent in the unequal distribution of power between worker and employer may be addressed by statutory and mandatory (labour) law. Even rights to collective bargaining and collective action have mainly been seen as instruments able to compensate for structural imbalances that exist on the level of individual work relationships.[81]

4.2.3. Dependencies as the Basic Rationale for Labour Law Regulation

The EU and German examples show that constitutional concepts can provide theoretical foundations for a conceptualisation of labour law that is functionally equivalent to the concepts that have been developed in the realm of philosophical and socio-economic frameworks. These concepts ultimately depart from the presumption of freedom of contract, and then legitimise labour law by pointing to socio-economic barriers and vulnerabilities that make regulation necessary for realising the values and purposes of dignity, social justice, workers' self-determination, and social inclusion.

However, the constitutional concepts are narrower than philosophical and socio-economic perspectives. Ultimately directed towards a private law approach with an interest in the individual work relationship, they do not envision economic governance and labour market regulation in a broader sense (including regulatory instruments in other areas of the law, such as tax law, social security, etc).

German and British law in respect of sureties by family members/intercession, *cf* P Ungan, *Sicherheiten durch Angehörige* (Mohr Siebeck, 2012); *cf Barclays Band Ltd v O'Brien* [1994] 1 AC 180; *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44 on security agreements/sureties signed in benefit of the spouse).

[79] BVerfG, Case 1 BvR 567/89 (n 78), para 53. The case law has been continued, for example, in the case law on legal control and invalidation of prenuptial and marriage agreements (BVerfG 6 Febr, Case 1 BvR 12/92, BVerfGE 103, 89).

[80] U Preis, '§ 611a BGB' in R Müller-Glöge, U Preis and I Schmidt (eds), *Erfurter Kommentar zum Arbeitsrecht*, 19th edn (Beck, 2019) para 8.

[81] BVerfG 27 Febr 1972, Case 2 BvL 27/69, BVerfGE 34, 307, 316; BAG 10 June 1980, Case 1 AZR 822/79, BAGE 33, 140; BVerfG 26 June 1991, Case 1 BvR 779/85, BVerfGE 84, 212, 229; for the theoretical framework of 'collective autonomy' see, eg, T Dieterich, 'Die Grundrechtsbindung von Tarifverträgen' in M Schlachter, R Ascheid and H-W Friedrich (eds), *Tarifautonomie für ein neues Jahrhundert: Festschrift für Günter Schaub zum 65. Geburtstag* (Beck, 1998); V Rieble, 'Der Tarifvertrag als kollektiv-privatautonomer Vertrag' [2000] *Zeitschrift für Arbeitsrecht* 5; F Bayreuther, *Tarifautonomie als kollektiv ausgeübte Privatautonomie: Tarifrecht im Spannungsfeld von Arbeits-, Privat- und Wirtschaftsrecht* (2005), 55; 57; for a critical perspective on this approach, see below at nn 117/118.

Nevertheless, they fit within the scope of this book in their concern with the justification of laws that allocate rights to workers in relation to their employers, and burden companies with obligations towards their workers. If we want to know something about the rationales of labour law categories, in particular the category of the employee, we must look at the vulnerabilities we find in the relationship between the parties of the work relationship. This is why, at this point, a 'de facto economic reality of class poverty test' cannot be considered a viable alternative to 'the modern economic reality of dependence test'.[82]

The terms this chapter has found to capture the specific vulnerabilities in the worker-company relationship are 'inequality of bargaining power' and 'domination', or, more broadly speaking, 'dependence'.[83] These terms refer to different theoretical frameworks: economic, political, socio-psychological and legal-constitutional.[84] The following section lays out in further detail what 'dependence' means in this context, and makes some additional distinctions in order to further elucidate what the notions of 'employee' analysed in the previous chapter (three) may potentially encapsulate.

4.3. Functions and Purposes of Labour Law: Focus on Employers' Powers

4.3.1. Sources of Power at Work

My own earlier proposal for reconceptualising labour law's categories built on acknowledging labour law's function of controlling 'private power', in the context of broader research on the topic of 'private power' carried out by a group of (then) junior private law scholars.[85] In order to identify private power in labour law, I suggested starting by identifying a variety of different socio-economic sources

[82] This is, however, the proposition by Linder, *The Employment Relationship* (n 24) 233–36 (he attributes the class poverty test to 'Anglo-American courts in the 19th century under certain protective labor statutes', and the dependence text to the US Supreme Court's case law since the 1940s); on the difficulties of spelling out 'vulnerability' for a legal test, see V Daskalova, 'The Competition Law Framework and Collective Bargaining Agreements for Self-Employed: Analysing Restrictions and Mapping Exemption Opportunities' in B Waas and C Hießl (eds), *Collective Bargaining for Self-Employed Workers in Europe: Approaches to Reconcile Competition Law and Labour Rights* (Wolters Kluwer, 2021) 50.

[83] B Rogers, 'Employment Rights in the Platform Economy: Getting Back to Basics' (2016) 10 *Harvard Law & Policy Review* 479, 496; on the theoretical background of the anti-domination principle in Pettit's and Lovett's approaches, see Rogers, 'Employment Rights' (n 83), 499; 510; D Cabrelli and R Zahn, 'Civic Republican Political Theory and Labour Law' in H Collins, G Lester and V Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press, 2018) 109–18; Eleveld, 'Argumentative Strategies' (n 37) 212–16; see also E Anderson, *Private Government: How Employers Rule Our Lives (And Why We Don't Talk About It)* (Princeton University Press, 2017).

[84] See also the three notions of vulnerabilities set out by Davidov, *Purposive Approach* (n 45) 36–48.

[85] Published in: F Möslein (ed), *Private Macht* (Mohr Siebeck, 2015); for a historical account *cf* KW Nörr, *Die Republik der Wirtschaft – Teil II: Von der sozial-liberalen Koalition bis zur Wiedervereinigung* (Mohr Siebeck, 2007) 72–84.

that generate power at work – sources and phenomena of power that could and should give rise to specific regulation.[86]

First, most employees ultimately depend on their work capacity to secure their economic and social existence. This is a function of class and market position that determines bargaining power (or lack thereof) when concluding a work contract. Labour markets are by and large buyers' markets. In other words, the employer side usually has more and better exit options than the employee side,[87] and, typically, the worker's economic dependence on the employment relationship is incomparably stronger than the employer's. Although not every company may have greater bargaining and market power than every worker, using market power as a proxy for imbalances between workers and companies on labour markets can be justified as a general rule.[88]

Secondly, once a work relationship is built, specific imbalances arise. One such imbalance results from the fact that the conclusion of a long-term relationship usually leads to a narrowing down of options for both parties (lock-in effect). The company often makes investments in promoting qualifications specific to the business, and in building up stable relationships, motivation and commitment. The worker, meanwhile, often adapts her entire life to job requirements, such as the place of work and working hours. These specific investments create specific barriers to exit.[89]

Third, working for another's company exhibits a unique feature – one that Hans Potthoff described in the 1920s as follows:

> Employment relationships are not exchange relationships but organisational relationships. Large companies actually do not enter into contracts for the performance of specific tasks with thousands of individuals, but instead need to dispose over the working capacity of thousands of workers in order to meld them into one whole, according to companies' plans. … These relationships are not about the exchange of assets; instead, human beings are unified into an organisational association. The employee […] does not owe the employer the performance of specific tasks but places his capacity for work at the employer's disposal.[90]

[86] E Kocher, 'Private Macht im Arbeitsrecht' in F Möslein (ed), *Private Macht* (Mohr Siebeck, 2015).

[87] R Wank, *Arbeitnehmer und Selbständige* (CH Beck, 1988) 49–50; V Rieble, *Arbeitsmarkt und Wettbewerb: Der Schutz von Vertrags- und Wettbewerbsfreiheit im Arbeitsrecht* (Springer, 1996) para 91.

[88] Individual personal qualities, education and training, habitus, experiences, will also be socially structured, but less clearly attributable to market positions (*cf* Davidov, *Purposive Approach* (n 45) 43; E Kocher, *Funktionen der Rechtsprechung: Konfliktlösung im deutschen und englischen Verbraucherprozessrecht* (Beiträge zum ausländischen und internationalen Privatrecht vol 86, Mohr Siebeck, 2007) 52–54; for an economic-analysis-of-law-perspective on redistribution: H Eidenmüller, *Effizienz als Rechtsprinzip: Möglichkeiten und Grenzen der ökonomischen Analyse des Rechts*, 4th edn (Mohr Siebeck, 2015) 283–93.

[89] R Rebhahn, 'Der Arbeitnehmerbegriff in vergleichender Perspektive' (2009) 62(3) *Recht der Arbeit* 154, 163–64. *cf* D Sadowski and U Backes-Gellner, 'Der Stand der betriebswirtschaftlichen Arbeitsrechtsanalyse' [1997] *ZfB-Ergänzungsheft* 83, 85 (employment as co-investment).

[90] H Potthoff, *Wesen und Ziel des Arbeitsrechtes* (Berlin, 1922) 18; 38.

While the first and second socio-economic sources of power mentioned here could both be attributed to labour law's function 'to diffuse the economic risks of wage dependency',[91] the third issue of 'power imbalances in the organisation of work' relates to a different function of the law, one which is closely associated with the fact that work tasks will usually be organised in a division of labour coordinated by a company that owns these coordination processes. It is here that the problems of arbitrary power and 'domination'[92] at work ultimately reside.

4.3.2. Market Power and Bureaucratic Power – Submission and Subordination

This last distinction has been formulated quite often, albeit in different terms.[93] Hugh Collins, in his 1986 article on the contract of employment, aptly termed the problem: the difference between market power and bureaucratic power (subordination).[94] Even in cases with reduced inequality of bargaining power, he noted, the social dimension of subordination remains.

The bureaucratic managerial power results from how work is organised in a hierarchical organisation: 'An employee normally joins a bureaucratic organisation. He is allocated a particular role, which is defined by the rules of the institution.' Collins also draws an analogy to the authority of the state when he suggests that the legal traditions developed in public law could provide the concepts and standards by which a legal control of the exercise of managerial prerogative could be designed.

More recently, Collins has used the terms 'submission' and 'subordination' to indicate the effect of a lack of bargaining power at the conclusion of the contract, on the one hand, and the daily experience of an employee being subject to the hierarchical control of the employer or manager, on the other.[95] It is, after all, the contract itself that 'engender[s] relations of power' and formally legitimises them via the employee's consent, with the law acknowledging this transaction and thereby conferring authority to the company to direct workers.[96] Notwithstanding this constituting function of the contract, Collins explicitly confronts any interpretation that may locate the company's power always and exclusively in the market. The contract of employment is more than a market transaction, he contends, in that it authorises subordination in an inherently

[91] These denominations are from Deakin, 'What Exactly Is Happening' (n 19).

[92] See above n 83.

[93] *cf* Davidov, *Purposive Approach* (n 45) 36–41: 'governance in an organisation', as differentiated from 'social and/or psychological dependence on the employer' or 'economic dependence'.

[94] H Collins, 'Market Power, Bureaucratic Power, and the Contract of Employment' (1986) 15 *Industrial Law Journal* 1.

[95] H Collins, 'Is the Contract of Employment Illiberal?' in H Collins, G Lester and V Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press, 2018) 51–52.

[96] Collins, 'Market Power, Bureaucratic Power, and the Contract of Employment' (n 94) 1; 3–4.

hierarchical structure. Burkhard Boemke has formulated this in a similar way by saying that activities are only typical for employees if they must be provided in cooperation with other employees of the enterprise, in which case it is to be presumed that the employer has to issue instructions in order to coordinate the cooperation with regard to his economic objectives.[97]

Confronting the 'crucial subversion of some liberal values in the workplace'[98] associated with this form of subordinance, is a task that labour law addresses and should not take lightly.

4.3.3. Concepts of the Employer

Putting organisational power into perspective individualises the demand side of the labour market. And this is how the concept of the 'employer' comes into the picture. In order to categorise the concept of the employer,[99] Jeremias Prassl proposes starting from categorising employers' functions as a way forward to conceptualising labour law. Towards this aim, he identifies five key employer functions:[100]

- exerting power over the beginning and end of the work relationship;
- receiving and using work and its results;
- providing work and pay;
- 'managing the enterprise-internal labour market' (which Prassl describes as 'coordination through control over all factors of production, … the power to require both how and what is to be done'); and
- 'managing the enterprise-external labour market' (which Prassl describes as 'undertaking economic activity in return for potential profit, whilst also being exposed to any losses that may result from the enterprise').

Prassl's concept of the employer draws on ideas exposed by Judy Fudge and Simon Deakin, and comes to terms with the fact that one unitary notion of the employer proves inadequate in a variety of situations – particularly temporary work agencies and fragmented corporate structures.[101] In this context, Prassl's approach can

[97] B Boemke, 'Neue Selbständigkeit und Arbeitsverhältnis: Grundsatzfragen sinnvoller Abgrenzung von Arbeitnehmern, Arbeitnehmerähnlichen und Selbständigen' [1998] *Zeitschrift für Arbeitsrecht* 285, 325.

[98] Collins, 'Is the Contract of Employment Illiberal?' (n 95) 54; 63.

[99] On the challenges of triangular work relationships, see above ch 3, 3.1.2.

[100] Prassl, *Concept of the Employer* (n 35); J Prassl and M Risak, 'The Legal Protection of Crowdworkers: Four Avenues for Workers' Rights in the Virtual Realm' in P Meil and V Kirov (eds), *Policy Implications of Virtual Work* (Springer International Publishing, 2017); J Prassl, *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (Oxford University Press, 2018).

[101] Fudge, 'Fragmenting Work' (n 41); H Collins, 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws' (1990) 10 *Oxford Journal of Legal Studies* 353, 377; S Deakin, 'The Changing Concept of the "Employer" in Labour Law' (2001) 30

be understood as less about justifying regulation and the need for protection, and more about justifying the assignment of responsibility for protection, which is an important labour law concern once protection has been established. Prassl ascertains multiple loci of control and therefore states that employers' functions can be exercised and shared by more than one entity at a time. Consequently, he argues, different labour rights and obligations could and should be enforced against different economic units.[102]

Moreover, differentiating between employers' functions also tells us something, albeit indirectly, about the specific powers companies may have over workers. Thus, this approach contributes to justifying labour law regulation by pointing to functions of labour rights. If we approach the concept from this direction, we recognise the sources and types of power mentioned before (4.3.1 and 4.3.2): power over the beginning and end of a work relationship presupposes market power; provision of pay creates economic dependence of a worker on a company; and receiving work and managing an internal labour market indicates bureaucratic power. Combined with the power over the management of the external labour market, these powers also exclude the employee from being present on an external market herself.

4.3.4. Employee versus Entrepreneur

First in his 1988 habilitation thesis and in numerous articles since, legal scholar Rolf Wank has put forward ideas focusing on the specific power relationship between employees and employers and a conceptual divide between employees and entrepreneurs.[103] Wank starts from the assumption that legal consequences should be justifiable in light of specific problems. By closely investigating labour law rights and obligations, he identifies two functions of labour rights:

- protecting the work relationship as the worker's economic basis; and
- addressing the professional and organisational risks workers are exposed to due to their dependence on the employer's economic organisation.[104]

Industrial Law Journal 72; M-L Morin, 'Labour Law and New Forms of Corporate Organization' (2005) 144(1) *International Labour Review* 5, 10; *cf* A Hyde, 'Legal Responsibility for Labour Conditions Down the Production Chain' in J Fudge, S McCrystal and K Sankaran (eds), *Challenging the Legal Boundaries of Work Regulation* (Hart Publishing, 2012).

[102] Prassl, *Concept of the Employer* (n 35); see also Deakin, 'Changing Concept' (n 101) for a reflection of the entities that could be addressed.

[103] Wank, *Arbeitnehmer und Selbständige* (n 87) (eg 94 ff); most recent restatements include R Wank, 'Die personelle Reichweite des Arbeitnehmerschutzes aus rechtsdogmatischer und rechtspolitischer Perspektive' (2016) 9(2) *Europäische Zeitschrift für Arbeitsrecht* 143; R Wank, 'Der Arbeitnehmer-Begriff im neuen § 611a BGB' [2017] *Arbeit und Recht* 140; a short English-language version of his ideas can be found in R Wank, 'Diversifying Employment Patterns: The Scope of Labor Law and the Notion of Employees' (2005) 53 *Bulletin of Comparative Labour Relations* 105.

[104] Wank, *Arbeitnehmer und Selbständige* (n 87) 46–50; R Wank, 'Telearbeit' [1999] *Neue Zeitschrift für Arbeitsrecht* 225, 227.

While we could roughly compare this distinction to the differentiation of market power and bureaucratic power,[105] Wank's main contribution to labour law theory lies elsewhere. Departing from the presumption of private market and contract law, he views markets and labour law as alternative options for workers' protection. He defines the 'dependence' labour law should react to as the situation of not being able to care for oneself, due to being bound to work for the benefit of others.[106]

Wank's view on naming the activities that are not in need of labour protection meets, in a certain way, with Freedland and Kountouris' bottom line of excluding from protection those service providers who operate 'mainly and predominantly … through their ability to organise other factors of production'.[107] This is also where Wank's approach sounds similar to class analysis:

> Both historically and categorically, the lack of ownership of the means that would enable workers to work for their own account constitutes the dependence and inequality that compelled them to subordinate themselves to those who did own those means.[108]

However, Wank gives his concept a specific twist that makes it about more than identifying market power. His concept of the employee is ultimately not about identifying opportunities for independent economic activity outside the work relationship; it is about identifying the lack of independent economic opportunities arising out of the constraints of the work relationship itself. In this perspective, an employee is a person who is not able to make entrepreneurial decisions on her own account, not able to use her skills and capacities towards self-imposed goals, *precisely because* the structures of her work relationship preclude her from independent access to the markets of goods and services.[109] Hence, Wank is not interested in the economic dependence that arises out of depending on the specific income.[110] His description of the employee is about being subject to another's orders in opposition to being the subject of entrepreneurial freedom and entrepreneurial risks, which, after all, describes consequences of bureaucratic and organisational power, ie of the integration into an organisation, that justify labour law protection.

4.4. Results

This chapter has analysed reconceptualisations of labour law that work on two levels. One level aims directly at finding new categories and new theoretical structures for classification, while the other aims at identifying labour law's specific

[105] Above at 4.3.2 and text at n 91.
[106] Wank, 'Personelle Reichweite' (n 103) 150–51.
[107] Above n 22.
[108] As formulated by Linder, T*he Employment Relationship* (n 24) 236.
[109] Wank, 'Arbeitnehmer-Begriff im neuen § 611a BGB' (n 103).
[110] On this common understanding of his theory in German legal doctrine, see above ch 3, 3.4.2.3.2.

rationales. As for the first level, we have seen that it is hard to reconceptualise labour law by only looking at the person of the worker according to her different appearances and needs for protection. Nevertheless, the deconstructive exercises conducted by the Supiot Report as well as Freedland and Kountouris yield an important result: human rights approaches to labour law can engender a theoretical framework able to identify the universal rights to which all workers should be entitled.

As for the second level, which explains and justifies the specific and closely-knit employment categories and respective entitlements beyond universal rights, we have considered labour law's purposes, functions and vulnerabilities, and the power relationships in labour markets that are at the heart of labour law in the strictest sense. After all, the functions of labour law refer to specific vulnerabilities of workers. Labour law's basic purposes of granting freedom, justice, democracy and social inclusion to workers come down to the functional idea that in order to enjoy and make use of these rights, workers must be protected by the law due to the unequal power relationship between them and their employers, and the resulting dependence this causes. The instruments of private labour law do this by addressing employers' power(s) over workers and workers' dependence. Consequently, we can reconceptualise labour law's categorising on the basis of an assumption of a causal relationship: Labour law grants workers rights in relation to their employers in order to overcome and compensate for workers' vulnerabilities, which, in turn, can facilitate their enjoyment of fundamental rights and values. As such, labour law is only one among the many instruments of economic ordering necessary to enable the world of work to effectively contribute to the realisation of democratic ideals and non-dominance.

While agreeing with Davidov's recognition of vulnerabilities in subordination and dependence,[111] it may be over-theorising to try to identify each vulnerability with a regulatory goal (eg 'subordination' with democratic participation and 'dependence' with chances to distribute economic risks in a marketplace).[112] Overcoming any kind of vulnerability can enable any of labour law's values (such as freedom, dignity, distributive justice, workplace democracy[113]). This is why it is so important to closely analyse any piece of regulation both in terms of its general function of addressing dependence, as well as in terms of the specific normative value it furthers.[114]

If we further analyse the character of how companies' powers create workers' dependencies (4.3), we come to identify a duality of market power and bureaucratic

[111] Above n 58.

[112] Davidov, *Purposive Approach* (n 45) 34–48; *cf* G Davidov and B Langille, 'Beyond Employees and Independent Contractors: A View from Canada' (1999) 21 *Comparative Labor Law & Policy Journal* 7, 43.

[113] Above n 48.

[114] This is something Davidov himself does expertly in ch 6 to ch 9 of Davidov, *Purposive Approach* (n 45); see also the review by C Estlund, 'A Purposive Approach to Labour Law by Guy Davidov' (2019) 40 *Comparative Labor Law & Policy Journal* 349.

power. While bureaucratic (organisational) power can be assigned to a single actor (ie the employer, company or client), market power does not immediately translate into a worker's subordination or dependence on a single company. However, labour law – in contrast to other areas of the law – focuses on the work relationship: Employees have an employer 'who can and should take care of their well-being'.[115] It is the employer who is responsible for the vulnerabilities of workers that build up barriers to achieving the normative goals and purposes of labour law, because it is the employer that disables workers' abilities to protect themselves. Ultimately, the responsibility and accountability of employers for labour law protection is justified by the fact that the work relationship creates organisational power.

One point that should be kept in mind already at this stage, however, is that, even though justifications of structural imbalances in the work relationship are also used for collective bargaining and collective representation of workers,[116] collective structures are invested with functions that exceed those of individual labour (employment) law.[117] Collective and individual labour rights may pursue similar goals and values, but on the level of functions, collective bargaining is more than just a collective version of and compensation for the defects of individual bargaining. Indeed, collective bargaining is about far more than enabling workers as individuals. Collective representation can be justified independently from employment rights (partly in line with fundamental rights), with goals of participation in the governance of a company and as establishing democratic procedures and arenas.[118]

Chapter seven will come back to these topics.[119] Before that, however, chapters five and six will explore the ways in which the specific vulnerabilities of workers are captured in the categories of labour law, in order to identify where the challenges posed by digital work platforms are located and how they can best be solved.

[115] Fudge, 'Fragmenting Work' (n 41) 633, with a link to Davidov, 'Re-Matching Labour Laws' (n 52).

[116] Above at n 81.

[117] On the use of the term 'labour law' in this book, see ch 1, 1.5.

[118] See my review of recent case law in the light of these ideas: E Kocher, 'Die Arbeitsverfassung als Gegenstand des Sozialstaatsgebots: Die Koalitionsfreiheit bei Helmut Ridder und heutige Spuren' (2020) 53(2) *Kritische Justiz* 189. For the English-speaking world, the leading contrast is between A Flanders, 'Collective Bargaining: A Theoretical Analysis' (1968) 6(1) *British Journal of Industrial Relations* 1 and Sydney and B Webb, *Industrial Democracy* (Longmans, 1902); for a contemporary review in a sociological perspective: A Demirovic, *Demokratie in der Wirtschaft: Positionen – Probleme – Perspektiven* (Westfälisches Dampfboot, 2007); on the democratic arenas created by organised collectivities, see also Fudge, 'Fictive Commodity' (n 27) 132 ff, with a link to Anderson, *Private Government* (n 83). *cf* on efficiency arguments from the economic analysis of the law, see P Davies, 'Efficiency Arguments for the Collective Representation of Workers: A Sketch' in A Bogg and others (eds), *The Autonomy of Labour Law* (Hart Publishing, 2015).

[119] Ch 7, 7.6.

5

Digital Work Platforms as Organisations

The typological method of classification challenges legal operators to identify those features of a work relationship that are inherent to the business model at stake. It suggests that any business model will entail certain dynamics in the management of workers that companies cannot easily change or even manipulate. The cross-national analysis of labour law categories in chapter three showed that the endeavour to analyse business models under traditional concepts of employment is mainly directed towards those traits of the work relationship linked to hierarchy, organisational integration and economic position. Building on these results, chapter four explored theoretical reconstructions of categories, criteria and indicators that ended up looking at the economic and social dynamics that justify protection through the very instruments of labour law to which the employment category gives access. We are now left with the task of further identifying the social, economic and institutional dynamics that can be used for a 'functional-typological concept'[1] of the employment category, and analysing the adequacy of such a concept for digital work platforms.

Chapter four focused on the power relationship between employees and employers, or more precisely, on the dependence, control and power created in and by the organisation of the company or the employer. This chapter is dedicated to better understanding why organisations create dependencies and how they can be identified. It shows how legal concepts of employment have been informed by organisation theory and have attempted to draw lines between the coordination of work in organisations and the coordination of work on markets (5.1). It proposes taking lessons from organisational analyses that have already found new concepts for new organisational forms for work (5.2), in order to locate the novel coordination mechanisms we find on digital work platforms (5.3).[2]

[1] J Prassl and M Risak, 'Uber, Taskrabbit & Co: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork' (2016) 37(3) *Comparative Labor Law & Policy Journal* 619; L Nogler, 'Die typologisch-funktionale Methode am Beispiel des Arbeitnehmerbegriffs' [2009] *Zeitschrift für Europäisches Sozial- und Arbeitsrecht* 461.

[2] The method of linking labour law with organisation theory comes close to Katherine Stone's reconstruction of the purposes of employment law in the digital age: KV Stone, *From Widgets to Digits: Employment Regulation for the Changing Workplace* (Cambridge University Press, 2004).

5.1. Organisation and Market in Organisation Theories

Organisation theory aligns with labour law in its attempt to explain the differences between the coordination of goods, services and work by organisations, on the one hand, and coordination by market mechanisms, on the other. In other words, organisation theory explains and draws a line between making a product or service (with employees) versus buying it on a market (from an independent contractor).[3]

5.1.1. The Theory of the Firm

Ronald Coase, who was awarded the Nobel Prize in Economic Sciences in 1991 for inventing the theory of the firm, already realised the close links between his theory and employment law. When describing the 'firm in the real world', Coase used 'the legal relationship normally called that of "master and servant" or "employer and employee"' to assert that:

> [t]he essentials of [the employment] relationship have been given as follows: (1) the servant must be under the duty of rendering personal services to the master … (2) The master must have the right to control the servant's work, … of being entitled to tell the servant when to work (within the hours of service) and when not to work, and what work to do and how to do it … [This] marks off the servant from an independent contractor, or from one employed merely to give to his employer the fruits of his labour.[4]

His description assumes that the legal categories of control and instruction correspond to the underlying economic dynamic with which he is concerned. Coase's economic approach starts with the 'theory of moving equilibrium' between two kinds of coordination mechanisms. On the reverse side of management, ie the exercise of hierarchical power in an organisation, he finds coordination by 'initiative or enterprise' (ie, based on market mechanisms), which 'operates through the price mechanism by the making of new contracts', whereas organisational '[m]anagement proper merely reacts to price changes, rearranging the factors of production under its control'.[5]

[3] *cf* J Fudge, 'Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation' (2006) 44(4) *Osgoode Hall Law Journal* 609; D Weil, *The Fissured Workplace: Why Work Became So Bad For So Many and What Can Be Done to Improve It* (Harvard University Press, 2014) 30–37; on the emergence of and different approaches in organisation theory *cf* M Burawoy, *Manufacturing Consent: Changes in the Labor Process under Monopoly Capitalism*, 10th edn (University of Chicago Press, 2010) 3 ff.

[4] RH Coase, 'The Nature of the Firm' (1937) 4 *Economica* 386, 403–04; J Tomassetti, 'Does Uber Redefine the Firm?: The Postindustrial Corporation and Advanced Information Technology' (2016) 34 *Hofstra Lab & Emp LJ* 1, 58 has also commented on the issue of Coase's theory being based on legal assumptions and figures.

[5] Coase, 'Nature of the Firm' (n 4) 405.

Highlighting the divide between organisation and market is the most common feature of organisation theory.[6] In this sense, organisation theory has responded to developments like the emergence of Taylorism, which embedded power in routines, thereby taking power out of the hands of workers and putting it in the hands of management.[7] By at least the second half of the twentieth century, the model of the large, vertically integrated, horizontally diversified and managerially directed enterprise became predominant, empirically and in organisation theory.[8] By assigning differentiated functions, competences, positions and departments, such enterprises create what has come to be called 'internal labour markets'.[9]

Altogether, organisations accomplish 'the collective bending of individual wills to a common purpose',[10] in order to fulfil their function as a mode of coordination, and they produce value through a division of labour that requires the coordination of single work activities. Conventional organisation theory today[11] usually describes the coordinating mechanisms of organisations in detail, using elements of: membership; hierarchy and control; rules; monitoring; and sanctions.[12]

5.1.2. Organisation Theory and Labour Law

While Gunther Teubner suggests that, for civil law, the divide between market and organisation corresponds to the legal institutions of contract and association (corporate law),[13] labour lawyers recognise employment as another relevant

[6] M Hutter and G Teubner, 'Der Gesellschaft fette Beute: Homo juridicus und homo oeconomicus als kommunikationserhaltende Fiktionen' in P Fuchs and A Göbel (eds), *Der Mensch – das Medium der Gesellschaft?* (Suhrkamp, 1994) 136–39 describe the choice between market and organisations for systems theory as a choice between different environments for economic transactions: They can link up to mental systems (market) or to formal organisations.

[7] FW Taylor, *The Principles of Scientific Management* (Routledge, 1911/1903 (reprint 1993)) 39 ff; *cf* SR Clegg, D Courpasson and N Philipps, *Power and Organizations* (Sage, 2006) 47–54; Stone, *From Widgets to Digits* (n 2) 27 ff; Burawoy, *Manufacturing* (n 3) 83 ff.

[8] NR Lamoreaux, DMG Raff and P Temin, 'Beyond Markets and Hierarchies: Toward a New Synthesis of American Business History' (2003) 108(2) *The American Historical Review* 404, 405–07; leading analysis: AD Chandler, *The Visible Hand: The Managerial Revolution in American Business* (Belknap Press of Harvard University Press, 1977) 287 ff, 372; on the limits *cf* R Dukes and W Streeck, 'From Industrial Citizenship to Private Ordering?: Contract, Status, and the Question of Consent' (Köln, 2020) 18.

[9] Stone, *From Widgets to Digits* (n 2) 51 ff; G Ahrne and N Brunsson, 'Organization outside Organizations: The Significance of Partial Organization' (2011) 18(1) *Organization* 83, 85; H Collins, 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws' (1990) 10 *Oxford Journal of Legal Studies* 353, 379; *cf* H Collins, 'Market Power, Bureaucratic Power, and the Contract of Employment' (1986) 15 *Industrial Law Journal* 1.

[10] Clegg, Courpasson and Philipps, *Power and Organizations* (n 7) 39–46.

[11] For alternative concepts, see below 5.2.

[12] Summary, for example, by: Ahrne and Brunsson, 'Organization' (n 9) 84; 86.

[13] G Teubner, 'Hybrid Laws: Constitutionalizing Private Governance Networks' in RA Kagan, M Krygier and KI Winston (eds), *Legality and Community: On the Intellectual Legacy of Philip Selznick* (Md. Berkeley Public Policy Press; Rowman & Littlefield, 2002); G Teubner, *Networks as Connected Contracts: With an Introduction by Hugh Collins. Translated by Michelle Everson* (Hart Publishing, 2011) ch 3.IV.

opposite to contract.[14] The divide between employment and independent contracting is therefore the result of an economic and institutional duality. In particular, the approaches of Hugh Collins, Rolf Wank and other legal scholars have come to show that employment categories can be conceptualised as testing the existence of bureaucratic control or organisational integration.[15]

Katherine VW Stone's 2004 book *From Widgets to Digits* analysed these links between employment law and organisation theory in detail. She assessed the functions and cornerstones of labour law regulation against the backdrop of organisation theory, showing how the historical shift from nineteenth century artisanal production to the twentieth century mode of industrial production corresponded with legal and social assumptions of long-term, stable relationships between employees and firms.[16] Other basic aspects of employment law can also be explained on these lines, particularly the use of incomplete contracts that 'leave most terms to managerial discretion and modification along the way', in order to 'be able to assign tasks or projects as they arise and to oversee the work or alter its direction on demand'.[17]

5.1.3. Why do Organisations Exist? Differences to Markets

Coase's major contribution to the theory of the firm was his explanation for the existence of organisations. He refutes the idea that the reason for the firm's existence can be found in the division and coordination of labour as such. A heightened division of labour may have been enabled by dramatically lowered costs for transport and communication in the nineteenth century,[18] but market or price mechanisms could also provide efficient coordination of work. Hence, and on the basis of a pro-market default position, Coase asks why organisations should develop as an alternative coordination mechanism to markets and what their economic advantages over markets could be. In other words, he asks in which ways the visible hand of management could be more efficient than the invisible hand of the market.[19]

[14] Fudge, 'Fragmenting Work' (n 3) 614; Weil, 'Fissured Workplace' (n 3) 54–58 on the theory of the firm; Collins, 'Independent Contractors and the Challenge of Vertical Disintegration' (n 9) 379; M-L Morin, 'Labour Law and New Forms of Corporate Organization' (2005) 144(1) *International Labour Review* 5 for a differentiation between different functions of the firm (as 'producer', as an economic and social organisation and as a financial group).

[15] Above ch 4, 4.3.

[16] Stone, *From Widgets to Digits* (n 2) 13 ff; see also SF Deakin and F Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (Oxford University Press, 2005).

[17] C Estlund, 'Rethinking Autocracy at Work: Book Review: Elizabeth Anderson, Private Government: How Employers Rule Our Lives (And Why We Don't Talk About It)' (2018) 131 *Harvard Law Review* 795–826, 812–13; *cf* Coase, 'Nature of the Firm' (n 4) 392; *cf* ch 4, at n 89.

[18] Lamoreaux, Raff and Temin, 'Beyond Markets and Hierarchies' (n 8) 414.

[19] Coase, 'Nature of the Firm' (n 4) 387–90, and passim; see Lamoreaux, Raff and Temin, 'Beyond Markets and Hierarchies' (n 8); Chandler, *Visible Hand* (n 8) 377 ff builds his analysis on this juxtaposition.

(1) Transaction Costs

Coase's answer points to the problem of transaction costs. He posits that organisations emerge where they are able to control the information about the price (of work), and where the cost of organisation is lower than the costs, for example, of concluding separate single contracts for each transaction.[20] By concluding employment contracts, companies and other non-market organisations deal with 'the fact that contracts cannot realistically specify all possible contingencies in the messy real world'.[21] Employment contracts, therefore, confer the right to decide over those issues that are not specified in the contract to the firm.

This results in incomplete contracts that enable organisational rules and unilateral instructions, as well as, in their wake, monitoring and sanctions. Other aspects of the puzzle presented by Coase relate to questions of uncertainty and prognosis,[22] for example in relation to the risk of having sufficient numbers of quality workers for adequate prices at one's disposal. Vertical integration (ie, hierarchy) and the creation of an internal labour market help here.[23]

(2) Information and Knowledge Production

Organisations that establish standards for quality and ensure compliance can also communicate information about quality on markets and solve clients' information problems.[24] Modern approaches to organisation theory have put particular emphasis on the advantages of organisations for knowledge production and information. Markets give information on prices and nothing more. The fact that very little information is found on markets makes coordination on markets highly flexible. Organisations, in contrast, are able to build up organisational competence and knowledge through recursive processes that validate, reform and develop knowledge and capacities.[25]

Hierarchical coordination attends to problems of knowledge distribution by addressing the presence of asymmetrical information among members of the organisation and by establishing methods that 'bypass foremen, secure direct information about the productivity levels that might reasonably be expected from workers, and create incentives for workers to perform up to their capabilities'.[26] This is one of the reasons why surveillance of workers has always been a key

[20] Coase, 'Nature of the Firm' (n 4) 390–91.

[21] A McAfee and E Brynjolfsson, *Machine, Platform, Crowd: Harnessing our Digital Future* (Norton, 2018) 326.

[22] Coase, 'Nature of the Firm' (n 4) 392–93.

[23] Collins, 'Independent Contractors and the Challenge of Vertical Disintegration' (n 9) 358; on functions of the internal market, see also Burawoy, *Manufacturing* (n 3) 95 ff.

[24] Lamoreaux, Raff and Temin, 'Beyond Markets and Hierarchies' (n 8) 414–16.

[25] J Koch, 'Crowdworking zwischen Markt und Organisation: Eine steuerungstheoretische Betrachtung' in I Hensel and others (eds), *Selbstständige Unselbstständigkeit: Crowdworking zwischen Autonomie und Kontrolle* (Nomos, 2019); on the 'learning organisation': C Argyris and D Schön, *Die lernende Organisation. Grundlagen, Methode, Praxis* (1999).

[26] Lamoreaux, Raff and Temin, 'Beyond Markets and Hierarchies' (n 8) 408–09. See Clegg, Courpasson and Philipps, *Power and Organizations* (n 7) 52 on the function of taking work tools out of the workmen's hands.

component of organisational modes of coordination[27] – independently of instructions and sanctions.[28]

<u>(3) Political Issues, Grabbing for Power</u>

Behavioural and sociological approaches have added broader perspectives to analysing organisations. Coase had already mentioned that 'transactions on a market and the same transactions organised within a firm are often treated differently by Governments or other bodies with regulatory powers',[29] thereby creating incentives for one or the other mode of coordination. We find further dynamics of status and power if we look beyond purely economic issues and interests to the culturally constructed personalities involved. Organisations are not coherent, unified agents, but rather create identities and status orders[30] – along with profit.[31] They produce and use managers who can accrue more status and power the larger the organisation is.[32]

5.2. New Concepts: Between Market and Organisation?

There have been signs that the coordination of work through organisation has considerably changed since the 1990s.[33] Different names and concepts have been found for these developments: the 'vertical disintegration' and 'fragmentation' of organisations;[34] the 'fissuring' of firms;[35] or 'fluid organisations' (using mechanisms of 'temporariness, plurality and partiality').[36] Like the evolution of organisations

[27] P Thompson, 'Fantasy Island: A Labour Process Critique of the "Age of Surveillance"' (2002) 1(2) *Surveillance and Society* 138; Burawoy, *Manufacturing* (n 3) 87; 107, focusing on the aspect of rules confining uncertainty; *cf* S King, 'On the Clock and Under Watch: A Review of the Literature on Electronic Employee Surveillance, with a focus on Call Centres' (Frankfurt (Oder), 2020). Arbeit|Grenze|Fluss. Work in Progress interdisziplinärer Arbeitsforschung 4, 3–4.

[28] See below at 5.3.4.

[29] Coase, 'Nature of the Firm' (n 4) 393; on the weaknesses of the transaction cost theory from a point of view of economic analysis of the law, see H Eidenmüller, *Effizienz als Rechtsprinzip: Möglichkeiten und Grenzen der ökonomischen Analyse des Rechts*, 4th edn (Mohr Siebeck, 2015).

[30] Ahrne and Brunsson, 'Organization' (n 9) 85; *cf* Collins, 'Market Power, Bureaucratic Power, and the Contract of Employment' (n 9); Chandler, *Visible Hand* (n 8) 377 ff (case studies); Taylor, *Principles* (n 7) 44 ff, naming the disenfranchisement of workers as one of the main objectives of 'task management'.

[31] Burawoy, *Manufacturing* (n 3) 13 ff.

[32] *cf* Collins, 'Independent Contractors and the Challenge of Vertical Disintegration' (n 9) 359; Fudge, 'Fragmenting Work' (n 3) 622–23.

[33] J Rubery and others, 'Changing Organizational Forms and the Employment Relationship' (2002) 39(5) *Journal of Management Studies* 645–72.

[34] Collins, 'Independent Contractors and the Challenge of Vertical Disintegration' (n 9) 360; Fudge, 'Fragmenting Work' (n 3).

[35] Weil, *Fissured Workplace* (n 3).

[36] J Sydow and M Helfen, '10 – Work and Employment in Fluid Organizational Forms' in BJ Hoffman, MK Shoss and LA Wegman (eds), *The Cambridge Handbook of the Changing Nature of Work* (Cambridge University Press, 2020).

in the first place, these dynamics can be traced back to a variety of causes, such as the dramatic fall of transaction costs associated with making and enforcing contracts on markets.[37] The technological and economic options of cutting up value-creating activities into ever-smaller pieces of work activities that can be coordinated at lower information and transportation costs has multiplied, and the economic advantages of making over buying has diminished.[38] The identification of organisations with hierarchy may, from the start, have been a consequence of the under-theorisation of service work, which has always displayed more diverse features of work coordination.[39]

It should also be noted that these economic dynamics have only been able to unfold due to certain politics and regulations backing them. Legal deregulation and rules furthering so-called labour market 'flexibility' have contributed considerably to the proliferation of vertical disintegration.[40] As a consequence, not only has work in traditional organisations changed; so has freelance work. Today, self-employment is no longer the reserve of liberal professions (eg, doctors, tax consultants and lawyers), the cultural and creative industries, or consulting and counselling professions. It has spread to almost any kind of work in the service sector, including care work.[41] The following section will describe the changes in work coordination and their consequences for the kind of understanding of organisations that forms the basis of labour law categorisation.

5.2.1. Indirect Management via Workers' Motivation and Marketisation

Due to the vertical disintegration of firms, value-creation based on the division of labour is now often organised without relying on a hierarchical and bureaucratic organisation – not only in small firms and service sectors, where bureaucratic organisation has always been less present, but also in large firms and production.[42] But this does not mean that firms do not still strive to control workers. Rather, they now use 'indirect' forms of management and control instead of relying on direct instructions and the routines established with the help of hierarchies.[43]

[37] Estlund, 'Rethinking Autocracy at Work' (n 17) 820; Tomassetti, 'Does Uber Redefine the Firm?' (n 4); Stone, *From Widgets to Digits* (n 2) 67 ff. On the analogous dynamics that helped create digital work platforms, see below 5.3.1.1.

[38] World Bank, 'The Changing Nature of Work: World Development Report' (Washington, DC USA, 2019).

[39] Tomassetti, 'Does Uber Redefine the Firm?' (n 4) 56–57; Dukes and Streeck, 'Industrial Citizenship' (n 8) 18.

[40] Collins, 'Independent Contractors and the Challenge of Vertical Disintegration' (n 9) 361, who holds that, still, the economic factors are decisive.

[41] R Waltermann, 'Welche arbeits- und sozialrechtlichen Regelungen empfehlen sich im Hinblick auf die Zunahme Kleiner Selbstständigkeit?' [2010] *Recht der Arbeit* 162.

[42] Fudge, 'Fragmenting Work' (n 3) 616.

[43] See below 5.3.4 on the roles of the persisting use of monitoring and surveillance techniques in these contexts.

Indirect management differs from direct management in that the latter presupposes direct access to workers' bodies. In order to achieve disposition over people's work without (legal rights of) instruction, indirect management exerts control via mechanisms that do not programme actions but rather structure them. Indirect management is heavily dependent on workers' motivation and commitment, and therefore incorporates instruments for creating 'responsible autonomy'.[44] As a result, the new 'boundaryless workplace' offers careers and occupational histories without clear task descriptions.[45] An important mechanism in this respect is the use of competition inside the organisation, which has made the boundaries of market-based coordination fluid. More and more organisations tend to pass on the competition requirements inherent in markets to the workers.

5.2.2. Alternative Approaches to Power

In order to better describe these developments, analyses of organisations have partly shifted from looking at the formal design of work to focusing on the consciousness of the employee at work, with an emphasis on companies' appropriation of the brain rather than the body of the worker.[46] One important theoretical shift in this regard comes from the field of critical organisation studies, which analyses power as knowledge management. Rather than using Max Weber's understanding of power as domination and legitimate authority,[47] critical organisation studies is interested in the forms in which leadership-knowledge management becomes institutionalised. Such forms and 'circuits of power' do not necessarily imply hierarchy (ie domination, authority and coercion),[48] but are rather 'woven' through different media and modalities of power that include, for instance, 'seduction'

[44] G Fairtlough, *The Three Ways of Getting Things Done: Hierarchy, Heterarchy and Responsible Autonomy in Organizations* (Triarchy Press, 2007); on the juxtaposition of direct/indirect control: C Gerber, 'Crowdworker*innen zwischen Autonomie und Kontrolle: Die Stabilisierung von Arbeitsteilung durch algorithmisches Management' (2020) 73 *WSI-Mitteilungen* 182; C Gerber and M Krzywdzinski, 'Brave New Digital Work?: New Forms of Performance Control in Crowdwork' in SP Vallas and A Kovalainen (eds), *Work and Labor in the Digital Age* (Emerald Publishing Limited, 2019); Tomassetti, 'Does Uber Redefine the Firm?' (n 4) 31 ('indirect governance'); WG Ouchi, 'A Conceptual Framework for the Design of Organizational Control Mechanisms' (1979) 25 *Management Science* 833 uses the term 'loose coupling' (adapted for digital work platforms by D Schönefeld, 'Kontrollierte Autonomie: Einblick in die Praxis des Crowdworking' in I Hensel and others (eds), *Selbstständige Unselbstständigkeit: Crowdworking zwischen Autonomie und Kontrolle* (Nomos, 2019)); fundamental analyses of the management of consent in firms: Burawoy, *Manufacturing* (n 3).

[45] Stone, *From Widgets to Digits* (n 2) 87 ff has described these indirect mechanisms in more detail. *cf* GG Voß and HJ Pongratz, 'Der Arbeitskraftunternehmer: Eine neue Grundform der "Ware Arbeitskraft"?' (1998) 50(1) *Kölner Zeitschrift für Soziologie und Sozialpsychologie* 131 and their description of the worker of an entrepreneur of his own capacity for work (*Arbeitskraftunternehmer*).

[46] Clegg, Courpasson and Philipps, *Power and Organizations* (n 7) ch 3 (66 ff).

[47] ibid, 85 ff.

[48] ibid, 133–35; ch 4 (94 ff); ch 9 (266 ff) on critical theories of organisational power; 241 ff on Stuart Clegg's concept of 'circuits of power'.

or manipulation.[49] According to this line of thinking, all organisations can be analysed (and criticised) in their capacity to produce knowledge and information, ie in their capacity to build up organisational competence through recursive processes that validate, revise and develop knowledge.[50]

5.2.3. Partial Organisation

Another alternative approach uses more traditional understandings of power to analyse new concepts of organisations. Göran Ahrne and Nils Brunsson, for instance, identify decision-making as 'the most fundamental aspect of organisation' and the organisation as 'the result of organising activities by managers', leading them to see 'organisation' as an activity rather than an institution.[51] They start from the empirical observation that, in reality, there is no categorial divide between markets and organisations: All markets will usually be organised to a greater or lesser extent, and many markets have been created by organisations. They point to the fact that the elements of organisation (membership, hierarchy and control, rules, monitoring and sanctions)[52] are relevant for analysing both organisations and markets, and they use the concept of 'partial organisation' to describe situations in which only some elements of organisation are present.[53]

In this framework, long-term relationships and hierarchical coordination can be seen as instruments of (partial) organisation that solve problems of information and establish indirect management with the help of 'informal restraints on self-interested behavior'.[54]

5.2.4. The Network Theory

The concept of the 'network' attempts to grasp 'non-market and non-organisational form[s] of coordinated inter-organisational value-creation'.[55] It describes coordination that alternates between organisation and market, or is otherwise located

[49] ibid, 228 ff; 258 ff. This approaches often have a Foucauldian theoretical background (going back to, inter alia, M Foucault, *Überwachen und Strafen: Die Geburt des Gefängnisses*, 16th edn (Suhrkamp, 2016)).

[50] *Cf* Koch, 'Crowdworking' (n 25).

[51] eg Ahrne and Brunsson, 'Organization' (n 9); Sydow and Helfen, 'Fluid' (n 36); G Ahrne and N Brunsson (eds), *Organization Outside Organization: The Abundance of Partial Organization in Social Life* (Cambridge University Press, 2019); Ouchi, 'Conceptual Framework' (n 44).

[52] Above n 12.

[53] Ahrne and Brunsson, 'Organization' (n 9) 85. On these elements *cf* above at n 12. See also Lamoreaux, Raff and Temin, 'Beyond Markets and Hierarchies' (n 8) 409 on the mixing of mechanisms.

[54] Lamoreaux, Raff and Temin, 'Beyond Markets and Hierarchies' (n 8) 408–09; 429–30.

[55] Sydow and Helfen, 'Fluid' (n 36); for the term 'inter-organisational', see M Marchington and others (eds), *Fragmenting Work: Blurring Organizational Boundaries and Disordering Hierarchies* (Repr, Oxford University Press, 2005); see Lamoreaux, Raff and Temin, 'Beyond Markets and Hierarchies' (n 8) 431 ('networks of long-term relationships').

between coordination achieved through hierarchy and coordination achieved through prices, contract and association.[56] The term 'network' has come to replace the term 'clan' previously used by William Ouchi to describe coordination that is neither done through markets nor organisation/bureaucracy.[57] The term 'network' implies forms of horizontal integration and coordination, or even non-proprietary models of peer production.[58] A network typically involves different elements of competition, trust, market power and hierarchy.[59]

5.3. Digital Work Platforms as Market Organisers

Digital platforms are examples of new concepts of organisation, along with outsourcing and offshoring.[60] As prominent and influential examples, they can even stand in for digital capitalism on the whole,[61] representing the 'digital mode of production'.[62] The following section will identify digital work platforms' different organisational forms by looking at the organisational aspects they display (5.3.1) and identifying their specific challenges (5.3.2). After that, it will present a concept that can describe the aspects that most digital work platforms have in common (5.3.3).

5.3.1. Organisational Aspects of Digital Work Platforms

5.3.1.1. Lower Transaction Costs

Transaction-cost economics as developed by Coase's theory of the firm explain many of the general dynamics of digital platforms, as digital technologies have significantly lowered transaction and coordination costs.[63] Indeed, Orly Lobel has identified 10 principles of digital platforms that can be traced back to the systematic reduction of transaction costs, among them 'tailoring the transactional unit',

[56] Teubner, 'Hybrid Laws' (n 13); Teubner, *Networks as Connected Contracts* (n 13) ch 3.IV.
[57] WG Ouchi, 'Markets, Bureaucracies, and Clans' (1980) 25(1) *Administrative Science Quarterly* 129; Ouchi, 'Conceptual Framework' (n 44).
[58] Y Benkler, *Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale University Press, 2008).
[59] D Grimshaw, H Willmott and J Rubery, 'Inter-Organizational Networks: Trust, Power, and the Employment Relationship' in M Marchington and others (eds), *Fragmenting Work: Blurring Organizational Boundaries and Disordering Hierarchies* (Repr Oxford, Oxford University Press, 2005) (41–44 with a critical review of the literature on the network form).
[60] C Estlund, 'What Should We Do After Work?: Automation and Employment Law' (2018) 128 *Yale Law Journal* 254–326, 283–91.
[61] JE Cohen, *Between Truth and Power: The Legal Constructions of Informational Capitalism* (Oxford University Press, 2019) on their representing digital capitalism (see also above ch 2, n 39.
[62] Stone, *From Widgets to Digits* (n 2) 13 and passim.
[63] McAfee and Brynjolfsson, *Machine, Platform, Crowd* (n 21) 326.

'reduced barriers to entry', and 'dynamic feedback systems'.[64] In relation to labour markets and the coordination of work, in particular, digitalisation has facilitated the cutting up of value-creating activities into separate smaller tasks ('gigs') that can be performed at any time and in any place. Consequently, company's transaction costs for the acquisition of labour and the creation of contingent forms of work have massively fallen.[65] This is how digital work platforms can draw on contingent labour on external markets and not necessarily need to create internal labour markets as a classic 'organisation' would.

5.3.1.2. Creating 'Sticky' Clusters of Transactions

Nevertheless, platforms also work hard at 'making clusters of transactions and relationships stickier'.[66] In the words of Julie Cohen: 'Platforms do not enter or expand markets; they replace (and rematerialise) them.'[67] Stefan Kirchner and Elke Schüßler show that managers of start-ups like Airbnb and Lyft have heavily engaged in the discursive theorisation and framing of their own activities,[68] as one element of shaping preferences and creating new market orders.[69] The extraction of data from different kinds of users and the shielding of the platforms' own data from other actors are central to these functions.[70] Platforms take part in the 'quantification of societies' and the exploitation of digital data as a new source of value.[71] In economic terms, these features of platforms, particularly as represented in digital work platforms, fulfil functions of trust-building and knowledge-production and contribute to the constitutive network effects generated on digital platforms.[72]

[64] O Lobel, 'The Law of the Platform' (2016) 101(1) *Minnesota Law Review* 87–166, 106 ff.

[65] Stone, *From Widgets to Digits* (n 2) 67 ff; Tomassetti, 'Does Uber Redefine the Firm?' (n 4); Lamoreaux, Raff and Temin, 'Beyond Markets and Hierarchies' (n 8) 429–30; S Kirchner, 'Arbeiten in der Plattformökonomie: Grundlagen und Grenzen von "Cloudwork" und "Gigwork"' (2019) 71(1) *Kölner Zeitschrift für Soziologie und Sozialpsychologie* 3, 15–16 (the problem of fluctuation); see above ch 1, 1.2.2 on the dynamics and 'opportunities' of gig work and contingent work.

[66] JE Cohen, 'Law for the Platform Economy' (2017) 51 *University of California Davis Law Review* 133, 144.

[67] ibid.

[68] S Kirchner and E Schüßler, 'The Organization of Digital Marketplaces: Unmasking the Role of Internet Platforms in the Sharing Economy' in G Ahrne and N Brunsson (eds), *Organization Outside Organization: The Abundance of Partial Organization in Social Life* (Cambridge University Press, 2019); for the 'framing' concept, *cf* DA Snow, EB Rochford Jr, SK Worden, and RD Benford, 'Frame Alignment Processes, Micromobilization, and Movement Participation' (1986) 51 *American Sociological Review* 464.

[69] ibid; Lobel, 'Law of the Platform' (n 64) 112 ff.

[70] Cohen, 'Platform Economy' (n 66) 154.

[71] Above ch 1, at nn 20–21.

[72] P Belleflamme and M Peitz, 'Inside the Engine Room of Digital Platforms: Reviews, Ratings, and Recommendations' in J-J Ganuza and G Llobert (eds), *Economic Analysis of the Digital Revolution* (Funcas, 2018); PC Evans and A Gawer, 'The Rise of the Platform Enterprise: A Global Survey' (New York, 2016) 5; A Engert, 'Digitale Plattformen' (2018) 218 *AcP (Archiv für die civilistische Praxis)* 304; J Prassl, *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (Oxford University Press, 2018) 23; McAfee and Brynjolfsson, *Machine, Platform, Crowd* (n 21) 129.

(1) Trust-building

The markets digital work platforms create are usually not open-ended on all sides. Some platforms have entry-level tests for prospective workers, while most give detailed instructions to workers on how to do good work. Some platforms test workers on the go by using feedback mechanisms of different sorts, and then assign tasks and activities according to performance levels.[73]

These processes are often highly opaque for the workers, but are usually important and defining features of the platforms, as the platforms require some form of quality control to justify the trust factor on which their work is based, and to uphold their end of the contracts that they enter into with clients.[74]

(2) Knowledge-Production

We should also not underestimate the economic value of workers' performance data gathered through platforms' monitoring and feedback mechanisms. The information these mechanisms collect can be fed into recursive processes of knowledge production that can not only explain and justify the added trust platforms provide to customers, but also contribute to learning and the development and innovation of platform services themselves.[75]

This is an aspect of platform organisation that has long been neglected, as control has never been the only objective achieved through membership. Membership can also enable coordination by differentiation, which, in turn, can enable organisational learning and innovation. Hierarchies tend to learn slowly,[76] while markets lack the wealth of information and knowledge production that organisations can generate through recursive processes.[77]

5.3.2. Theorising Digital Work Platforms as Organisations

When it comes to describing and explaining digital platforms and the gig economy in theoretical terms, the idea of the 'network' has been particularly influential.[78]

[73] For examples, see case-law evidence in ch 3, 3.5.2. See also Schönefeld, 'Kontrollierte Autonomie' (n 44).

[74] Above ch 2, at n 50 ff; Kirchner, 'Arbeiten in der Plattformökonomie' (n 65) 16–20 (problems of qualification and performance).

[75] Koch, 'Crowdworking' (n 25); *cf* M Rossi, 'Asymmetric Information and Review Systems: The Challenge of Digital Platforms' in J-J Ganuza and G Llobert (eds), *Economic Analysis of the Digital Revolution* (Funcas, 2018); Belleflamme and Peitz, 'Inside' (n 72).

[76] Clegg, Courpasson and Philipps, *Power and Organizations* (n 7) 135.

[77] Koch, 'Crowdworking' (n 25).

[78] Benkler, *Wealth of Networks* (n 58); Grimshaw, Willmott and Rubery, 'Inter-Organizational Networks' (n 59), 44–55; GG Parker, MW van Alstyne and SP Choudary, *Platform Revolution: How Networked Markets are Transforming the Economy – and How to Make Them Work for You* (WW Norton, 2017); M Finger and J Montero, *The Rise of the New Network Industries: Regulating Digital Platforms* (Routledge, 2021); A Bücker, 'Arbeitsrecht in der vernetzten Arbeitswelt' (2016) 23(2) *Industrielle Beziehungen* 187.

In relation to economic theories of multi-sided markets and indirect network effects,[79] the concept of the network is well suited to describe and analyse phenomena of the 'sharing economy', ie horizontal and cooperative systems in the strict sense.[80] When it comes to legal approaches, the concept of the network has prompted solutions like the piercing of contractual veils, minority protection and establishing countervailing power for network members.[81] Although 'network is not a legal concept',[82] the term has been helpful in recognising the institutional embeddedness of contracts[83] and analysing 'connected contracts' and 'multilateral (legal) effects' in legal terms.[84] However, beyond its use as a metaphor for multilateralism, the concept of the network does not easily lend itself to identifying power structures within the connection of contracts. This is what Julie Cohen means with the phrase 'a platform is not (just) a network'.[85]

Rather different considerations apply to post-structural Foucauldian analyses of power, which seek to understand how people are being governed and how power can take on different manifestations and aggregate states. While such analyses are useful for discerning *how* power pervades every relation, they are not well suited to drawing lines between the specific power relations of organisations, on one side, and markets, on the other. Such lines, however, are exactly what we are concerned with here.

Labour law's divide between employment and independent contracting builds on an economic and institutional duality of organisation and market, with employment found in organisation. For our purpose of identifying the features of digital work platforms that have organisational characteristics, the concept of 'partial organisation', although not very intuitive or visual, is well equipped for the task precisely because it is not theoretically charged. As it ties in with traditional understandings of hierarchical organisation, it aligns well with my effort to better

[79] *cf* Bundeskartellamt (German Federal Cartel Office), *Arbeitspapier 'Marktmacht von Plattformen und Netzwerken'*, 2016 (English executive summary of the working paper, *The Market Power of Platforms and Networks*: www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Think-Tank-Bericht-Zusammenfassung.pdf?__blob=publicationFile&v=4); Engert, 'Digitale Plattformen' (n 72).

[80] Benkler, *Wealth of Networks* (n 58); for this use of the term 'sharing economy' (and its critique), see above ch 2, at nn 51–52.

[81] Teubner, *Networks as Connected Contracts* (n 13) ch 5 (piercing the veil inside the network), ch 6 (piercing the veil for external liability); S Grundmann, 'Die Dogmatik der Vertragsnetze' (2007) 207(6) *AcP (Archiv für die civilistische Praxis)* 718, 733; 750 ff; for the liability of crowdworking platforms towards crowdsourcers, see E Kocher, 'Die Spinnen im Netz der Verträge: Geschäftsmodelle und Kardinalpflichten von Crowdsourcing-Plattformen' [2018] *Juristenzeitung* 862.

[82] RM Buxbaum, 'Is "Network" a Legal Concept?' (1993) 149(4) *Journal of Institutional and Theoretical Economics* 698.

[83] This is also what Grimshaw, Willmott and Rubery, 'Inter-Organizational Networks' (n 59) 44–55 are looking for.

[84] Teubner, *Networks as Connected Contracts* (n 13); Grundmann, 'Dogmatik der Vertragsnetze' (n 81) 733; 750 ff proves that contract law is in fact well suited to deal with these issues; 'a third private regime, beyond contract and association' (Teubner, 'Hybrid Laws' (n 13)) may therefore not be necessary; *cf* Kocher, 'Spinnen im Netz' (n 81) for crowdworking platforms.

[85] Cohen, 'Platform Economy' (n 66) 143 ('platforms represent infrastructure-based strategies for introducing friction into networks').

describe the different functions that digital work platforms may take on in the coordination of work processes.[86]

With its link to traditional organisation theory, the concept of partial organisation invites us to take a closer look at the economic rationales of every element of digital platform work. Transaction cost analysis explains why platforms might not depend on a long-term commitment from workers, but instead opt for using contingent work arrangements: because they can easily gain access to a large workforce they can flexibly use.[87] On the flipside, organisational functions of trust-building and knowledge production explain why platforms might nevertheless show traits analogous to verticality and organisational power.[88]

5.3.3. The Partial Organisation of Market Organisers Using Indirect Management

In order to analyse digital work platforms in line with the idea of partial organisations, Stefan Kirchner has applied an approach he developed with Elke Schüßler for digital platforms in general.[89] In this approach, they recast the five core elements of organisation (membership, hierarchy and control, rules, monitoring and sanctions) according to the specific features of digital platforms.[90] They see membership mirrored in account membership and find hierarchy in any order asymmetrically determined by the platform without routine mechanisms of voice or other forms of direct user participation. They recognise rules in algorithmic bureaucracy and monitoring in user evaluations and the recording of process data. Finally, Kirchner and Schüßler identify sanctions in exclusion mechanisms and the impact of ratings on transaction terms.

However, membership on digital work platforms is relatively weak compared to hierarchical organisations. Many digital work platforms register workers, evaluate their performance, classify them, and then allocate tasks according to performance and/or reputation levels. Yet, for the most part, they lack any form of direct control over workers (as 'members'). In contrast to hierarchical organisations, most platforms also try to ensure performance quality through market mechanisms of redundancy rather than control, for instance, by having more than

[86] *cf* WB Liebman and A Lyubarsky, 'Crowdworkers, the Law and the Future of Work: The U.S.' in B Waas and others (eds), *Crowdwork: A Comparative Law Perspective* (Frankfurt a. M. Bund-Verlag, 2017) 58 who has used the terms aggregator, facilitator, governor and arbitrator platforms, with a similar intention.

[87] See above 5.3.1.1.

[88] See above 5.3.1.2.

[89] Kirchner, 'Arbeiten in der Plattformökonomie' (n 65).

[90] Kirchner and Schüßler, 'Organization of Digital Marketplaces' (n 68) (they use the term 'sharing economy platforms' (for a critique of the term, see above ch 2, at nn 51–52); Kirchner, 'Arbeiten in der Plattformökonomie' (n 65) 9–11; on these elements of organisation, see above at n 12 and n 52.

one worker perform or be ready to perform each task. In short, digital work platforms must coordinate work in order to solve problems of fluctuation, qualification and performance. They do so with the help of market coordination mechanisms, without relying on an anonymous market, as they themselves control the market mechanisms they use.[91]

For this reason, Kirchner uses the term 'market organiser' to describe the social structures and specific functions of digital work platforms as partial organisations.[92] According to this typology, a (private) market organiser is present if the market is not exclusively formed by the mutual adaptation among sellers and buyers in an environment shaped by states' public market regulation, but formed by 'platform-regulation'.[93] The creation and organisation of markets is what characterises the organising activity of digital work platforms. In this function, digital work platforms are on par with stock exchanges, standardisation organisations or trade associations, but devoted to organising 'markets' for work as opposed to capital markets or markets for goods.

5.3.4. Why Monitoring? Information as Value

There is one last issue of digital work platforms that new concepts in organisation theory can help us understand better than traditional approaches, and that is the issue of monitoring/surveillance.[94] Monitoring employed by digital work platforms, particularly geo-tracking and the extensive collection of workers' data, has not only been a recurrent issue in contemporary debates on digital work platforms, but has also often been framed in contrasting theoretical terms. Does extensive digital monitoring represent a form of controlling workers 'that FW Taylor could only have dreamed of'[95]? Or is US District Judge Edward M Chen right when he invokes Michel Foucault?

Judge Chen compared the monitoring that Uber drivers suffer with the monitoring of FedEx drivers, whose work relationship had been the object of earlier jurisprudence classifying them as employees:

> In *Alexander*, the Ninth Circuit found the fact that drivers were accompanied on ride-alongs by management representatives up to four times each year important to

[91] Kirchner, 'Arbeiten in der Plattformökonomie' (n 65) 12–15; *cf* D Das Acevedo, 'Regulating Employment Relationships in the Sharing Economy' (2016) 20(1) *Employee Rights and Employment Policy Journal* 1; S Walzer, *Der arbeitsrechtliche Schutz der Crowdworker: Eine Untersuchung am Beispiel ausgewählter Plattformen* (Nomos, 2019) 224 ff.

[92] Kirchner, 'Arbeiten in der Plattformökonomie' (n 65) 9 ('*Organisator digitaler Marktplätze*'); Kirchner and Schüßler, 'Organization of Digital Marketplaces' (n 68).

[93] Cohen, 'Platform Economy' (n 66) 154; *cf* Ahrne and Brunsson (eds), *Organization* (n 51).

[94] On these terms, see King, 'On the Clock' (n 27) 3–4.

[95] P Thompson and K Briken, 'Actually Existing Capitalism: Some Digital Delusions' in K Briken and others (eds), *The New Digital Workplace: How New Technologies Revolutionise Work* (Macmillan Education; Palgrave, 2017) 251.

> its determination that drivers were FedEx's employees … The Alexander Drivers were monitored just four times a year, and knew exactly when they were being inspected. Uber drivers, by contrast, are monitored by Uber customers (for Uber's benefit …) during each and every ride they give … [This is] a level of monitoring where drivers are potentially observable at all times. Cf. Michel Foucault, Discipline and Punish … (a 'state of conscious and permanent visibility assures the automatic functioning of power').[96]

The reason there is a potential mismatch between Tayloristic and Foucauldian understandings of monitoring lies in their different theoretical frameworks. Taylor's concept of scientific management is designed to solve problems of task management through the establishment of routines, a workflow and a division of labour that exploit workers' labour most efficiently. In this framework, monitoring is very much an instrument of hierarchy designed to get the work done in an efficient manner.[97] In contrast, Foucault is more concerned with the all-pervading power created through knowledge than he is with power as an instrument to make others do something.[98]

Although the theoretical framework suggested by Judge Chen's Foucault citation might not be adequate for our purposes,[99] the judge does have a point. Digital work platforms do not always use the data they gather to instruct or sanction workers. Companies have always tried to extract as much information out of workers as possible, in order to feed their recursive processes of knowledge production and learning.[100] This function is a feature of organisations rather than markets that can and should be analysed separately from monitoring's enabling of instructions and sanctions through hierarchy.[101] With digitalisation, (big) data, as such, have become a new source of value – for learning and indirectly influencing behaviour.[102] The examples presented by the comparison of FedEx and Uber aptly shows the new qualities of monitoring that are increasingly becoming the norm.[103]

[96] *Douglas O'Connor, et al v Uber Technologies, Inc., et al.* Case No. 13-cv-03826-EMC, 82 F. Supp. 3d 1133 (US District Court, Northern District of California, 11 Mar 2015) at paras 1151–52 (referring to *Alexander v Fedex Ground Package Sys., Inc.* Case No. 12–17458 12–17509, 765 F.3d 981 (US Court of Appeals for the 9th Circuit, 27 Aug 2014); Tomassetti, 'Does Uber Redefine the Firm?' (n 4) 56.

[97] Above n 7.

[98] Above 5.2.2. On widespread misunderstandings of Foucault's concept of power if employed by lawyers, see R Sinder, 'Wider die Kritik der Macht: Vom Nutzen Michel Foucaults für die Rechtswissenschaft' [2016] *Kritische Justiz* 338.

[99] Above 5.3.2, text after n 85.

[100] Above nn 27–28.

[101] Above nn 24–25.

[102] On the processes of rendering experience to data and vice versa, see also S Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*, Paperback edition (Profile Books, 2019) 233–54 and passim.

[103] Above nn 70 and 71; overview by King, 'On the Clock' (n 27); *cf* Thompson, 'Fantasy Island' (n 27) with a critical discussion of the question of novelty.

5.4. Results: 'Something Old, Something New'[104]

The concept of hierarchical organisation has been described as mirroring 'the social reality of the employment relation in advanced industrialised societies'[105] or, considering its institutional embeddedness, as representing the post-war capital–labour compromise in industrialised democracies,[106] or (considering that many service sectors have never been integrated into this compromise), work experiences in the context of industrial ways of production.[107] As digital information and communication have contributed to changing the economic landscape,[108] eg by fostering horizontal instead of hierarchical coordination and respective governance mechanisms, organisation and organising have become more fluid and less reliant on hierarchy.

Today, firms can choose from of a growing variety of coordination mechanisms and their resulting forms of 'non-standard employment'. This poses an alarming challenge for labour law, which relies on companies not being able to choose the legal form of work relationship.[109] Labour law's primacy of facts principle is designed to evaluate the inherent organisational dynamics of the business model at stake in relation to work coordination. It is based on the assumption that specific forms of work coordination are unchangeably inherent to specific business models, and that hierarchy and organisational integration are indispensable for companies who want to use labour in an intense way.[110]

This chapter has shown that such relations between business models and mechanisms of work coordination also exist on digital work platforms. Hence, it argues that labour law should draw lessons from organisation theory in order to identify the organisational features of digital work platforms. This chapter's short, non-exhaustive review of organisation theory presented from the perspective of a labour lawyer has identified some insights that may help understand the puzzle presented by the legal analysis in chapter three. First, in order to find features of organisation as opposed to markets when examining digital work platforms, we should not only look for elements of hierarchical coordination. The instruments of indirect management that labour lawyers have so-far used to classify work relationships on digital work platforms[111] can and should be analysed as elements of

[104] M Finkin, 'Beclouded Work in Historical Perspective' (2016) 37(3) *Comparative Labor Law & Policy Journal* 603.

[105] Collins, 'Market Power, Bureaucratic Power, and the Contract of Employment' (n 9) 10.

[106] J Fudge, 'The Future of the Standard Employment Relationship: Labour Law, New Institutional Economics and Old Power Resource Theory' (2017) 59(3) *Journal of Industrial Relations* 374; cf Dukes and Streeck, 'Industrial Citizenship' (n 8) 8–11.

[107] Dukes and Streeck, 'Industrial Citizenship' (n 8) 18–19.

[108] *cf* above ch 2, at n 39 ff.

[109] As an example for these concerns, see W Däubler, 'Die offenen Flanken des Arbeitsrechts' [2010] *Arbeit und Recht* 142, 142–43 and references in nn 33 and 34.

[110] R Rebhahn, 'Der Arbeitnehmerbegriff in vergleichender Perspektive' (2009) 62(3) *Recht der Arbeit* 154, 154.

[111] Above ch 3, 3.5.1.

partial organisation, as they are a function of a market organiser's work coordination. If compared to the duality of 'active' and 'neutral' digital platforms that has been the basis for regulation in many legal areas and regulatory domains to date,[112] 'market organising' addresses the functions of digital platforms that go beyond the formal structure of market mediation that the term 'marketplace' entails.[113] Indeed, it points to those functions that actively establish specific power imbalances.

Understanding digital work platforms as market organisers also explains why descriptions of them have oscillated between analogies to the nineteenth century[114] and emphasising their novelty. It is the casual character of the work, enabled by lowered transaction costs, that make them resemble old-time middlemen or 'brokers'.[115] It is not a coincidence that the term 'task management' used in relation to digital platform work, was originally coined by Frederick Taylor as a synonym to 'scientific management'.[116] It is the coordination mechanisms on digital work platforms that are relatively new. They coordinate work by co-creating and exploiting workers' motivation, and by establishing systems of reputational feedback and indirect control. In this way, they mimic markets while at the same time disabling their workers' direct market access.

The following chapter will explore in more detail how labour law could potentially analyse digital work platforms as market organisers. It will outline which descriptions and indicators could be used in such analyses, and will also show how this approach relates to existing classification exercises and legislative and policy proposals on the regulation of digital work platforms.

[112] See above ch 1, at n 42/43; ch 2, 2.3.

[113] On this term, see Kirchner, 'Arbeiten in der Plattformökonomie' (n 65) 8; on its use in the regulation of digital work platforms, see below ch 6, at n 21.

[114] Above ch 3, at n 292.

[115] Finkin, 'Beclouded Work' (n 104); M Freedland, 'New Trade Union Strategies for New Forms of Employment: A Brief Analytical and Normative Foreword' (2019) 10 *European Labour Law Journal* 179.

[116] Taylor, *Principles* (n 7) 30.

6

Labour Law Categories for Workers on Market Organising Platforms

The preceding chapters collectively argue that labour law should not limit its reach to hierarchical organisations. Instead, it should also cover alternative forms of organisations that keep workers and labour at their disposal, such as partial organisations and particularly market organisers, which would include most digital work platforms. The following two chapters discuss the regulatory techniques that could be used to include such alternative forms of organisations within the scope of labour law on two levels. First, this chapter addresses categories and classification, asking: To whom should (labour law) rights and obligations apply? The following chapter then considers the legal consequences of classification, asking: Which (labour law) rights and obligations should be applicable?[1] In both chapters, the discussion centres around capturing indirect mechanisms of worker control like feedback and rating systems.

With a view to labour law categories, this chapter starts by identifying criteria and indicators that could be used to classify market organisers (6.1). It suggests that new criteria and indicators could become relevant in labour law in various ways. One such way is through the reformulation of existing categories in the jurisprudence of different national legal systems, as demonstrated in chapter three. Section 6.2 then discusses approaches that could potentially make employment classification more effective. Finally, section 6.3 considers the idea of creating a new, additional category in labour law classification to stand alongside employment and independent contracting, based on the concept of 'market organisation'.

6.1. Identifying Market Organisers

Market organisers, understood as partial organisations, are characterised by the mechanisms they use to coordinate and control work and workers. These differ from the mechanisms of hierarchy and instructions, with market organisers instead relying on feedback systems as indirect mechanisms that not only structure

[1] The formulation of these questions is borrowed from F Hendrickx, 'Regulating New Ways of Working: From the New "Wow" to the New "How"' (2018) 9 *European Labour Law Journal* 197.

work but also enable organisational learning with the help of the information they gather. In addition to mimicking markets in this sense, market organisers simultaneously disable workers' direct access to markets. Hence, two basic elements that characterise market organisers are:

- feedback systems that collect information on workers' activities and use them for structuring workers' behaviour; and
- control of workers' access to external markets, tasks and contracts.

Note that the second issue of market access identifies the platform as the relevant market actor. This aspect ultimately coincides with the categorisation of digital platforms in general. While controlling market access describes the situation applicable to digital platform workers, it also describes the platforms as 'active' in relation to their clients (consumers or businesses), in contrast to 'passive' or 'neutral' platforms (ie mere intermediaries).[2]

As an essential precondition for classifying work for market organisers, the framework (or user) contract, as such, would have to be classified, instead of single tasks or gigs.[3]

6.1.1. Indicators of Market Organising by Digital Work Platforms

Indicators are not part of a definition, but rather part of a description. With this in mind, the following list represents a non-exhaustive account of possible facts and features of digital work platforms that could indicate the existence of the elements of market organisers described above.[4]

- A triangular relationship exists in which the platform offers a service to clients and customers other than the workers.
- The platform formally restricts market access by workers, eg by not allowing them to work for other parties.
- There is an information gap that makes it impossible for the workers to take informed business decisions on their own.
- Workers are charged for the platforms' coordinating activities.
- The platform defines contractual terms, prices, and working conditions for all participants or users.

[2] For more on this divide, see above ch 1, at nn 42/43; ; ch 2, 2.3; ch 5, at n 111 f; for a different typology (aggregator, facilitator, governor and arbitrator platforms), see WB Liebman and A Lyubarsky, 'Crowdworkers, the Law and the Future of Work: The U.S.' in B Waas and others (eds), *Crowdwork: A Comparative Law Perspective* (Frankfurt a. M. Bund-Verlag, 2017) 58.

[3] M Risak, '(Arbeits-)Rechtliche Aspekte der Gig-Economy' in M Risak and D Lutz (eds), *Arbeit in der Gig-Economy: Rechtsfragen neuer Arbeitsformen in Crowd und Cloud* (ÖGB-Verlag, 2017).

[4] For references and discussion in detail, see above ch 3, 3.5.1.

- The platform disables (or controls) communication between workers and customers/clients.
- The platform processes the payments supposedly flowing between workers and clients.
- The platform controls the assignment of tasks to workers.
- Rating and feedback mechanisms regulate access to jobs, contracts, tasks or gigs.
- The results of rating and feedback mechanisms are used to influence workers' behaviour in various respects.
- Workers are part of a specific technical and communicative infrastructure. The platform provides and manages the digital means that enable and/or structure tasks and work activities, such as an app.
- The qualification level of workers is tested at some point. The platform tells workers how to go about tasks.
- The platform performs security or personal identity checks on workers.

6.1.2. Relation to Other Descriptions in Jurisprudence and Law-Making

6.1.2.1. Organisational Integration: Perspectives for the Employment Category

National courts and tribunals have already managed to incorporate many of these and other indicators of market organisation into their jurisdictions' descriptions of employment, usually by redefining the already-used criteria and indicators in their jurisdictions, and by newly incorporating indicators of app-based management, rating and feedback mechanisms, qualification requirements, and lack of market access in order to classify digital platform work as employment or independent contracting.[5]

These redefinitions have not always been announced as novel or as adaptations. Indeed, it seems that even when courts do acknowledge the innovative quality of new indicators, they would rather avoid reframing the abstract criteria of employment.[6] Yet, if we look at the approaches to employment that have been favoured in classifying digital platform work with the help of new indicators, we find that subordination and hierarchy have had little or no importance in these cases. For instance, the UK Supreme Court in *Uber* and the Spanish Tribunal

[5] This following account builds on the analyses laid out in ch 3, 3.5.3.1 (3.5.1 and 3.5.2).
[6] See above ch 3, 3.5.2.

Supremo (on *Glovo*) highlighted economic access to markets, or, respectively, the lack of the 'ability to improve [one's] economic position through professional or entrepreneurial skill'.[7] The French Cour de cassation (final court of appeal), on the other hand, in its *Uber* decision, looked at the 'economic reality' of the organisational integration of the worker into an organised service, while the German Bundesarbeitsgericht (BAG, Federal Labour Court) also focused on the organisational context instead of formal obligations as the most relevant aspect for worker classification.[8]

If we look at the opening of the ECJ's understanding of the worker in the *FNV Kunsten* case, which did not concern digital platform work, but collective bargaining for the self-employed, we find a similar shift away from subordination towards entrepreneurial opportunities and organisational integration. In addition to traditional criteria of instructions as to the time, place and content of work, the ECJ here used criteria of entrepreneurial risk-taking and forming 'an integral part of [the] employer's undertaking' in its classification of workers.[9] And in the Californian dispute over AB 5 (introducing section 2750(3) Labor Code California in order to enable classifying workers on digital platforms for transport and delivery as employees), we find these same aspects: While AB 5 codified jurisprudence that took the lack of entrepreneurial activities by a worker as indicators against employment,[10] Proposition 22, aimed at classifying those same workers as independent contractors, countered AB 5 by refocusing on traditional indicators, ie unilateral instructions and the formal obligation to perform tasks.[11] Lastly, note that the Workers (Definition and Rights) Bill read in the UK Parliament also proposes a shift in the classification of workers and employees alike from subordination to entrepreneurial opportunities ('not genuinely operating a business on his or her own account').[12]

Redefining organisations by membership and organisational integration rather than by subordination can more easily validate new indicators than labour law's traditional approach to employment classification, thereby adapting the notion of employment to organisations that make use of indirect control. However, litigation

[7] *Uber BV & Others v Aslam & Others* [2021] UKSC 5, para 101; Tribunal Supremo (Sala de lo Social) 25 Sept 2020, Case STS 2924/2020 (*Glovo*), ECLI:ES:TS:2020:2924; see above ch 3, 3.5.2.2. and 3.5.3.2.

[8] See above ch 3, 3.5.2.4.1. See also Art 2(1) of the Italian Disciplina organica dei contratti di lavoro (above ch 3, at n 277), which uses organisational integration as an alternative criterion to subordination and explicitly mentions platform workers.

[9] Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* [2014] ECLI:EU:C:2014:2411, para 36 (already discussed above ch 3, 3.4.1.2).

[10] Above ch 3, 3.5.2.1 ('(B) The worker performs work that is outside the usual course of the hiring entity's business. (C) The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.'); also relying on the ABC test, but emphasising attributes of entrepreneurial opportunities: T Goldman and D Weil, 'Who's Responsible Here?: Establishing Legal Responsibility in the Fissured Workplace' (2020). Working Paper 114, 43; 50.

[11] Above ch 3, 3.5.2.1.

[12] *cf* ch 4, n 3.

and connected legal debates on digital platform work have been taking place on a quite limited empirical basis.[13] Classifying digital platform work as employment has worked fine for transportation and food-delivery services, and it can even be argued that these are, in fact, hierarchical organisations in which indirect mechanisms rather serve to dissimulate the hierarchies built into them. It is still doubtful that crowdworking platforms and more loosely organised offline gig-work platforms would, in the long run, be considered employers in the strict sense. It might therefore be useful to develop a distinction between indirect management in organisations and indirect management in partial organisations, such as market organisers. We would then be able to differentiate between digital work platforms that use hierarchy to integrate workers into their organisation, platforms that use other forms of membership for the same end, and platforms that do not integrate workers into an organisation but nevertheless organise the market they create and dominate.

6.1.2.2. Market Organisers and Economic Dependence

Where they exist, third categories of economically dependent workers have sometimes been suggested as a possible way out of the binary quandary that labour law presents for digital platform workers. However, neither the German category of employee-like person[14] nor any similar category relying on economic dependence[15] will provide coverage for more than only that small percentage of digital platform workers who earn most of their income on one platform.[16] These categories work on the assumption of economic dependence, as opposed to organisational integration and membership which characterise categories of employment.

6.1.2.3. Adding Another Category in between Employment and Independent Contracting?

But how are the features of market organisers as described above (6.1.1) reflected in policy proposals for new categories?

[13] On this issue, see already above ch 3, 3.5.3.4.

[14] As proposed by Deutscher Juristentag (DJT, German Lawyers‘ Conference), Resolution I.2.a), 2016; R Krause, 'Digitalisierung der Arbeitswelt – Herausforderungen und Regelungsbedarf: Gutachten B' in Deutscher Juristentag (Ständige Deputation) (ed), *Verhandlungen des 71. Deutschen Juristentags Essen 2016* (CH Beck, 2016) B 106-07.

[15] As proposed for EU law by M Risak and T Dullinger, 'The Concept of "Worker" in EU Law: Status Quo and Potential for Change' (Brussels, 2018). See also the French labour law scholars' proposal for a new Code du Travail (Labour Code) of 2017 (E Dockès (ed), *Proposition de code du travail* (Dalloz, 2017). *cf* Goldman and Weil, 'Who's Responsible Here?' (n 10) 28 who advise against adopting a dependent contractor category for the US context.

[16] Economic dependence is however used for classification in the collective agreement for the Danish domestic work platform hilfr.dk: It offers workers the status as employee after 100 hours of work (ILO, 'World Employment and Social Outlook: The Role of Digital Labour Platforms in Transforming the World of Work' (Geneva, 2021) 214; see also ch 7, n 197.

Abbey Stemler who has advocated for a hybrid category between employee and independent contractor suggests the term '**dependent contractor**' (as used in Canadian law, for example[17]) in order to cover digital platform work. She does not, however, give any hints as to what the criteria and indicators for this category might be, and rather uses it as a device to call on regulators 'to think differently'.[18]

'**Independent worker**' is the term proposed for similar purposes by Seth Harris and Alan Krueger (Hamilton Project).[19] They name certain important features of market organisers as indicators for this category, namely: the existence of a triangular relationship with an intermediary; the freedom of workers to choose if and when they provide services for the platform; platform control of 'some aspects of the methods and means of work', including setting fees or fee caps, and being able to prohibit workers from using the platform; and workers being 'integral to the business of the intermediary'. While Harris and Krueger do not give a broader conceptional reasoning for these criteria, they coincide with many of the aspects mentioned in this book, particularly those of market access and organisational integration. Harris and Krueger do not directly address the feature of indirect control, but it forms the backdrop of workers having the freedom to choose if and when they work for the platform, while at the same time being subject to control by the platform in other respects. It seems dangerous, however, to use both 'freedom' and 'control' as indicators, as doing so suggests a binary idea that diverts attention away from the indirect mechanisms that platforms use to structure workers' decisions and behaviour.

For **US legislators**, the discussion has mostly focused on redefining the existing category of the employee, with conflicting objectives to extend or further restrict the application of the category. The cases related to the 2019 California Act known as AB 5 (intended to explicitly subject workers on transport and delivery platforms to labour law) are the most famous examples in this regard. In order to capture app-based transportation workers (in taxi as well as delivery services), AB 5 redefined the general category of 'employee' in section 2775(3) of the California Labor Code with the help of a legal presumption. It was then countered by new regulation, known as 'Proposition 22', that passed by popular vote in California's 2020

[17] Ch 3, 3.4.3.4, at n 262 ff; for assessments, see below 6.3.4.

[18] A Stemler, 'Betwixt and Between: Regulating the Shared Economy' (2016) 43 *Fordham Urban Law Journal* 31, 61–62; see critique by MA Cherry and A Aloisi, 'Dependent Contractors in the Gig Economy: A Comparative Approach' (2017) 66(3) *American University Law Review* 635, 648–49; Goldman and Weil, 'Who's Responsible Here?' (n 10) 28.

[19] SD Harris and AB Krueger, 'A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker"' (2015). Discussion Paper 10, 9–10 and passim (Alan Krueger was President Obama's former Council of Economic Advisors chairman; Seth Harris served briefly as US Secretary of Labor in 2013 and is now (Biden administration) member of the National Economic Council); critical considerations: Cherry and Aloisi, 'Dependent Contractors' (n 18) 646 (they purport the concept would have originated in Silicon Valley); Liebman and Lyubarsky, 'Crowdworkers' (n 2) 106–09.

elections. The latter was also limited to a redefinition of the category of 'employee', albeit with the opposite objective of excluding app-based transportation workers.[20]

Another US development seems, at least initially, to be more pertinent to the question of regulating market organisers. In 2017 and 2018, several (Republican-governed) US states passed laws introducing the category of '**marketplace contractor**' in order to classify workers on digital work platforms as independent contractors.[21] Contrary to what one might suspect when considering the specificity of the term, these laws did not introduce a new worker classification category. Rather, they stuck to a binary model by defining the new category as non-employees, thereby indirectly defining the employee in a very conventional sense. Contrary to these legislative definitions of marketplace contractors, a definition and criteria for market organisers should go further than simply addressing the formal structure of market mediators. Indeed, they should name those features that form the basis of the specific power imbalances that market organisers create.

Existing legislative descriptions of work relationships on digital platforms that look at the market organiser instead of the worker come closer to the approach this book supports. Such descriptions often define platforms in a very general way, with few differences drawn between platform definitions for the purposes of digital work platforms and consumer law or other areas.[22] For example, when the French legislature set out to assign 'a social responsibility towards the workers' on digital work platforms, it referred to a definition in tax law that understands an **electronic platform** as a

> company, irrespective of its place of establishment, which in its capacity as a platform operator brings persons into contact with each other at a distance, by electronic means, with the purpose of the sale of goods, the provision of a service or the exchange or sharing of a good or service.[23]

The French legislation only lists one main criterion that describes the relationship towards workers (who are identified as self-employed), when it refers to the

[20] The exclusion of app-based transportation is now explicitly mentioned in the new law, ie ss 7452–7462 of the California Business and Professions Code. See above at nn 10 and 11, and the detailed analysis of this process and the relevant norms above ch 3, 3.5.2.1.

[21] Arizona Revised Statutes, Title 23, § 23-1603, AZ Rev Stat § 23-1603 (2016); Florida Statutes, Title XXXI, Ch 451, FL Stat § 451.02 (2019); Indiana Code Title 22. Art 1, Ch 6., § 22-1-6-3, IN Code § 22-1-6-3 (2019); Iowa Code Title III, Ch 93, § 932 IA Code § 93.2 (2020); Kentucky Revised Statutes, Ch 336, § 336.137, KY Rev Stat § 336.137 (2019); Tennessee Code Title 50, Ch 8, § 50-8-102, TN Code § 50-8-102 (2019); similar attempts were unsuccessful in Alabama, California, Colorado and Georgia, according to R Hill, '"Marketplace Platforms" and "Employers" Under State Law – Why We Should Reject Corporate Solutions and Support Worker-Led Innovation', 18 May 2018, www.nelp.org/publication/marketplace-platforms-employers-state-law-reject-corporate-solutions-support-worker-led-innovation/. These laws seem to have served as blueprints for Proposition 22.

[22] See, eg, the very wide definitions of 'gig workers' and 'platform workers' in Art 2(35) and (60) of the Indian Code of Social Security.

[23] Art 242-bis Code Général des Impôts ('l'entreprise, quel que soit son lieu d'établissement, qui en qualité d'opérateur de plateforme met en relation à distance, par voie électronique, des personnes en vue de la vente d'un bien, de la fourniture d'un service ou de l'échange ou du partage d'un bien ou d'un service').

platform '[determining] the characteristics of the service provided or the good sold and [setting] its price' (Article L. 7342-1 Code du Travail).[24]

This description is quite similar to that found in the Italian regulation of 2015/2019 that defined **digital platforms** as 'the computer programs and procedures of the company which, irrespective of its place of establishment, is instrumental in the delivering of goods, fixing the remuneration and determining the manner in which the service is to be performed'.[25] Although the application of this regulation is limited to transportation and food-delivery workers identified as self-employed, it is interesting to note how the contribution of the platform in the performance of the service (the delivering of goods) is now (since 2019) described differently than in the 2015 version: It no longer refers to the 'organisation of the delivering of goods',[26] but to merely 'instrumental in' it.[27]

In 2021, the German Ministry for Labour and Social Affairs put forward a proposal to regulate those **digital work platforms** that

> do not limit themselves to intermediation, but take advantage of the structural characteristics of the platform economy and exert influence on contract design and work execution, as central, controlling actors in the triangular relationship between customers/clients, platform and workers.[28]

This description addresses the active character of the platform more abstractly than the French and Italian regulations, but focuses on essentially the same aspects that the latter put in the foreground: the control of market access. However, the German description does more than address offline gig-work in transport and food delivery, as it aims to capture digital work platforms in general. That is why it includes an additional criterion, which it addresses very abstractly with the formula 'take advantage of the structural characteristics of the platform economy'.[29]

[24] '[L]a plateforme détermine les caractéristiques de la prestation de service fournie ou du bien vendu et fixe son prix'. Introduced by the El Khomry Act of 2016 (Loi no 2016-1088 du 8 août 2016 relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels, Journal officiel no 184, 9 Aug 2016).

[25] '[P]rogrammi e le procedure informatiche utilizzate dal committente che, indipendentemente dal luogo di stabilimento, sono strumentali alle attività di consegna di beni, fissandone il compenso e determinando le modalità di esecuzione della prestazione'. Art 47-bis (2) Disciplina organica dei contratti di lavoro; *cf* C Schubert, 'Beschäftigung durch Online-Plattformen im Rechtsvergleich' (2019) 118 *Zeitschrift für Vergleichende Rechtswissenschaft* 341, 351.

[26] Art 47-bis (2) Disciplina organica dei contratti di lavoro (n 25).

[27] Above n 25.

[28] BMAS (Bundesministerium für Arbeit und Soziales= German Federal Ministry of Labour and Social Affairs), Eckpunkte 'Faire Arbeit in der Plattformökonomie' [2021] www.denkfabrik-bmas.de/fileadmin/Downloads/eckpunkte-faire-plattformarbeit_1_.pdf, 3 ('Plattformbetreiber, die sich nicht auf reine Vermittlungstätigkeiten beschränken, sondern unter Ausnutzung der strukturellen Besonderheiten der Plattformökonomie als zentrale, steuernde Akteure im Dreiecksverhältnis zwischen Kunden/Auftraggeber, Plattformtätigen und Plattformbetreiber Einfluss auf die Vertragsgestaltung und -durchführung nehmen („Arbeitsplattformen")'); *cf* the test for crowdwork has proposed by W Däubler (according to S Walzer, *Der arbeitsrechtliche Schutz der Crowdworker: Eine Untersuchung am Beispiel ausgewählter Plattformen* (Nomos, 2019) 184 ('Arbeitnehmer ist auch, wer sich aufgrund einer allgemeinen Aufforderung im Internet bei einem Anbieter meldet und zu den im Wesentlichen von diesem festgelegten Arbeitsbedingungen für ihn tätig ist').

[29] BMAS (n 28). This comes close to the French labour scholars' proposal for a new category of 'salarié externalisé' (Dockès (ed), *Proposition* (n 15) 8 ff.

6.1.3. Describing the Category of Market Organisers

The definitions and descriptions in the previous section display some similarities to the criteria and indicators for classifying digital platform work proposed in this book, but they differ in that they address the issue of market organisation either more concretely or more abstractly, and often less comprehensively and less systematically. This book's analytical approach to classifying digital platform work hinges on the differentiation between hierarchical organisations and market organisers, with the latter characterised by feedback systems and the control of workers' access to external markets, tasks and contracts. Both aspects – feedback systems and market access – are closely connected. The second aspect identifies the lack of independence characteristic for self-employed independent contractors, which forms the backdrop of platforms' ability to achieve organisational dominance over workers through the first aspect.

For the sake of legal consistency, the aspect of market access could be described in a similar way to that characteristic of 'active' platforms in other areas of the law, ie as the exercise of 'decisive influence over the conditions under which the service is provided'.[30] Similar formulas can be found in the French, Italian and German regulations mentioned above. However, these are not sufficient to identify the unique organisational forms of market organisers, which come to life through structuring workers' behaviour. In order to expressly capture mechanisms of indirect control, indicators and criteria should test if systems are in place that structure the workers' behaviour.

Before discussing whether this understanding of 'market organiser' should really be used as the basis for a new labour law category (6.3), the following section first elaborates on several techniques that have been proposed for making labour law classification more effective.

6.2. Techniques for Regulating Categories

As the basic methodological approach to labour law classification, the clustering of indicators that point to descriptive rather than prescriptive types of work relationships is designed to, at best, prevent evasion of labour law and provide adaptability to new developments. Consequently, however, this approach comes with a high degree of legal uncertainty. After all, the typological method necessarily creates grey zones.[31] As US judge Frank Easterbrook once put it: 'A score of 5 to 3 decides a baseball game, but [employee classification] does not work that way.'[32]

Nevertheless, developing 'sophisticated principles for determining whether a worker is in fact an employee, however they are described in terms of service

[30] On this formula, see already ch 2, n 57 ff on the use of this formula by the ECJ.

[31] Above ch 3, 3.3.3.

[32] Judge Easterbrook in *Reyes v Remington Hybrid Seed Co.* [2007] 495 F.3d 403, 407 (7th Circuit) (already cited in ch 3, n 247).

agreements', is in fact 'crucial'.[33] ILO Recommendation 198 names some of the methods legislators could potentially use to this end (N°s 10 and 11), while also allowing 'a broad range of means for determining the existence of an employment relationship' (No 11.a).[34] The Recommendation particularly mentions the provision of 'a legal presumption that an employment relationship exists where one or more relevant indicators is (*sic*) present' (No 11.b), discussed below 6.2.1), and 'defining … specific indicators of the existence of an employment relationship' (No 13, discussed below 6.2.2).

6.2.1. Burden of Proof and Legal Presumptions

The reversal of the burden of proof is a well-known technique for regulating worker classification categories. Introducing a legal (rebuttable) presumption in favour of employment has been proposed for the regulation of digital platform work by a number of different commentators[35] and is already in use in some legal systems.[36] While the determination of employment falls to the worker to prove in most legal systems, a presumption in favour of employment implies a reversal of the burden of proof. Usually, such rules require the company to prove the non-existence of employment if the worker has proven the existence of at least some (often enumerated) indicators. Sometimes, however, the burden is completely reversed, requiring the company to prove the worker's self-employment/independent contracting by demonstrating certain specific conditions. Chapter three discussed the Portuguese and Spanish experiences with the latter approach, which

[33] ILO, 'World Employment and Social Outlook' (n 16) 209.

[34] Explicitly referring to the Recommendation in this respect: ibid, 209; European Parliament resolution of 19 January 2017 on a European Pillar of Social Rights (2016/2095(INI)), No. 5b).

[35] H Collins, 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws' (1990) 10 *Oxford Journal of Legal Studies* 353, 379; B Rogers, 'Employment Rights in the Platform Economy: Getting Back to Basics' (2016) 10 *Harvard Law & Policy Review* 479, 512; S Fredman and D Du Toit, 'One Small Step Towards Decent Work: Uber v Aslam in the Court of Appeal' (2019) 48 *Industrial Law Journal* 260, 274; Cherry and Aloisi, 'Dependent Contractors' (n 18); M Risak and D Lutz, 'Gute Arbeitsbedingungen in der Gig-Economy – was tun?' in M Risak and D Lutz (eds), *Arbeit in der Gig-Economy: Rechtsfragen neuer Arbeitsformen in Crowd und Cloud* (ÖGB-Verlag, 2017) (proposal of a Crowdwork Law for Austria); M Risak, 'Fair Working Conditions for Platform Workers: Possible Regulatory Approaches at the EU Level' (Berlin, 2018); Krause, 'Digitalisierung der Arbeitswelt' (n 14) B 106-07; Goldman and Weil, 'Who's Responsible Here?' (n 10) 42 ff; 71st German Lawyers' Conference (Deutscher Juristentag, DJT), Resolution I.2.a), 2016; BMAS, Eckpunkte 'Faire Arbeit in der Plattformökonomie' [2021] (n 28); Deutscher Gewerkschaftsbund (German Trade Union Confederation, DGB), Position on Platform Work, March 2021, www.dgb.de/++co++f012a364-8c7b-11eb-8bce-001a4a160123; Don't Gig Up, Policy Recommendations, Jan 2020, Recommendation 3 (see ch 7, n 192 on this project).

[36] In Spain, a draft bill is at the moment (summer 2021) being debated in parliament that would create a rebuttable presumption for the existence of an employment relationship in the case of food-delivery platform workers (D Del Pérez Prado, 'The Legal Framework of Platform Work in Spain: The New Spanish "Riders' Law"' [2021] *Comparative Labor Law & Policy Journal* Dispatch No 36).

showed that a legal presumption of employment may solve some problems of classification, but also brings with it additional conceptual issues.[37]

First, problems of classification very rarely occur on the level of proof and the assessment of facts. Facts are often more or less undisputed, and if they are disputed, it is usually not very difficult for workers to prove their points of fact. Although digital platform workers do find themselves in a situation of information asymmetry with the platforms,[38] this does not necessarily mean they lack the necessary information to prove the facts that would enable their classification as employees. Most of the facts that have been identified as possible indicators in this context,[39] as well as the facts that have been proposed in this book,[40] relate to the experiences of the workers themselves.

Secondly, a legal presumption based on specific indicators is not consistent with the principle of primacy of facts. Attaching more weight to some indicators than to others renders a valuable aspect of the clustering exercise inoperative, namely its cumulative consideration of all the dynamics of the individual case and the business model, as such. The principle of primacy of facts presupposes a certain freedom on behalf of the courts to attribute more weight to certain indicators and less to others that it considers to be merely incidental and not characteristic of the contractual relationship in question. The typological approach and the primacy of facts principle establish clustering as a free exercise in the sense that all indicators can potentially count. Hence, a rule for burden of proof based on specific indicators moves away from the typological method for classification and instead uses elements of the common doctrinal method of subsumption. This is dangerous because the naming of specific indicators can give employers hints as to how to contractually construct a work relationship to evade labour law requirements. Such strategies can be dismantled by enabling courts and enforcers to evaluate the business model, as such.[41]

Finally, proof of facts may not always be the point of a presumption. As the Spanish and Portuguese examples show,[42] a legal presumption can also be used to simply give some indicators more weight in the overall assessment than other indicators. In other words, it can tell courts which indicators can and should be used as the primary indicators for clustering.

[37] Ch 3, 3.4.3.3; see also Art L.7313-1 Code du Travail (France); s 2750(3) Labor Code (California) (AB 5); for the South African norm (since 2002) in s 200A South African Labour Relations Act 1995 (LRA) *cf* Fredman and Du Toit, 'One Small Step' (n 35) 274.

[38] This is how BMAS, Eckpunkte 'Faire Arbeit in der Plattformökonomie' [2021] (n 28) and DGB, Position on Platform Work, March 2021 (n 35) justify their proposals for a legal presumption.

[39] Ch 3, 3.5.1.

[40] Above 6.1.1.

[41] *cf* G Davidov, 'Special Protection for Cleaners: A Case of Justified Selectivity?' (2015) 36(2) *Comparative Labor Law & Policy Journal* 219 who warns against replacing standards by rules in the area of employment classification.

[42] Ch 3, 3.4.3.3 and 3.5.3.2.

Aside from these additional conceptual issues, a legal presumption would have to be very precise in order to capture the central features that characterise a work relationship as employment. If the rule is unsuccessful in this respect, the presumption might enable manipulation and could backfire, or at the very least, have confusing effects. For example, a presumption of employment based on a minimum threshold of hours worked or income earned[43] might be taken by some companies as a cue to give workers tasks just up to the threshold, but not above it. In addition, there is also the risk of effectively introducing a new system of worker protection through the back door of a legal presumption based on concrete indicators. This book contends that we should rather do this through the front door, by explicitly choosing indicators that are not only based on a conception of employment, but that also cover the core of this conception.[44] Indicators that do not relate to central functions of an employment relationship should not give rise to a presumption of employment.

6.2.2. Specifying Indicators

Specifying indicators is not only one of the most important, but also one of the most difficult tasks of labour law classification. It is usually up to the courts to determine the specification of indicators on a case-to-case basis. If legislators take up the task, it becomes a far more abstract and challenging exercise. There are quite a few examples of such attempts that were ill-fated due, at least partly, to design flaws inherent in the concept.

In Germany, for example, the Ministry for Labour and Social Affairs attempted to propose specific indicators in 2015, when the introduction of a legislative description of the employment relationship (now section 611a BGB) was first being discussed.[45] It was the second attempt at codifying indicators, after a rigid

[43] Cherry and Aloisi, 'Dependent Contractors' (n 18); Risak and Lutz, 'Gute Arbeitsbedingungen' (n 35) (proposal of a Crowdwork Law for Austria); Risak, 'Fair Working Conditions' (n 35); 71st German Lawyers' Conference (Deutscher Juristentag, DJT), Resolution I.2.a), 2016; Krause, 'Digitalisierung der Arbeitswelt' (n 14) B 106-07; *cf* Rogers, 'Employment Rights' (n 35) 512 with an approach which would still need some conceptional embedding (workers should be presumptively classified as employees in two distinct situations: 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).

[44] See Collins, 'Independent Contractors and the Challenge of Vertical Disintegration' (n 35) 379 with his proposal ('presumption in favour of employment in service arrangements, which a firm can only rebut by demonstrating that it has managed to acquire labour power efficiently without using any techniques of control other than that of checking the adequacy of the completed service'). My only objection is that is mixes aspects of market access and acquisition of labour with aspects of control too indiscriminately.

[45] The draft Bill, of December 2015, in s 611a(2)2 BGB, mentioned the following indicators: a) subjection to instructions in terms of time, place and content; b) and c) work mainly in the clients' premises and regular use of his work equipment; d) interaction with employees of the client; e) work exclusively or predominantly on behalf of the client; f) lack of independent organisation; g) and h) service without warranty (G Thüsing and M Schmidt, 'Rechtssicherheit zur effektiveren Bekämpfung

(and closed) list had been introduced in social security law in 1999, which was later replaced by an open and shorter description of the employment contract, without naming indicators.[46] The 2015 proposal was also ultimately abandoned before even making it into parliament. In its place, a description of the employment contract was adopted that merely codified the existing case law of the Federal Labour Court, based on the typological method and with all its legal uncertainty.[47]

But why has the naming of indicators been so difficult for German legislators so far? Leaving aside policy issues, we can identify some conceptual issues that likely contribute to the situation. Criticisms of the open list of indicators proposed in 2015 questioned their level of abstraction, citing a categorial difference between 'characteristics of the type' (indicators) and 'criteria of a definition'.[48] However, at closer look, the typological method does not work with definitions at all; it is all about descriptions – and descriptions are not so easily distinguished from indicators.[49] A comparative view shows how aspects that form part of the definition (or rather description) in one legal system, can reappear as indicators in another system.[50] There is only a blurred line describing what it means to be employed and explaining how we can tell if someone is employed.

The real danger lies in choosing indicators that are too arbitrary to capture the essence of organisational models.[51] Indicators are usually developed for specific purposes, with concrete cases and problems in mind. For example, the 2015 German proposal was designed to clarify the line between an employee working in the context of her employer's service contract with a client, and an employee assigned to a client by a temporary work agency. It therefore mixed indicators for the classification of employment with indicators for the determination of the employer.[52] It was not designed to work for the identification of disguised/false self-employment, and in all probability would not have helped in such cases. And the set of indicators proposed would also not have worked for digital platform work.[53]

von missbräuchlichem Fremdpersonaleinsatz: Zum Entwurf eines neuen § 1 Abs. 1 Satz 3 AÜG und § 611a BGB als Versuch der gesetzlichen Konkretisierung des Arbeitnehmerbegriffs' [2016] *Zeitschrift für Wirtschaftsrecht* 54; M Henssler, 'Überregulierung statt Rechtssicherheit: Der Referentenentwurf des BMAS zur Reglementierung von Leiharbeit und Werkverträgen' [2016] *Recht der Arbeit* 18; W Hamann, '"Entwurf eines Gesetzes zur Änderung des AÜG und anderer Gesetze" vom 17.02.2016' [2016] *Arbeit und Recht* 136).

[46] Section 7(4) Sozialgesetzbuch (SGB IV, Social Code vol 4); *cf* Henssler, 'Überregulierung' (n 45).

[47] Above ch 3, 3.4.2.1.

[48] Thüsing and Schmidt, 'Bekämpfung' (n 45).

[49] *cf* ch 3, 3.3.

[50] See the experiences in US law above ch 3, 3.5.2.1 (in particular, the last paragraph on Proposition 22); see also above 6.1.2.3, text at nn 20/21; for the new German description in s 611a(1) BGB (mix of criteria and indicators) above ch 3, 3.4.2.1/3.4.2.3.

[51] Henssler, 'Überregulierung' (n 45), 19 (danger of codifying arbitrary 'snapshots'); Hamann, 'Entwurf' (n 45).

[52] Henssler, 'Überregulierung' (n 45), 19.

[53] These arguments are all the more true for the European Commission's failed attempts at codifying the ECJ's case law (above ch 3, 3.4.1.3).

The main challenge for statutory specifications of indicators lies in defining the group of cases and problems the indicators are supposed to address. When crafting indicators, legislators need to know very well what they are doing. While jurisprudence can develop different indicators for different types of organisations, legislators are well advised to rather focus on the employment status of particular categories of workers and organisations.[54]

6.2.3. Further Regulatory Techniques

For the sake of completeness, two more methods should be mentioned that could potentially help make classification more effective and misclassification less effective. Introducing special (and speedy) procedures as well as anti-circumvention rules can bolster, but not replace, a consistent regulatory approach to labour law classification.

6.2.3.1. Special Procedures for Employment Classification

Avoiding the sometimes arduous and often time-consuming method of classifying employment through litigation by having alternative and speedy procedures in place can potentially create greater legal certainty without compromising the fragile relationship between definition, descriptive indicators and clustering. For example, the procedure for the determination of legal status in German social security that was introduced in 1999 (*Statusfeststellung*, determination of legal status) has been quite successful in this respect.[55] The German federal state pension scheme established a 'clearing agency' that can classify work relationships for purposes of social security law (section 7a SGB IV). Decisions are non-binding, but nevertheless provide orientation.[56]

How such procedural structures might look depends very much, however, on the institutional structures in the relevant national regulatory context. For example, where works councils or similar institutions exist, participation or co-determination by works councils could also be effective in providing orientation for employment classification on the workplace level, without precluding court decisions.[57]

[54] Rogers, 'Employment Rights' (n 35) 515; more on these policy consequences below 6.4.

[55] See also proposals to simplify and give decisions greater consistency: Coalition agreement between CDU, CSU und SPD of 7 February 2018, for the 2018–2021 administration, paras 1840–1842; A Körner, 'Beitragsrisiken des Arbeitgebers bei Einsatz von Fremdpersonal. Verbesserungspotential für das Anfrageverfahren zur Klärung von Scheinselbstständigkeit' [2019] NZA 278.

[56] For the Portuguese judicial procedure to assess the qualification of contracts, see JJ Abrantes and R Da Canas Silva, 'The Concept of "Employee": The Position in Portugal' in B Waas and GH van Voss (eds), *Restatement of Labour Law in Europe: Vol I: The Concept of Employee* (Hart Publishing, 2017) 554–55.

[57] Eva Kocher, 'Statt Schwarz-Weiß: Verfahren zum Umgang mit Grautönen' [2013] AuR 465.

6.2.3.2. Anti-circumvention Protection

Legally banning employment misclassification as an 'unfair labour practice' is another possible approach. US and Canadian Labour Relations Acts, for example, consider any interference with individual or collective labour rights, such as victimisation on the basis of organising activities or an employer's domination of a trade union, to be 'unfair labour practice', which can be adjudicated before Labour Relations Boards. The same instrument could also potentially be deployed to treat the deliberate avoidance of labour law coverage through independent contracting as 'unfair labour practice'.[58] The mechanism partly resembles similar uses of unfair competition law against companies who gain competitive advantages through the violation of labour laws.[59]

6.3. A New Category?

Considering these regulatory techniques, the description and indicators explained above could give rise to the establishment of an additional square-shaped[60] hole for classifying work relationships, to use Judge Chhabria's metaphor.[61] But proposals for establishing a new category in between employment and independent contracting are always controversial. Hence, this section discusses the pros and cons of adding a new intermediary category and reviews the mixed experiences with such categories to date.

6.3.1. Con: The Dangers of Deregulation

The main argument against new (intermediate) categories lies in the assumption that digital platform work is nothing more than a modern form of precarious atypical employment. Against this backdrop, the introduction of additional forms

[58] For US law: N Zatz, 'Beyond Misclassification: Tackling the Independent Contractor Problem Without Redefining Employment' (2011) 26(2) *ABA Journal of Labor & Employment Law* 279; for Canadian law: D Doorey, 'Thoughts on the Foodora Fiasco: Have Labour Laws Been Violated?' [2020] *Canadian Law of Work Forum* on a trade union's complaint against Foodora's decision to leave the Canadian market.

[59] For German law, see R Sack, 'Die wettbewerbsrechtliche Durchsetzung arbeitsrechtlicher Normen' in P Hanau, E Lorenz and H-C Matthes (eds), *Festschrift für Günther Wiese zum 70. Geburtstag* (Luchterhand, 1998); E Kocher, 'Unternehmerische Selbstverpflichtungen im Wettbewerb' [2005] *Gewerblicher Rechtsschutz und Urheberrecht* 647 (commenting on the high threshold established by having to prove a competitive advantage); for Italian law: Cherry and Aloisi, 'Dependent Contractors' (n 18) 667; for Spanish law *cf* Case C-434/15 *Asociación Profesional Elite Taxi v Uber Systems Spain* ECLI:EU:C:2017:981.

[60] M Kawakami, 'The future of the sharing economy' [23 Nov 2017] Law Blog Maastricht, www.maastrichtuniversity.nl/blog/2017/11/future-sharing-economy.

[61] Above ch 3, n 5.

and levels of labour law protection signifies deregulation.[62] Veena Dubal summarised this position aptly in a tweet: 'We don't need more categories. We need compliance.'[63]

On one hand, this is a matter of principle. Some scholars fear that new intermediary categories could weaken bipolarity as a base principle of employment law.[64] This argument goes far beyond labour law and concerns labour market regulation in general, encompassing rules for employment in tax law, consumer protection and social security contributions.[65] The argument is, after all, concerned with the level playing field between traditional companies and digital work platforms.[66]

From a different, more pragmatic angle, adding another worker category may make employment status litigation even more confusing than it already is,[67] at least as long as case law providing specific guidelines is lacking. And this may create even more opportunities for evasion and circumvention on the part of the employer.[68] Introducing a new category could dilute employers' responsibilities and risk further reducing the number of fully protected workers.[69] The standard employment relationship could thus come under even more pressure.[70] And there

[62] J Prassl and M Risak, 'Uber, Taskrabbit & Co: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork' (2016) 37(3) *Comparative Labor Law & Policy Journal* 619; J Prassl and M Risak, 'The Legal Protection of Crowdworkers: Four Avenues for Workers' Rights in the Virtual Realm' in P Meil and V Kirov (eds), *Policy Implications of Virtual Work* (Springer International Publishing, 2017); V de Stefano, 'Crowdsourcing, the Gig-Economy and the Law (Introduction)' (2016) 37(3) *Comparative Labor Law & Policy Journal* 1; for general overviews, see G Davidov, 'Re-Matching Labour Laws with Their Purpose' in G Davidov and B Langille (eds), *The Idea of Labour Law* (Oxford University Press, 2011) 176–77; B Langille, 'Labour Law's Theory of Justice' in G Davidov and B Langille (eds), *The Idea of Labour Law* (Oxford University Press, 2011) 107 ff; Cherry and Aloisi, 'Dependent Contractors' (n 18) 684; KD Ewing, JQC Hendy and C Jones, 'The Universality and Effectiveness of Labour Law' (2019) 10(3) *European Labour Law Journal* 334, 337; *cf* Liebman and Lyubarsky, 'Crowdworkers' (n 2) 106 ff with a critical discussion of the Hamilton project proposal; Dockès (ed), *Proposition* (n 15) 2.

[63] Tweet by @veenadubal, 23 June 2019, 10:38 pm; *cf* A Aloisi and V de Stefano, 'European Legal Framework for "Digital Labour Platforms"' (Luxembourg, 2018).

[64] C Brors, 'Schöne, neue Arbeitswelt: Ist der Arbeitsvertrag dafür zu "altbacken"? Zugleich eine Stellungnahme zu Bücker (2016): Arbeitsrecht in der vernetzten Arbeitswelt' (2016) 23(2) *Industrielle Beziehungen* 226.

[65] J Prassl, *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (Oxford University Press, 2018), 119; Harris and Krueger, 'Proposal for Modernizing Labor Laws' (n 19) 18–21; W Brose, 'Von Bismarck zu Crowdwork: Über die Reichweite der Sozialversicherungspflicht in der digitalen Arbeitswelt' [2017] *Neue Zeitschrift für Sozialrecht* 7, 8; R Waltermann, 'Welche arbeits- und sozialrechtlichen Regelungen empfehlen sich im Hinblick auf die Zunahme Kleiner Selbstständigkeit?' [2010] *Recht der Arbeit* 162, 167; European Parliament resolution of 19 January 2017 on a European Pillar of Social Rights (2016/2095(INI)), No 5b).

[66] Aloisi and Stefano, 'European Legal Framework' (n 63).

[67] Rogers, 'Employment Rights' (n 35) 516.

[68] Opinion of the European Economic and Social Committee (n. 13) of 19.1.2011 with evidence from Italy. On this objection *cf* Davidov, 'Re-Matching Labour Laws' (n 62) 176–7; Langille, 'Labour Law's Theory of Justice' (n 62) 107; R Castel, *Die Krise der Arbeit: Neue Unsicherheiten und die Zukunft des Individuums* (Hamburger Edition, HIS 2011) 106–07.

[69] Prassl and Risak, 'Uber, Taskrabbit & Co' (n 62); Stefano, 'Crowdsourcing' (n 62); Goldman and Weil, 'Who's Responsible Here?' (n 10) 27–28 (who nevertheless opt for a 'concentric circle', ie a proliferation of new categories).

[70] D Biegoń, W Kowalsky and J Schuster, 'Schöne neue Arbeitswelt?: Wie eine Antwort der EU auf die Plattformökonomie aussehen könnte' (Berlin, 2017) 8 in their discussion of European Commission,

is good reason for labour lawyers to distrust the gig economy in this respect: Both empirically and in principle digital work platforms have been instrumental in replacing standard employment.[71]

6.3.2. Pro: The Benefits of Fitting Rules

The perspective outlined in the preceding section suggests that offering more categories and widening the scope of the employment category could not only strengthen deregulatory tendencies in employment law,[72] but also provoke a withdrawal of labour law more generally.[73] In contrast to the arguments advocated above, however, other scholars persuasively argue that persevering with the existing categories and criteria cannot effectively combat existing trends towards deregulation. In other words, it may already be too late to protect the employment relationship against undermining. Legal opportunities for evading labour law obligations already exist, particularly in contract law, which offers hardly any social protection whatsoever.[74] The regulatory rift between employment law and general contract law drives dynamics of circumvention. If the law makes it imperative to choose between the complete set of labour law rights, on one side, and no labour law rights at all, on the other side, it creates incentives for strategic evasion.[75]

This is not a new phenomenon, but it is sharpened by the widening array of organisational choices opened up by technological developments. New forms of work are not always openly abusive of labour law, but they often manage to evade labour law obligations through organisational design. This is why Simon Deakin thinks that the 'worker concept preserves the contract of employment only at the expense of diminishing the scope of application of the core model'.[76]

'Modernising Labour Law to Meet the Challenges of the 21st Century: Green Paper' (COM(2006) 708 fin); similarly Risak and Lutz, 'Gute Arbeitsbedingungen' (n 35) (proposing basic pillars for an Austrian legislation on crowdworking); *cf* Liebman and Lyubarsky, 'Crowdworkers' (n 2) 106 ff in their discussion of the Hamilton project proposals.

[71] Crowdsourcing, in particular, has often been advertised as an alternative to employment: J Howe, 'The Rise of Crowdsourcing' (2006) 14 *Wired Magazine*.

[72] S Deakin, 'What Exactly Is Happening to the Contract of Employment: Reflections on Mark Freedland and Nicola Kountouris's Legal Construction of Personal Work Relations' (2013) 7(1) *Jerusalem Review of Legal Studies* 135.

[73] See references in ch 1, n 58.

[74] MR Freedland and N Kountouris, *The Legal Construction of Personal Work Relations* (Oxford University Press, 2011) 436; W Däubler, 'Die offenen Flanken des Arbeitsrechts' [2010] *Arbeit und Recht* 142.

[75] RR Carlson, 'Why the Law Still Can't Tell an Employee When It Sees One And How It Ought to Stop Trying' (2001) 22 *Berkeley Journal of Employment and Labor Law* 295, 354; C Estlund, 'What Should We Do After Work?: Automation and Employment Law' (2018) 128 *Yale Law Journal* 254–326; E Brameshuber, 'Back to the Roots: Re-embedding Labour Law into Civil Law to Prevent Evasion of Labour Law' in L Ratti (ed), *Embedding the Principles of Life Time Contracts: A Research Agenda for Contract Law* (eleven international publishing, 2018).

[76] Deakin, 'What Exactly Is Happening' (n 72); see also Goldman and Weil, 'Who's Responsible Here?' (n 10) 41.

One of the reasons why it is often rather easy for digital work platforms (and eventually other market organisers) to work around employment law and strategically evade it lies in the existing legal concepts of employment: Existing labour laws do not exactly fit the specific features of digital work platforms.[77] The assumption that digital platform work is nothing more than just another form of precarious atypical employment is therefore at least partly wrong. With digital platform work, labour law faces the fundamental challenge that Orly Label called the Goldilocks Regulatory Challenge: 'getting law just-right with neither definitional over-inclusiveness nor under-inclusiveness'.[78] Victor Fleischer, who has analysed regulatory arbitrage by differentiating between regulatory avoidance and legitimised innovation, identifies inconsistencies in the law as the primary conditions for regulatory avoidance. What he offers as a solution to the problem may sound familiar to labour lawyers: He proposes to track 'the economic substance of deals in accordance with the policy goals of that regime' as closely as possible.[79]

This is exactly what the methodological principle of primacy of facts is supposed to bring about: classification 'by reference to social and economic criteria which reduce as far as possible the influence of the employer's choice of form'.[80] It builds on the assumption that there are certain features of work coordination and organisation that a firm cannot easily change. That is why this book identifies organisational features as the structures that should determine and form the basis of labour law classification, instead of focusing on characteristics of the worker (such as the need for protection). Consequently, criteria and indicators used to determine employment classification should, as accurately as possible, reflect digital work platforms' actual organisational mechanisms. The alternative – insistence on a concept that does not really fit the organisational form – is likely to backfire.

6.3.3. The Benefits of a Status

Instead of introducing another intermediate category of work relationship between employment and independent contracting, we could also stop classifying altogether. The scope of application of every piece of labour regulation could also be determined independently from classification; rights and obligations could be assigned on a case-by-case basis.[81] And in fact, a number of scholars have

[77] This is what ch 5 is all about (*cf* ch 5, 5.4); Hendrickx, 'Regulating New Ways' (n 1) 199 comes to a similar conclusion.

[78] O Lobel, 'The Law of the Platform' (2016) 101(1) *Minnesota Law Review* 87–166, 156.

[79] V Fleischer, 'Regulatory Arbitrage' (2010) 89 *Texas Law Review* 227, 244; for an example in tax law: AHLP Donovan, *Reconceptualising Corporate Compliance: Responsibility, Freedom and the Law* (Hart Publishing, 2021) 19 ff.

[80] Collins, 'Independent Contractors and the Challenge of Vertical Disintegration' (n 35) 379; *cf* Brors, 'Schöne, neue Arbeitswelt' (n 64).

[81] Carlson, 'Why the Law Still Can't Tell' (n 75) 354 (already above ch 3, n 411); *cf* Estlund, 'What Should We Do After Work?' (n 75); *cf* Walzer, *Crowdworker* (n 28) 224 ff.

mentioned that not all labour protection can easily be justified by the notion of the employee as a worker who is subordinated in a (hierarchical) organisation. While managerial control does indeed justify protection of workers as part of the organisation and entitle them to protection against arbitrary orders or health risks, rules protecting the work relationship, as such, particularly laws against unfair dismissal, may rather be justified by economic dependence.[82] Davidov's purposive approach also ascertains different goals for minimum wage legislation and unjust dismissal laws,[83] with a view to the organisational issues or the economic and social/psychological barriers that such regulations usually address.

If regulation were to be designed to fit the purposes of the respective single law, differentiated scopes of application would result. Consequently, it has been suggested that the term 'employee', since it appears in different laws, may very well have a different meaning in each of these contexts.[84] Such an approach could also be defended in light of the general equality principle, which demands that workers should be treated equally insofar (and only insofar) as their work situation is equal.[85]

It is not easy to argue against such a fragmentation of labour law on conceptual grounds. The argument that 'there is something about some work relations [employment] that separates them from other work relations [contractor-client relations]'[86] is only valid insofar as the 'something' can be identified as a feature that employee classification addresses. It is therefore only valid insofar as regulation reacts to integration into an organisation.

Only at first glance, however, does designing each right and obligation to fit the purpose and specific situation it reacts to sound like a convincing idea. Such a fragmentation of rights can make the legal life of organisations and the people involved in them difficult. It might also have social repercussions and reinforce social fragmentation in that it highlights differences between workers rather than what they have in common. In particular, it obstructs effective enforcement. Enforcement in labour law relationships very much depends on workers' and trade unions' knowledge and opinions about the law. Accordingly, regulation must take

[82] M Benecke, 'Der Citoyen als Travailleur: Recht als Schutzzone' [2018] *Europäische Zeitschrift für Arbeitsrecht* 3, 16, on working time laws.

[83] G Davidov, *A Purposive Approach to Labour Law* (Oxford University Press, 2016) 73–85; 98–112.

[84] Discussed by G Davidov and B Langille, 'Beyond Employees and Independent Contractors: A View from Canada' (1999) 21 *Comparative Labor Law & Policy Journal* 7, 18 and Davidov, *Purposive Approach* (n 83) 117–18; for social security law, see W Brose, 'Über die fortschreitende Loslösung des sozialversicherungsrechtlichen Beschäftigungsbegriffs vom Arbeitsrecht – und warum sie (fast) richtig ist', *Festschrift für Ulrich Preis* (CH Beck, 2021).

[85] The argument of equality has been put forward as a constitutional issue by BVerfG, 27 Jan 1998, Cases 1 BvL 15/87 and 22/93, BVerfGE 97, 169 and 186 (*Kleinbetriebsklausel*); applying it to digital platform work: Benecke, 'Citoyen als Travailleur' (n 82) 15; I Hensel, 'Soziale Sicherheit für Crowdworker_innen?' (2017) 66 *Sozialer Fortschritt* 897, 901; R Wank, 'Telearbeit' [1999] *Neue Zeitschrift für Arbeitsrecht* 225, 228; *cf* C Schirrmacher, 'Lockerung des Kündigungsschutzes für Risikoträger in bedeutenden Finanzinstituten' [2019] *Wirtschafts- und Bankrecht* 1291–1296 against exempting 'risk carriers' in 'important financial institutions' from dismissal protection.

[86] Davidov, *Purposive Approach* (n 83) 117.

into account that it needs communicating. And this is what the classification status of employee or market organiser can accomplish: It communicates access to justice based on community. The 'community' it refers to is a social community of those in similar positions in society, representing an extension of class-based approaches into the sphere of law. Employment classification takes the one aspect of workers' social position that marks them as 'subordinate' and uses it to create a status.[87]

Note that identifying labour law categories with status does not imply what Henry Sumner Maine talked about in his famous juxtaposition of status and contract, by which he suggested a development from status to contract constituted historical progress.[88] When Maine used the term 'status' to indicate the result of the law of civil status and families, he referred to a legal position the law allocates independently of an individual's will. In modern labour law, however, the concept of 'status' means something different. It refers to legal relationships that are based on agreement and contract, but that are substantively determined by the law in terms of content and coverage.[89] A legal status, ie a legally standardised contract, is therefore characterised by a bundling of (mostly statutory) rights and obligations. Regulating by way of a status or category and hereby institutionalising a specific social relation[90] should therefore be labour law's main concern.

6.3.4. Mixed Experiences with Intermediate Categories

The duality of employment and independent contracting has already been broken up by third categories in many national legal systems. The experiences with such categories in Western Europe and Canada to date should be considered if one wants to forecast the possible effects of a new category for market organisers.

Yet, these experiences do not clearly point in one direction. Miriam Cherry and Antonio Aloisi, who have compared experiences in Canada, Spain and Italy in detail, have come to rather diverse conclusions. While in Italy the 'quasi-subordinate' category created an opportunity for arbitrage that resulted in less worker protection, in Canada the 'dependent contractor' category succeeded

[87] On these institutional and social functions of the employment contract, see SF Deakin and F Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (Oxford University Press, 2005) 4–7; see also R Schwarze, 'Noch einmal: § 611a Abs. 1 S. 6 BGB und der arbeitsrechtliche Formenzwang' [2020] *Recht der Arbeit* 231.

[88] H Maine, *Ancient Law*, 1861 (extract on www.panarchy.org/maine/contract.html); on the complicated ways the 'free' employment contract was constructed and enforced historically with the help of coercion and force, see T Keiser, *Vertragszwang und Vertragsfreiheit im Recht der Arbeit von der Frühen Neuzeit bis in die Moderne* (Vittorio Klostermann, 2013).

[89] O Kahn-Freund, 'A Note on Status and Contract in British Labour Law' (1967) 80 *Modern Law Review* 635, 636; see also Freedland and Kountouris, *Legal Construction* (n 74) (who parallel this differentiation with contrasting common law and continental civil law); retracing the theoretical issues: R Dukes and W Streeck, 'From Industrial Citizenship to Private Ordering?: Contract, Status, and the Question of Consent' (Köln, 2020) 3 ff; R Rebhahn, 'Der Arbeitnehmerbegriff in vergleichender Perspektive' (2009) 62(3) *Recht der Arbeit* 154, 162.

[90] Dukes and Streeck, 'Industrial Citizenship' (n 89) 3–4.

in expanding the definition of employee and bringing more workers under the ambit of labour law protection.[91] Harry Arthurs, whose initiative gave rise to the Canadian 'dependent contractor' category in the first place,[92] has now proposed another category of 'autonomous workers' and has further suggested expressly excluding from coverage those persons ('independent contractors') who provide services to or on behalf of employers, but are neither 'employees' nor 'autonomous workers'.[93]

Having more than one category at one's disposal obviously enables compromising, negotiating and arbitrage. The effects of this can be good or bad, depending on how negative one's views are of the current situation or the alternatives.[94] The Spanish experience with the TRADE category has by one and the same author been both praised for a regularisation of 'grey areas' and attributed 'limited success' due to the small numbers of TRADES that have been recorded.[95] In general, 'the higher the stakes of employee status, the higher the probability the employers will drive workers into the ambiguity zone'.[96] Once in this zone, anything can happen. Companies and platforms will tend to use third categories to evade and avoid stricter employment law rules.[97] But courts can also use them to assign labour rights where they do not find enough indicators for employment classification. The 'employee-like person' in German law[98] seems to have been used in this way,

[91] Cherry and Aloisi, 'Dependent Contractors' (n 18) 656 ff on Italy; 651 ff on Canada; E Sánchez Torres, 'The Spanish Law on Dependent Self-Employed Workers: A New Evolution in Labor Law' (2010) 31 *Comparative Labor Law & Policy Journal* 231, 235 on the Italian situation; see also ch 3, 3.4.3.4. on the Canadian rules; on its application on digital platform work, see *Canadian Union of Postal Workers v Foodora Inc* [2020] ONLRB (Ontario Labour Relations Board) Case No. 1346-19-R (Wilson) para 116; *cf* Davidov and Langille, 'Beyond Employees and Independent Contractors' (n 84) 25 ('mixed blessing'); J Fudge, 'A Canadian Perspective on the Scope of Employment Standards, Labor Rights, and Social Protection: The Good, the Bad, and the Ugly' (2010) 31 *Comparative Labor Law & Policy Journal* 253, 254; 263 criticises the Canadian approach for its fragmentary character ('only a and tattered and threadbare patchwork of rights').

[92] HW Arthurs, 'The Dependent Contractor: A Study of the Legal Problems of Countervailing Power' (1965) 16 *University of Toronto Law Journal* 89; for the background in competition law (collective bargaining), see Fudge, 'Canadian Perspective' (n 91) 259.

[93] H Arthurs, 'Fairness at Work: Federal Labour Standards for the 21st Century. Final Report of the Federal Labour Standards Review' (Gatineau, Québec 2006) 64–65; for policy, see also Dockès (ed), *Proposition* (n 15) 3; 7 for a similar new category in French law ('salarié autonome', autonomous worker); for the respective debates in Belgium and France in the years 2016–17, see K Lenaerts, Beblavý and Z Kilhoffer, 'Government Responses to the Platform Economy: Where Do We Stand?' (Brussels, 2017). CEPS Policy Insights No 2017, 7.

[94] The relevance of future probabilities and prognoses for the assessment is aptly put by Fudge, 'Canadian Perspective' (n 91) 265.

[95] J-P Landa Zapirain, 'Regulation for Dependent Self-employed Workers in Spain: A Regulatory Framework for Informal Work?' in J Fudge, S McCrystal and K Sankaran (eds), *Challenging the Legal Boundaries of Work Regulation* (Hart Publishing, 2012) 167–69; see already above ch 3, 3.4.3.4., at n 261.

[96] Carlson, 'Why the Law Still Can't Tell' (n 75) 354; Estlund, 'What Should We Do After Work?' (n 75); this is also the assessment of Landa Zapirain, 'Dependent Self-employed Workers' (n 95) 165.

[97] Prassl and Risak, 'Legal Protection' (n 62).

[98] Ch 3, 3.4.2.6.

ie as kind of a safety net for 'in-between' workers. In this sense, Jason Moyer-Lee and Nicola Kontouris seem to be right in suggesting that

> what matters most is not the number of categories but rather the width of the definitions, the rights associated with each status, and the purposiveness of the jurisprudential approach to their interpretation.[99]

These experiences do not, therefore, clearly advise against the strategy of outlining a distinctive new category of market organisers, following the cues of organisation theory and using the description and indicators analysed above (6.1.1 and 6.1.3).

6.4. Courts or Legislators?

The theoretical framework developed in this book can be used for different purposes. For one, naming and describing market organisers could be used to systematise and justify the attempts by courts to adequately capture employment on digital work platforms. Courts, in turn, could use the concept of market organisers to more systematically advance concepts of employment in the strict sense – if judges continued to innovatively develop the employment category. Up to now, they have done so for transport and delivery platforms, and in a specific case of crowdworking.[100]

Relying on the courts, however, could become an unfair race between hare and hedgehog, between economy and the law. For one, courts do not have enough authority to ensure a fully efficient solution.[101] Secondly, platforms could try to 'tweak their policies' to ensure that the next court decision turns out differently.[102] Contractual clauses are sometimes designed more 'to intimidate than to be exercised'.[103] And as long as legal proceedings have not yet been instituted, a platform will tend to use the category on which it has chosen to build its contractual models.

This is not to say that strategic litigation cannot be used as an effective instrument to accelerate political and legal processes, and to bring cases and problems to the attention of courts and policymakers. Nevertheless, digital platform work comes in a great variety of forms, not all of which easily lend themselves to employment classification in the strict sense, and courts will usually be hesitant to break down legal concepts of employment into multiple meanings.[104]

[99] J Moyer-Lee and N Kontouris, 'The "Gig Economy": Litigating the Cause of Labour' in International Lawyers Assisting Workers Network (ILAW) (ed), *Taken for a Ride: Litigating the Digital Platform Model* (Issue Brief, 2021) 34.

[100] See examples in ch 3, 3.5.2.

[101] Harris and Krueger, 'Proposal for Modernizing Labor Laws' (n 19) 15.

[102] J Woodcock and M Graham, *The Gig Economy: A Critical Introduction* (Polity, 2020) 127–28; S Hill, *Raw Deal: How the "Uber Economy" and Runaway Capitalism Are Screwing American Workers* (St. Martin's Press, 2017) 27–28 on the 'slow [legal] route'.

[103] Moyer-Lee and Kontouris, 'Gig-Economy' (n 99) 18.

[104] G Davidov, 'Freelancers: An Intermediate Group in Labour Law?' in J Fudge, S McCrystal and K Sankaran (eds), *Challenging the Legal Boundaries of Work Regulation* (Hart Publishing, 2012) 176.

Considering what has been proposed even by those policymakers that classify digital platform work as employment,[105] they would probably agree that the legal consequences, rights and obligations of labour law may not fit the realities of any kind of digital work platforms. Regulation that addresses transport and food-delivery platforms, for example, will not necessarily be equally relevant for crowdworking platforms. And some labour law rights and obligations may not fit any digital work platforms. Legislators could therefore use a new category to link with specific rights and obligations and embed the category in broader regulatory strategies.[106]

6.5. Further Sectoral Differentiation?

A general approach to classifying market organisers need not be in opposition to more specific definitions or descriptions, in particular for organisers of online work (crowdwork)[107] or offline work in particular sectors, such as transport or food delivery.

For example, the 2015/2019 Italian law on the social protection of workers on digital platforms limits its scope exclusively to 'self-employed workers carrying out the delivery of goods on behalf of others, in urban areas and with the aid of bicycles or motor vehicles … through platforms including digital ones'.[108] In a similar vein, the French Code du Travail contains general rules for 'self-employed workers who use one or more electronic contact platforms to carry out their professional activity' (Article L 7341-1), and more specific rules for those digital platform workers who '[drive] a transport vehicle' or '[deliver] goods by means of a two- or three-wheeled vehicle, whether motorised or not' (Article L 7342-8).[109] These regulations create specific rights and obligations, such as rights to information, compensation insurance, vocational training and collective bargaining. While the

[105] See references ch 1, n 9/10.

[106] Moyer-Lee and Kontouris, 'Gig-Economy' (n 99) 33; more generally on strategic litigation, eg Open Society Justice Initiative, 'Strategic Litigation Impacts: Insights from Global Experience', Oct 2018, www.justiceinitiative.org/publications/strategic-litigation-impacts-insights-global-experience; H Duffy, *Strategic Human Rights Litigation: Understanding and Maximising Impact* (Hart Publishing, 2018).

[107] Risak, ' (Arbeits-)Rechtliche Aspekte' (n 3).

[108] '[L]avoratori autonomi che svolgono attività di consegna di beni per conto altrui, in ambito urbano e con l'ausilio di velocipedi o veicoli a motore … attraverso piattaforme anche digitali' (Art 47-bis (1) Disciplina organica dei contratti di lavoro (above n 25)); *cf* Schubert, 'Beschäftigung durch Online-Plattformen' (n 25) 351.

[109] '[T]ravailleurs indépendants recourant, pour l'exercice de leur activité professionnelle, à une ou plusieurs plateformes de mise en relation par voie électronique'; '1° Conduite d'une voiture de transport avec chauffeur; 2° Livraison de marchandises au moyen d'un véhicule à deux ou trois roues, motorisé ou non'; on this regulation (El Khomry Act), see above n 24. See also the overview over the French law of digital work platforms by J-Y Frouin and J-B Barfety, *Reguler les plateformes numériques* (Report for the French Prime Minister, 2020) 18–20.

legislators in these examples still refer to the workers covered as 'self-employed',[110] they have nevertheless incrementally started to create a new category.

The criteria and indicators for market organisers as developed in this book can orient how to advance on these paths in a consistent and more straightforward manner.

6.6. Results

This chapter has argued that it makes sense to use descriptions of market organisers to develop and delimit consistent jurisprudence on employment in organisations, and even to establish a new labour law category of 'market organiser'. The criteria by which market organisers such as digital work platforms can be identified are: (1) the systems they put in place that structure workers' behaviour; and (2) their exercise of decisive influence over the workers' access to the market of services (indicated, inter alia, by their influence on the conditions under which a worker's service is provided) (6.1.3).

However, one size will not equally fit all.[111] A new category would run the same risk that has partly materialised with respect to the 'employee' category: 'to squeeze [workers] into marginally relevant legal categories that trigger a whole host of undesirable responsibilities.'[112] But this risk may be outweighed by the advantages of status, connected with a wide category: it helps address organisations in a way to enable effective enforcement (6.3.3).[113] Enforcement of the status could also be helped by further specifying indicators (6.2.2 and 6.1.1). The instrument of specific indicators could also be used to differentiate between digital work platforms and other market organisers, or between sub-categories of digital work platforms.

Reconstructing labour law categories by identifying those features that are indispensable and characteristic for the particular business model at hand, while simultaneously keeping in line with the general assumptions and (organisational) ideas of employment, is only the first step to consistent regulation. Any new status will have to be justified by the concrete rights and obligations that are bundled into it.[114] Hence, the next chapter asks: How can and should the rights, obligations, and participation and governance structures associated with labour law be reformulated in order to address the indirect control and social dynamics that characterise digital platform work?

[110] Art 47-ter-sexies Italian Disciplina organica dei contratti di lavoro (above n 25); Art L 7342-2–6 French Code du Travail (above n 24). See also on the relationship of the economic dependent worker to the employee above ch 3, at n 283.

[111] WP de Groen and others, 'Employment and Working Conditions of Selected Types of Platform Work' (Luxembourg, 2018) 62–64.

[112] D Das Acevedo, 'Regulating Employment Relationships in the Sharing Economy' (2016) 20(1) *Employee Rights and Employment Policy Journal* 1.

[113] See also Goldman and Weil, 'Who's Responsible Here?' (n 10) 25.

[114] This is what Ewing, Hendy and Jones, 'Universality and Effectiveness' (n 62) 337 indirectly demand.

7

Enabling Workers and Holding Platforms Accountable

Remember the YouTubers Union that came together with an industrial trade union (IG Metall) to create the FairTube campaign?[1] There are several reasons why this cooperation is remarkable. One of them has to do with the different regulatory domains and discursive formations[2] to which these two unions belong, evidenced by the policy demands they have advanced. For example, in relation to workers' participation, the initial YouTubers Union campaign asked YouTube for transparency and a human person to talk to when problems arise. The joint FairTube campaign, in contrast, advanced far more specific demands that came down to institutionalising workers' participation.[3] These differences in approaches should not come as a surprise. What characterises the field and regulatory domain of labour law (where industrial trade unions such as IG Metall belong) is a sensibility towards power, particularly power imbalances, and collective action. Digital activists (such as the YouTubers Union) tend to prioritise transparency and the protection of data, as well as property rights.[4] Nevertheless, when coming together on issues of digital platform, as the YouTube example shows, even labour activists who defend the employment analogy for digital platform work have been reluctant to propose the exact same set of rights developed for employees.[5] Accordingly, the debate has been divided into two strands of thinking.[6] While many scholars, courts, tribunals and labour administrations all over the world have tried – sometimes

[1] Ch 2, at nn 1 ff.

[2] On these concepts, see ch 2, 2.1.

[3] These included independent conciliation (eg, by an ombudsperson) in cases of conflict and, for purposes of co-determination in business decisions, an advisory council, to be established with the help of collective representation.

[4] Ch 2, 2.3.1.

[5] This is similarly true for labour law scholars, see eg S Fredman and D Du Toit, 'One Small Step Towards Decent Work: Uber v Aslam in the Court of Appeal' (2019) 48 *Industrial Law Journal* 260 ('certain minimum rights'); D Das Acevedo, 'Regulating Employment Relationships in the Sharing Economy' (2016) 20(1) *Employee Rights and Employment Policy Journal* 1 ('undesirable responsibilities'); T Goldman and D Weil, 'Who's Responsible Here?: Establishing Legal Responsibility in the Fissured Workplace' (2020). Working Paper 114.

[6] For such a bifurcation, see F Hendrickx, 'Regulating New Ways of Working: From the New 'Wow' to the New 'How'' (2018) 9 *European Labour Law Journal* 197; MA Cherry and A Aloisi, 'Dependent Contractors in the Gig Economy: A Comparative Approach' (2017) 66(3) *American University Law Review* 635, 677.

successfully – to apply labour law's categories to digital platform work, legislators and other collective actors have often sought to develop specific regulation for it, usually based on regulatory models developed for digital platforms in general.

This chapter is dedicated to linking the debates about classification with those pertaining to policies, ie the legal consequences of classification. The YouTube example shows that not only do labour activists, such as traditional trade unions, focus on rather different issues than digital activists, but they have also developed policies for digital work platforms that differ quite considerably from traditional labour law positions on employment. Even those actors who insist on employment being the right category for digital platform workers, mostly end up advocating specific rights and obligations for them.[7]

This book suggests that acknowledging the particular organisational form of digital work platforms as market organisers may help build consistent social policies and equivalent labour rights for digital platform workers. Just like the employment category itself, the rights and obligations flowing from the category were developed for Fordist, hierarchical and vertically-integrated organisations. As such, they may not work well enough for digital platforms as market organisers or for virtual organisations without a material location or the physical co-presence of workers. This chapter will not develop a comprehensive legislative proposal, but rather discuss the principles according to which rights and obligations could be designed in order to effectively address market organisers and their power and domination over workers.

7.1. Policy Proposals: Examples and Frameworks

7.1.1. Overview

The many efforts to deconstruct and reconceptualise labour law undertaken by scholars, policymakers and legislators in recent years have had varying scopes and achieved different reach.[8] For example, grounded in its 'decent work' concept,[9] the ILO's 'World Employment and Social Outlook 2021'[10] advances a comprehensive framework for the regulation of digital platform work. It also compiles emerging regulatory responses to digital platform work, not only those promulgated

[7] See above ch 1, n 9/10.

[8] *cf* R Heeks, 'Decent Work and the Digital Gig Economy: A Developing Country Perspective on Employment Impacts and Standards in Online Outsourcing, Crowdwork, Etc' (2017) 16–22 for the different rationales for intervention (economic, legal, social, ethical).

[9] Institutionalised by the ILO Declaration on Social Justice for a Fair Globalization of 2008 and the ILO's Centenary Declaration for the Future of Work, 2019; Goal 8 of the UN Sustainable Development Goals (2030 Agenda for Sustainable Development of 2015).

[10] ILO, 'World Employment and Social Outlook: The Role of Digital Labour Platforms in Transforming the World of Work' (Geneva, 2021) 203; For a broad review and synthesis of existing proposals and standards, see also Heeks, 'Decent Work' (n 8) 23–28.

in national legislation, but also initiatives proposed by social partners and other non-state actors.[11] The Italian and French legislative examples have already been mentioned above,[12] which are limited to specific regulatory issues of transport and food-delivery platforms. Other legal systems, meanwhile, have started to at least ponder legislation by undertaking governmental reviews, such as the UK Taylor Review[13] or the German Labour Ministry's 'Weißbuch Arbeiten 4.0'.[14]

Policymakers and scholars have followed up on such initiatives with a range of regulatory ideas developed to varying degrees of detail. Notable contributions in this regard include Harris and Krueger's review for the US Hamilton project,[15] the proposal for a draft convention on platform work written by Sandra Fredman and Darcy du Toit,[16] and Martin Risak and Doris Lutz' draft of a crowdwork bill for Austria.[17] Interestingly, even more comprehensive reviews of labour laws in general have been proposed in response to the growing debate on how to regulate digital work platforms. For example, a review of French law has been suggested by a group of labour law scholars,[18] a review of Italian law by the trade union confederation CGIL,[19] and a review of UK law as part of the 'Status of Workers Bill' introduced in the House of Lords in May 2021.[20]

As for soft law initiatives, the World Economic Forum's 2020 Charter of Principles for Good Platform Work coincides with other social partner and multi-stakeholder initiatives in that it is geared towards generating a comprehensive catalogue of related rights and obligations. While the Charter is formulated in quite abstract terms, some initiatives address specific types of platforms, while others address digital work platforms in general. Most, however, leave aside the question of classification. The ILO 2021 Outlook mentions, inter alia, the Code of Conduct that was adopted in the Republic of Korea by its Economic, Social and Labour

[11] ILO, 'World Employment and Social Outlook' (n 10) 245.

[12] Ch 6, 6.5. See also the comprehensive analysis for France, by J-Y Frouin and J-B Barfety, *Reguler les plateformes numériques* (Report for the French Prime Minister, 2020).

[13] M Taylor, 'Good Work: The Taylor Review of Modern Working Practices' (England, 2017).

[14] Bundesministerium für Arbeit und Soziales (German Ministry of Labour and Social Affairs, BMAS), 'Weißbuch Arbeiten 4.0' (2016); *cf* BMAS, Eckpunkte 'Faire Arbeit in der Plattformökonomie' [2021] www.denkfabrik-bmas.de/fileadmin/Downloads/eckpunkte-faire-plattformarbeit_1_.pdf.

[15] SD Harris and AB Krueger, 'A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker"' (2015). Discussion Paper 10.

[16] Proposal for a Draft Convention on Platform Work (Sandra Fredman, Darcy du Toit), appendix in J Woodcock and M Graham, *The Gig Economy: A Critical Introduction* (Polity, 2020) 146.

[17] M Risak and D Lutz, 'Gute Arbeitsbedingungen in der Gig-Economy – was tun?' in M Risak and D Lutz (eds), *Arbeit in der Gig-Economy: Rechtsfragen neuer Arbeitsformen in Crowd und Cloud* (ÖGB-Verlag, 2017).

[18] E Dockès (ed), *Proposition de code du travail* (Dalloz, 2017) Arts L. 11–1 to L. 11–18; *cf* Frouin and Barfety, *Plateformes Numériques* (n 12).

[19] Confederazione Generale Italiana del Lavoro (CGIL, Italian General Confederation of Labour), Carta dei diritti universali del lavoro – Nuovo statuto di tutte le lavoratrici e di tutti I lavoratori (2016).

[20] 'A Bill to make provision for the creation of a single status for workers by amending the meaning of 'employee', 'worker', 'employer' and related expressions in the Trade Union and Labour Relations (Consolidation) Act 1992, the Employment Rights Act 1996 and cognate legislation; and for connected purposes', bills.parliament.uk/bills/2876.

Council, in cooperation with representatives of workers, platform companies and government,[21] but also the 2017 Code of Conduct for Crowdsourcing agreed upon by eight European crowdsourcing platforms, the German Crowdsourcing Association (Deutscher Crowdsourcing Verband) and the German trade union IG Metall, which came with the establishment of an Ombuds Office for the resolution of individual conflicts.[22] The Fairwork project's principles, explained above in chapter two, also belong in this context.[23]

7.1.2. Principles and Structures

All of these proposals cover a broad variety of standards, ranging from equality rights to social security, fair contracting, minimum pay, transparent algorithms, transferable reputation, working time regulation, dismissal protection, and – most importantly – collective representation.

The overview also confirms the observation that policy debates tend to treat the question of how to classify who counts as an employee and the matter of regulating specific rights and obligations for digital platform work as two separate issues. They achieve this by leaving aside the question of classification, and establishing rights for independent contractors, ie self-employed workers,[24] or assigning legal rights to all workers 'regardless', 'irrespective' or 'independently' of (classification) status.[25]

Such an approach is as understandable as it is unsatisfactory. If we want to align classification with the allocation of rights and obligations, proposals would have to be analysed according to the organisational model to which they react. As labour law is based on organisational positions and the specific power dynamics they entail, it makes sense to differentiate between those legal consequences that are specific to labour law, and other rights and obligations that have their basis elsewhere. The 2019 ILO Report 'Work for a Brighter Future' follows this approach in calling for universal labour guarantees and fundamental workers' rights, on one side, and 'a set of basic working conditions' (an adequate living wage, limits on hours of work, and safe and healthy workplaces), on the other.[26]

[21] ILO, 'World Employment and Social Outlook' (n 10) 246.

[22] crowdsourcing-code.com/; faircrowd.work/2017/11/08/ombudsstelle-fuer-crowdworking-plattformen-vereinbart/, based on the Frankfurt Declaration on Platform-Based Work [Dec 2016] faircrowd.work/unions-for-crowdworkers/frankfurt-declaration/.

[23] Ch 2, at n 2 ff; also ILO, 'World Employment and Social Outlook' (n 10) 247.

[24] Taylor, 'Good Work' (n 13) 75; M Weiss, 'The Platform Economy: The Main Challenges for Labour Law' in L Mella Méndez and A Villalba Sánchez (eds), *Regulating the Platform Economy: International Perspectives On New Forms Of Work* (Routledge, 2020) 15.

[25] ILO, 'World Employment and Social Outlook' (n 10) 203.

[26] ILO, 'Work for a Brighter Future: Global Commission on the Future of Work' (Geneva, 2019) 38–39; on fundamental rights with a 'universalistic vocation', see also N Countouris and V de Stefano, 'Executive Summary of the Report "New Trade Union Strategies for New Forms of Employment"' (2019) 10(3) *European Labour Law Journal* 183, 185.

This idea of universal rights for all workers can be traced back to the theoretical analyses reviewed in chapter four, in particular the embedment of labour law in human rights approaches.[27]

However, universal rights that are based on fundamental and human rights, or on respective norms, goals and values, differ from those 'universal' (contractual) guarantees that establish market mechanisms. They consider the worker as a citizen/citoyen, but not as a contractual partner and market player/bourgeois. However, as chapter two has shown, many policy proposals in the realm of digital platforms stem from the regulatory domains of contract and commercial law.[28] And this is not a coincidence: If digital work platforms function as market organisers, it makes sense to also address workers as economic players on these organised markets. This is what the YouTubers Union does when it asks for transparency and a human person to talk to if contractual issues have to be discussed. We are not only talking about universal social and human rights versus rights based on worker classification status; we must also consider those universal rights that protect workers in their capacity as contractual parties rather than in their capacity as humans.[29]

This chapter will therefore discuss possible rights for digital platform workers in three groups: (1) universal social and human rights; (2) contractual rights independent of classification status; and (3) labour rights. On this basis, section 7.5 takes its cue from digital law and addresses regulatory techniques and governance mechanisms, while section 7.6 asks what the law could do to enable workers' participation, collective action and collective organisation in relation to digital work platforms.

7.2. Independent of Classification Status: Universal Social Rights

7.2.1. Human Rights, Equality and Anti-discrimination Rights

There should not be a question as to the application of general human rights to all workers, independent of contractual status, especially rights to equality and

[27] Ch 4, 4.1.

[28] Ch 2, 2.3.1.

[29] R Dukes and W Streeck, 'From Industrial Citizenship to Private Ordering?: Contract, Status, and the Question of Consent' (Köln, 2020) 23; I Hensel, 'Die horizontale Regulierung des Crowdworking: Wer bestimmt die Regeln?' in I Hensel and others (eds), *Selbstständige Unselbstständigkeit: Crowdworking zwischen Autonomie und Kontrolle* (Nomos, 2019); M Linder, *The Employment Relationship in Anglo-American Law: A Historical Perspective* (Contributions in Legal Studies vol 54, Greenwood Press, 1989) 239 ff ('From Contract to Status to Universal Social Right').

protection against discrimination.[30] Protection against discrimination on digital platforms has particularly been an issue with regard to automatised decision-making and algorithmic management.[31]

To date, antidiscrimination regulations have often already covered at least access to independent contracting.[32] European Directives 2000/43/EC (Article 3), 2000/78/EC (Article 3), 2004/113/EC (Article 3), and 2006/54/EC (Article 1) are good examples of this.[33] Article 6 of Directive 2006/54/EC also contains provisions that include the self-employed within the scope of equal treatment in occupational social security schemes. However, both these European regulations as well as the respective US laws,[34] would have to be amended in order to become universal rights at work.

7.2.2. Social Security

A second group of rights usually put forward as universal social rights (ie, relevant for all workers regardless of contractual status) concerns 'access to social security protections … including unemployment insurance, disability insurance, health insurance, pension, maternity protection, and compensation in the event of

[30] Art 2 United Nations Universal Declaration of Human Rights of 1948; *cf* Art 47 quinquies of the Italian Disciplina organica dei contratti di lavoro (regulation of 2015/2019, Gazzetta Ufficiale, Serie generale no 144, 24 Jun 2015, as modified by Decreto-legge, 3 Sept 2019, n 101, Gazzetta Ufficiale, Serie generaleno 207, 4 Sept 2019) (ch 6, at nn 25/26 and 6.5); Harris and Krueger, *Proposal for Modernizing Labor Laws* (n 15) 17–18; Goldman and Weil, *Who's Responsible Here?* (n 5) 31–34; *Deutscher Gewerkschaftsbund* (German Trade Union Confederation, DGB), Position on Platform Work, March 2021; Proposal for a Draft Convention on Platform Work (Sandra Fredman, Darcy du Toit), appendix in Woodcock and Graham, *Gig Economy* (n 16) 146; the World Economic Forum's 2020 Charter of Principles for Good Platform Work frames issues of access under the heading 'diversity and inclusion'.

[31] See, eg, FZ Borgesius, 'Discrimination, Artificial Intelligence, and Algorithmic Decision-making' (Strasbourg, 2018). In this book, issues such as the access to technology and the internet, as such (R Smith and S Leberstein, 'Rights on Demand: Ensuring Workplace Standards and Worker Security in the On-demand Economy' (New York, 2015)) are being left aside.

[32] *cf* H Collins, 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws' (1990) 10 *Oxford Journal of Legal Studies* 353, 355.

[33] Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22, Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16, Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L 373/73, Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L 204/23.

[34] For the US Age Discrimination in Employment Act (ADEA), Title VII (of the Civil Rights Act of 1964), and the Americans with Disabilities Act (ADA): M Linder, 'Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness' (1999) 21 *Comparative Labor Law & Policy Journal* 187, 145.

work-related illness or injury'.[35] In the words of the ILO's Global Commission on the Future of Work:

> Social protection is a human right … [it] provides workers with freedom from fear and insecurity and helps them to participate in labour markets. … The future of work requires a strong and responsive social protection system based on the principles of solidarity and risk sharing, which provide support to meet people's needs over the life cycle.[36]

Universal social entitlements may also reduce workers' economic dependence on any single employer, or on employment generally.[37]

In a comparative view, social security systems are deeply embedded in national and historical institutional structures, and they display vast differences in their institutional and legal designs. Therefore, policy proposals in this field tend to get very specific. Basic differences lie in how closely social security systems are linked to employment and how balances are established between public and private systems, as well as mandatory and voluntary systems. Organisation and financing can therefore involve rather difficult political and economic issues.[38] In jurisdictions that correspond to the Beveridgean model, in which social security is financed from general revenues without requiring employer participation, universalisation may not even be an open question.[39] In jurisdictions that favour the Bismarckian social insurance model of social security, however, benefits are not universal but connected to employment status or similar, with financial contributions shared between employers and employees.[40] In addition, in some legal systems at least some social security rights (eg, maternity leave or sick leave) are constructed as labour law rights for which the employer is either solely or partially responsible.[41]

Against this backdrop, the inclusion of digital platform workers in social security schemes has often been part of general policies with regards to social security

[35] Frankfurt Declaration (n 22); Harris and Krueger, *Proposal for Modernizing Labor Laws* (n 15) 15–17.

[36] ILO, 'Work for a Brighter Future' (n 26) 35; ILO, 'World Employment and Social Outlook' (n 10) 203. *cf* Art 22 UN Universal Declaration of Human Rights of 1948 ('Everyone, as a member of society, has the right to social security'); ILO Social Security (Minimum Standards) Convention (No. 102) of 1952.

[37] C Estlund, 'What Should We Do After Work?: Automation and Employment Law' (2018) 128 *Yale Law Journal* 254–326.

[38] More on proposals for the sharing of financial responsibility for the social security of self-employed workers, see below 7.5.2.

[39] Linder, 'Dependent and Independent Contractors' (n 34) 223.

[40] HE Sigerist, 'From Bismarck to Beveridge: Developments and Trends in Social Security Legislation' (1999) 20(4) *Journal of Public Health Policy* 474.

[41] R Waltermann, 'Welche arbeits- und sozialrechtlichen Regelungen empfehlen sich im Hinblick auf die Zunahme Kleiner Selbstständigkeit?' [2010] *Recht der Arbeit* 162, 166 (referring to German Entgeltfortzahlungsgesetz (EFZG, Act on Continued Remuneration During Illness) and Mutterschutzgesetz (MuSchG, Maternity Protection Act).

for self-employed persons.[42] But policies specifically designed for platform work also exist.[43] India's Code on Social Security, 2020, for example, presents a comprehensive and broad solution by offering social security at least partly to 'unorganised workers, gig workers and platform workers'.[44]

7.2.3. Rights for Parents

Lastly, I would like to draw attention to an issue that has rarely been explicitly discussed under the umbrella of 'universal rights' for workers and may not be obvious, but does in fact belong here: parental rights.[45] Maternity rights, paternity leave, or rights and benefits for parents and carers touch on aspects of equality and non-discrimination,[46] but also involve funding social security for this specific social 'risk'. European rules governing maternity leave in Directive 2010/41/EU (on self-employed workers and assisting spouses) already explicitly cover self-employed women.[47]

This Directive also gives an idea of the organisational issues involved in constructing such entitlements as universal rights: In order to become effective, not only is the financing of benefits needed, but leave must be organised, which in the case of self-employed workers, may require arrangements for substitutes and replacements (Article 8(4) Directive 2010/41/EU).

7.3. Independent of Classification Status: Fair Contracts

> [I]f Uber is correct and their drivers are not employees, then they are very much akin to consumers in terms of their relative bargaining position.[48]

[42] For a comparative summary ibid, 166; see also the inclusion of self-employed workers in employment insurance by Part VII.1 of the Canadian Employment Insurance Act; New York Unemployment Insurance Appeal Board 12 July 2018, Appeal Board No. 596722 (Uber drivers covered).

[43] E Weber, 'Setting Out for Digital Social Security' (September 2018). Working Paper 34; E Weber, 'Digital Social Security: Outline of a Concept for the 21st Century' (May 2019). Working Paper Forschungsförderung 138; I Hensel, 'Soziale Sicherheit für Crowdworker_innen?' (2017) 66 *Sozialer Fortschritt* 897; Harris and Krueger, *Proposal for Modernizing Labor Laws* (n 15) 15–17; see also the (voluntary) inclusion of platform workers in work accident compensation by L 7342-2 *Code de Travail* (France).

[44] See s 2 (78) Code on Social Security, Gazette of India G-DL-E-29092020-222111.

[45] This seems to be the approach of the ILO, 'World Employment and Social Outlook' (n 10) 209; see Art 9 of CGIL's Carta dei diritti universali del lavoro (n 19).

[46] See also Arts 10-12 of the EU Work-Life-Balance Directive (Directive (EU) 2019/1158 of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, OJ L 188/79).

[47] Directive 2010/41/EU of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, OJ L 180/1; see, however, Art 2 Work-Life-Balance Directive 2019/1158 (n 46) (applying to 'all workers, men and women, who have an employment contract or employment relationship'); contrastingly, Goldman and Weil, 'Who's Responsible Here?' (n 5) 51–53 see parental rights as 'non-mandatory benefits'.

[48] Ontario Court of Appeal in *Heller v Uber Technologies Inc.* [2019] ONCA 1, para 71.

Labour law classification is not about choosing between legal regulation and no regulation. Regulation of work relationships does exist outside of labour law. As the main antipole to the employment relationship, the contract on independent services is primarily governed by civil law, based on the assumption of freedom of contract. And this does not mean it is free from regulation. An independent service contract would usually be governed, for example, by fair competition rules or the legal control of standard terms. Contract law and civil law should therefore be considered an important source of universal rights for persons in their functions as market actors.

The rules and rights that enable fair contracting have been repeatedly mentioned as an important issue for the regulation of digital platform work.[49] In this regard, they have partly been constructed in analogy to the rights of market actors in situations of power and/or information asymmetry (such as consumers).[50] The following subsections systematise contractual rights as general principles of fair contracting (7.3.1, 7.3.2) and contractual rights for users of digital platforms (7.3.3).

7.3.1. Principles of Lifetime Contracts

Transparency, accessibility and substantial fairness of terms and conditions are preconditions for fair contracts in digital platform work.[51] But what should be the standard for fairness? Where do we situate digital platform work in social contract law? By introducing the term 'social contract law', I would like to draw attention to a broader debate that looks at contracts in their social context.

Particularly relevant in this debate are the 'Principles of Life Time Contracts' elaborated by the International Social Contract Law Group (EuSoCo),[52] which

[49] Hensel, 'Horizontale Regulierung des Crowdworking' (n 29) 238 ff; B Fabo, J Karanovic and K Dukova, 'In Search of an Adequate European Policy Response to the Platform Economy' (2017) 23(2) *Transfer European Review of Labour and Research* 163, 171; *cf* ch 2, at n 2 ff on the Fairwork project's principle of 'fair contracts'; specific proposals are referenced below.

[50] For examples, see ch 2, 2.3.1; for a theoretical framework, see ch 4, 4.2.2.2 and 4.3.1.

[51] Ch 2, at n 2 ff on the Fairwork project's principle of 'fair contracts'; ILO, 'World Employment and Social Outlook' (n 10) 207; *cf* J Prassl and M Risak, 'The Legal Protection of Crowdworkers: Four Avenues for Workers' Rights in the Virtual Realm' in P Meil and V Kirov (eds), *Policy Implications of Virtual Work* (Springer International Publishing, 2017); Hensel, 'Horizontale Regulierung des Crowdworking' (n 29) 235 ff; W Däubler, *Digitalisierung und Arbeitsrecht: Internet, Arbeit 4.0 und Crowdwork*, 6th edn (Bund-Verlag, 2018) 477 ff; GN Diega and L Jacovella, 'Ubertrust: How Uber Represents Itself to Its Customers Through its Legal and Non-Legal Documents' (2016) 5(4) *Journal of Civil & Legal Sciences* 199; *cf* Fredman and Du Toit, 'One Small Step' (n 5) on the complicated legal representations of Uber's corporate structures in its terms and conditions; Art 47-ter (Forma contrattuale e informazioni) Italian Disciplina organica dei contratti di lavoro (n 30); World Economic Forum, Charter of Principles for Good Platform Work, 2020, Principle 2 ('safety and wellbeing').

[52] 'Principles of Life Time Contracts (en/fr/de/it/es)' in L Nogler, 'The Historical Contribution of Employment Law to General Civil Law: A Lost Dimension?' in L Nogler and U Reifner (eds), *Life Time Contracts: Social Long-term Contracts in Labour, Tenancy and Consumer Credit Law* (Den Haag, eleven international publishing, 2014), xvii ff and L Ratti (ed), *Embedding the Principles of Life Time*

systematise a regulatory model for contract law that is explicitly designed to respect social purposes of contracts. These principles depart from common principles of consumer, tenancy, and labour law,[53] and formulate a contrast to the 'liberal sales model of information' by focusing on contractual principles for 'social long-term relations providing goods, services, and opportunities for work and income-creation. They are essential for the self-realisation of individuals and their participation in society'[54] (so-called 'life time contracts'). Work relationships of any kind, including those on digital work platforms, fit this description, as they provide labour and subsistence for workers, and are constructed as long-term relations.[55]

7.3.1.1. Overview

The 'Principles of Life Time Contracts' offer an alternative model to private contract law. While contract law commonly assumes that legal protection is only needed in the event of power imbalances at the initial conclusion of a contract, the principles take into account that in any long-term, ongoing cooperation, power imbalances may arise as a consequence of organisation.[56] Here is what the principles establish:

- the protection of mutual trust, in particular protection against early termination and rules on transparency, accountability and social responsibility for termination in general;
- the safeguarding of the collective aspect of interests, including, inter alia, with mechanisms of collective representation;
- a ban on discrimination based on personal and social characteristics, and a right of access to goods, services and income opportunities;
- transparent, adequate and non-discriminating prices or wages;
- a right to adaptation of the contract in case of a change of social and/or economic circumstances;

Contracts: A Research Agenda for Contract Law (eleven international publishing 2018), 319 ff; see eg U Reifner, 'Principles of Life Time Contracts' in L Nogler and U Reifner (eds), *Life Time Contracts: Social Long-term Contracts in Labour, Tenancy and Consumer Credit Law* (Den Haag, eleven international publishing, 2014).

[53] Nogler, 'Historical Contribution' (n 52).

[54] Principle 1, ‚Principles' (n 52).

[55] J-A Defromont, 'Plateformes, Crowdsourcing, et Principes des Life Time Contracts' in L Ratti (ed), *Embedding the Principles of Life Time Contracts: A Research Agenda for Contract Law* (Den Haag, eleven international publishing, 2018), 242; on applying the principles to work relationships, see also E Brameshuber, 'Back to the Roots: Re-embedding Labour Law into Civil Law to Prevent Evasion of Labour Law' in L Ratti (ed), *Embedding the Principles of Life Time Contracts: A Research Agenda for Contract Law* (Den Haag, eleven international publishing, 2018) (who focuses on adaptation and 'securing livelihood' as well as employers' rights).

[56] Above ch 4, 4.3.1, at n 89 (this concerns lock-in dynamics, and organisational integration).

- the enabling of trust in cooperation and a personal cooperative dialogue between both parties on an equal basis; and
- information, transparency and confidentiality with regards to personal data.[57]

An interesting aspect of these principles is that they also acknowledge that lifetime contracts are embedded in a network of linked contracts.

7.3.1.2. In Particular: Protection against Unfair Termination

It seems worth highlighting that among the principles catalogued above is the protection against unfair termination of contracts. Rights in relation to the suspension or termination of contracts have been a contentious issue in demands for the regulation of digital work platforms. While some include it,[58] others hold that protection against dismissal should rather be considered part of a core of employment rights that cannot easily be significantly extended.[59]

Guy Davidov's analysis of the purposes of unjust dismissal laws sheds some light on why this might be so.[60] He posits that unjust dismissal laws can serve different purposes. First, they can provide security against arbitrary, opportunistic or otherwise 'unfair' dismissals. With this function, they are justified in order to prevent 'unnecessary injuries' to the social and psychological well-being of workers who depend on a particular relationship. This is the default 'just cause' rule that should be considered as implied in any long-term relationship, and this is what Principle 3 of the 'Principles of Life Time Contracts' is concerned with.[61]

The second possible function is rather specific to the organisational aspects of labour law, as ensuring a fair 'price' in return for the workers' integration into the organisation and their 'submission to a democratically deficient regime'[62] is a project particular to labour law. However, as far as digital platform workers also submit to the platform's organisation, it could be argued for them as well.[63]

[57] 'Principles' (n 52).

[58] For example Deutscher Juristentag (DJT, German Lawyers' Conference), Resolution I. 2.a), 2016; ILO, 'World Employment and Social Outlook' (n 10) 207; U Huws and others, 'Work in the European Gig Economy – Employment in the Era of Online Platforms: Research Results from the UK, Sweden, Germany, Austria, The Netherlands, Switzerland and Italy' (Brussels, 2017) 51.

[59] MR Freedland and N Kountouris, *The Legal Construction of Personal Work Relations* (Oxford University Press, 2011) 296; Collins, 'Independent Contractors and the Challenge of Vertical Disintegration' (n 32) 355.

[60] G Davidov, *A Purposive Approach to Labour Law* (Oxford University Press, 2016) 111.

[61] 'Principles' (n 52). See also Art 17 of Directive 86/653/EEC on the coordination of the laws of the Member States relating to self-employed commercial agents, OJ L382/17 which guarantees indemnity of compensation for damages in the event of termination; see also S Walzer, *Der arbeitsrechtliche Schutz der Crowdworker: Eine Untersuchung am Beispiel ausgewählter Plattformen* (Nomos, 2019) 240 ff who is only interested in the issue of due notice.

[62] Davidov, *Purposive Approach* (n 60) 98–112.

[63] More in detail on the extension of labour rights in a strict sense, below 7.4.

7.3.1.3. In Particular: Minimum Pay

A similar question arises in relation to Principle 9 of the 'Principles of Life Time Contracts' concerning remuneration.[64] Minimum wage legislation has been characterised by some actors as an employment right,[65] but by others as an issue relevant for all kinds of work, independently of contractual situation.[66] Here again, different purposes come together.[67] As far as minimum wages are regulated out of respect for human dignity, then regulated minimum pay should be considered a universal right.[68] As far as redistribution is concerned, minimum wage regulation should be part of social policies.[69]

Several examples exist of how minimum wage regulation could be organised for the self-employed.[70] In Poland, the Minimum Wage Act, as amended by the Act of 22 July 2016, extends provisions on minimum remuneration beyond employees to solo self-employed persons who perform contracts or provide services for undertakings. The Hugo Sinzheimer Institut für Arbeitsrecht has built on this example and proposed a similar rule for German law.[71]

'Decent income' or minimum wages have also played an important role in regulatory proposals for digital platform work.[72] The argument against regulating

[64] 'Principles' (n 52).

[65] ILO, 'World Employment and Social Outlook' (n 10) 209.

[66] Collins, 'Independent Contractors and the Challenge of Vertical Disintegration' (n 32) 355 (referring to low pay and deductions from pay).

[67] Davidov, *Purposive Approach* (n 60) 73–84.

[68] United Nations Universal Declaration of Human Rights of 1948, Art 23(3).

[69] H Eidenmüller, *Effizienz als Rechtsprinzip: Möglichkeiten und Grenzen der ökonomischen Analyse des Rechts*, 4th edn (Mohr Siebeck, 2015) 283 ff; 321.

[70] See also Art 6 Directive 86/653/EEC on the coordination of the laws of the Member States relating to self-employed commercial agents, OJ L382/17 (reasonable remuneration); however, fixed tariffs for the planning services of architects and engineers violate freedom of establishment, as regulated in Arts 15(1), (2)(g) and (3) of Directive 2006/123/EC of 12 December 2006 on services in the internal market, according to Case C-377/17 *European Commission v Federal Republic of Germany* [2019] ECLI:EU:C:2019:562, paras 90, 92; for minimum tariffs for engineer and architect fees: Case C-137/18 *hapeg dresden gmbh v Bayrische Straße 6-8 GmbH & Co. KG* [2020] ECLI:EU:C:2020:84.

[71] J Heuschmid and D Hlava, 'Entwurf eines Gesetzes über Mindestentgeltbedingungen für Selbstständige ohne Arbeitnehmer (Solo-Selbstständige)' (2018). Working Paper 2, referring to Ustawa z dnia 10 października 2002 r. o minimalnym wynagrodzeniu za pracę (Act of 10 October 2002 on the minimum wage); F Bayreuther, 'Entgeltsicherung Selbstständiger' [2017] *Neue Juristische Wochenschrift* 357; see also C Hießl, 'Comparative Analysis of Country-Level Experience' in B Waas and C Hießl (eds), *Collective Bargaining for Self-Employed Workers in Europe: Approaches to Reconcile Competition Law and Labour Rights* (Wolters Kluwer, 2021) 287, and reports on Italy (Gramano), the Netherlands (Laagland) and Poland (Mitrus) in the same book.

[72] Fairwork Principles above ch 2, at n 5; City of Bologna's Carta dei diritti fondamentali del lavoro digitale nel contest urbano (Charter of Fundamental Rights in Digital Work within an urban setting) of May 2018, concluded between the city mayor, Riders Union Bologna, trade unions CGIL, CISL and UIL, and the food delivery company 'Sgnam-MyMenu' which was later joined by 'Domino's Pizza Italia'; A Aloisi, 'Negotiating the Digital Transformation of Work: Non-Standard Workers' Voice, Collective Rights and Mobilisation Practices in the Platform Economy' (June 2019). EUI Working Paper Max Weber Programme; ILO, 'World Employment and Social Outlook' (n 10) 209; Frankfurt Declaration (n 22); Proposal for a Draft Convention on Platform Work (Sandra Fredman, Darcy du Toit), appendix in Woodcock and Graham, *Gig Economy* (n 16) 146; World Economic Forum, Charter

minimum pay on digital platforms put forward by Harris and Krueger[73] has been convincingly disproven, as it is in fact perfectly possible for platforms to trace working hours, even across platforms.[74]

For taxi services, in particular, different models for minimum payments have been proposed. Jeremias Prassl has suggested a 'surge price for gig work', which would entail raising prices in periods where little work is on offer, and would function as a form of compensation for precariousness and lack of stability of tasks.[75] This is more or less how the Minimum Payment Rule enacted by the New York City Taxi and Limousine Commission on 4 Dec 2018 works.[76] It established a pay of $17.22 per hour after expenses as the minimum rate, and adjusts the amount drivers are paid per mile and per minute to account for how much work they are getting each hour. As for food-delivery services, the Italian regulation of 2015/2019 now establishes payment by the hour instead of payment on the basis of the deliveries made, as the rule.[77]

7.3.1.4. Access to Justice

Universal access to justice, for example via grievance mechanisms and effective dispute-resolution mechanisms, including protection against retaliation, has become an important issue in human rights law[78] and has often been mentioned in relation to digital work platforms.[79] The demand is closely connected to the

of Principles for Good Platform Work, 2020, Principle 2 ('safety and wellbeing'); J Prassl, *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (Oxford University Press, 2018) 109 ff; Fredman and Du Toit, 'One Small Step' (n 5); M Finkin, 'Beclouded Work in Historical Perspective' (2016) 37(3) *Comparative Labor Law & Policy Journal* 603; Huws and others, 'Work in the European Gig Economy' (n 58) 51; Fabo, Karanovic and Dukova, 'Adequate European Policy Response' (n 49); Smith and Leberstein, 'Rights on Demand' (n 31).

[73] Harris and Krueger, 'Proposal for Modernizing Labor Laws' (n 15) 20.

[74] Prassl, *Humans as a Service* (n 72) 105–06; Cherry and Aloisi, 'Dependent Contractors' (n 6) 678; B Rogers, 'Employment Rights in the Platform Economy: Getting Back to Basics' (2016) 10 *Harvard Law & Policy Review* 479, 519 for Handy and TaskRabbit; on questions of working time, see below 7.4.2.

[75] Prassl, *Humans as a Service* (n 72) 105; 109, referring to Australia's casual loading system or the French indemnité de précarité (compensation for precarity).

[76] Maintained by the Supreme Court of the State of New York in *Lyft (Tri-City, LLC and Endor Car and Driver, LLC) v New York City Taxi and Limousine Commission, Meera Joshi*, Case 151037/2019, 1 May 2019; upheld by First Department, Appellate Division, 22 Dec 2020.

[77] Art 47-quater Italian Disciplina organica dei contratti di lavoro (n 30). (The rule of 2015 that granted the hourly remuneration if the worker accepted at least one call was revoked in 2019.)

[78] Ch 2, n 32 on the human rights approach to regulating digital platforms; on access to justice as a human rights issue *cf* UN Guiding Principles on Business and Human Rights, Section III Access to Remedy, Principles 25–30 (Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework', annex to the final report of JG Ruggie, Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (A/HRC/17/31), endorsed by the Human Rights Council in its resolution 17/4 of 16 June 2011.

[79] ILO, 'World Employment and Social Outlook' (n 10) 207; Goldman and Weil, 'Who's Responsible Here?' (n 5) 34–36; for digital platforms in general, see Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services [2019] OJ L 186/57 (P2B-Regulation), Arts 11–16.

concern that the use of algorithms and the platform's lack of local presence contribute to putting workers at a disadvantage when it comes to enforcement.[80] In the YouTube conflict,[81] having direct means of communication at one's disposal was one of the most prominent demands put forward by the workers.[82]

Access to justice is also why arbitration clauses constitute a legal problem. For instance, Uber's arbitration clause requiring that Canadian drivers settle disputes through an arbitration process based in Amsterdam was declared invalid by the Ontario Court of Appeal.[83] This decision got to the heart of the matter by pointing out that employee status was not decisive regarding the application of arbitration clauses. While arbitration clauses may not be used with employees,[84] neither can they be used in any other situation of inequality of bargaining power and unfairness. In this respect, the Ontario Court of Appeal held Uber drivers as being in a situation comparable to that of a consumer.[85]

7.3.2. Control of Unfair Terms as a Regulatory Method

As a default option for the regulation of independent contracting, legal control of the contractual terms and conditions is hardly controversial in relation to digital work platforms,[86] which frequently use 'boilerplate terms-of-use agreement[s] not open to negotiation'.[87] In general, the control of unfair terms is designed to prevent the abuse of dominant positions by the party formulating the terms and conditions. It is the default method for implementing universal contractual rights and the 'Principles of Life Time Contracts'.

[80] WP de Groen and others, 'Employment and Working Conditions of Selected Types of Platform Work' (Luxembourg, 2018) 35.

[81] Above at n 1.

[82] *cf* Huws and others, 'Work in the European Gig Economy' (n 58) 51 (including emergency hotlines).

[83] *Heller v Uber Technologies Inc* [2019] ONCA 1, upheld by the Supreme Court of Canada in *Uber Technologies Inc v Heller* [2020] SCC 16. A parallel US case, however, was decided differently, with the courts refraining from material control of terms and focusing only notice and assent to the Terms of Service (*Meyer v UberTechs. Inc* [2017] Case 16-2750 (US Court of Appeals for the 2nd circuit), following *Meyer v Kalanick* [2018] Case 1:15-cv-09796-JSR (US District Court, Southern District of New York), 291 F.Supp.3d 526).

[84] According to s 5(1) Ontario Employment Standards Act (ESA) which prohibits contracting out.

[85] Fredman and Du Toit, 'One Small Step' (n 5) 275–76. For arbitration agreements concluded with consumers, see also Art 19 Brussels Regulation (Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (Recast Brussels Regulation), OJ L 351/1).

[86] European Parliament, Resolution of 19 Jan 2017 on a European Pillar of Social Rights (2016/2095(INI)) No. 5b); Fairwork Principles above ch 2, at n 5; Prassl and Risak, 'Legal Protection' (n 51); Däubler, *Digitalisierung und Arbeitsrecht* (n 51); Hensel, 'Horizontale Regulierung des Crowdworking' (n 29) 217 ff; W Däubler and T Klebe, 'Die neue Form der Arbeit – Arbeitgeber auf der Flucht?' [2015] *Neue Zeitschrift für Arbeitsrecht* 1032, 1037–38; Walzer, *Crowdworker* (n 61) 105 ff; DGB, Position on Platform Work, March 2021 (n 30).

[87] JE Cohen, 'Law for the Platform Economy' (2017) 51 *University of California Davis Law Review* 133, 154.

7.3.3. Rights for Digital Platform Users

The preceding section (7.2) analysed the applicability of a universal rights approach to contract law on digital platform work. This section (7.3) is concerned with contractual rights that enable the economic activity of workers on organised markets.

Most of the rights put forward in this respect are akin to what is being discussed for other groups of digital platform users, for example consumers or smaller businesses.[88] These rights have been formulated as contractual rights that address the market power of platforms as well as the effects of digital management by algorithms, the collection of big data, and the use of reputational feedback systems. Some rights that have been elaborated in the digital law domain[89] are also being discussed specifically for digital platform workers, including rights to:

- transparency and information,[90] in particular in relation to work and tasks offered,[91] in order to help workers 'to avoid wasting time on unpromising tasks';[92]
- the protection of privacy and access to data;[93]
- fair and non-discriminating algorithms, in particular in relation to ranking and rating systems;[94] the right to challenge customer ratings;[95] restrictions with regard to termination of contract or downgrading in rankings;[96] and

[88] See scope of application of the P2B-Regulation (EU) 2019/1150 (n 79) Art 1(1) and (2) (*cf* ch 2, at n 40).

[89] Ch 2, 2.3.

[90] City of Bologna's Charter (n 72); Art. 47-ter Italian Disciplina organica dei contratti di lavoro (n 30).

[91] DGB, Position on Platform Work, March 2021 (n 30).

[92] Groen and others, 'Employment and Working Conditions' (n 80) 35.

[93] Proposal for a Draft Convention on Platform Work (Sandra Fredman, Darcy du Toit), appendix in Woodcock and Graham, *Gig Economy* (n 16) 146; ILO, 'World Employment and Social Outlook' (n 10) 207; DGB, Position on Platform Work, March 2021 (n 30); City of Bologna's Charter (n 72); Huws and others, 'Work in the European Gig Economy' (n 58) 51; World Economic Forum, Charter of Principles for Good Platform Work, 2020, Principle 7 ('data management'); for digital platforms in general: C Busch, 'European Model Rules for Online Intermediary Platforms' in U Blaurock, M Schmidt-Kessel and K Erler (eds), *Plattformen – Geschäftsmodelle und Verträge* (Nomos, 2018); JE Cohen, *Between Truth and Power: The Legal Constructions of Informational Capitalism* (Oxford University Press, 2019); Smith and Leberstein, 'Rights on Demand' (n 31); *cf* European Council, Recommendation CM/Rec(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries; for digital platforms in general, see Art 9 P2B-Regulation (EU) 2019/1150 (n 79).

[94] Fredman and Du Toit, 'One Small Step' (n 5): non-discrimination and equality; Finkin, 'Beclouded Work' (n 72); Frankfurt Declaration (n 22); DGB, Position on Platform Work, March 2021 (n 30); *cf* European Council, Recommendation CM/Rec(2018)2 (n 93); Fairwork Principles above ch 2, at n 5; see also ch 2, 2.4., at n 43.

[95] Huws and others, 'Work in the European Gig Economy' (n 58) 51.

[96] Art 4 P2B-Regulation (EU) 2019/1150; C Busch, 'Mehr Fairness und Transparenz in der Plattformökonomie? Die neue P2B-Verordnung im Überblick' [2019] *Gewerblicher Rechtsschutz und Urheberrecht* 788.

- inter-platform portability of reputational data,[97] in order to enable workers to be active on multiple platforms.

Such rights are designed to enable a certain minimum level of 'entrepreneurial' or economic action for workers rather than to protect them from the organisational power with which the platforms are invested.

7.4. Labour Rights for Non-Employees

From a labour law perspective, the most interesting questions concern the application of employment rights in the strict sense. The 2019 ILO 'Work for a Brighter Future' report drew a clear distinction between 'fundamental workers' rights', on one hand, and 'a set of basic working conditions' ('adequate living wage', 'limits on hours of work', and 'safe and healthy workplaces'), on the other.[98] The analysis above has shown that minimum wages/minimum pay could also be argued as constituting a universal right. However, the goal of an adequate living wage, as indicated by the ILO, should rather be considered an issue of social policy.[99] Health and safety at work and limits on hours of work are the issues in the ILO's set of basic working conditions that are most intimately connected to the organisational power of employers. For digital work platforms, these rights could be harder to configure than for hierarchical organisations.

This section summarises proposals for extending these specific employment rights to workers on digital platforms, before the following section discusses how accountability for such rights on digital work platforms could be organised.

7.4.1. Health and Safety at Work

The application of health and safety protections for digital platform workers, independently of their employment status, is a recurrent issue in the debate on how to regulate digital work platforms.[100] The demand for such protections is supported

[97] DGB, Position on Platform Work, March 2021 (n 30) (also demanding an equivalent to employers' job references); *cf* European Council, Recommendation CM/Rec(2018)2 (n 93); Cohen, *Between Truth and Power* (n 93); Busch, 'European Model Rules' (n 93); Walzer, *Crowdworker* (n 61) 240 ff; *cf* Don't Gig Up, Policy Recommendations, 8 Jan 2020 on procedural rights (for more information on the Don't Gig Up-project see below n 194).

[98] ILO, 'Work for a Brighter Future' (n 26) 38–39; 129; Woodcock and Graham, *Gig Economy* (n 16); *cf* Goldman and Weil, 'Who's Responsible Here?' (n 5) 36–38 who consider 'access to a safe working environment' to belong to 'all workers' (but propose a specific governance mechanism).

[99] Above 7.3.1.3.

[100] Fairwork Principles above ch 2, at n 5; Proposal for a Draft Convention on Platform Work (Sandra Fredman, Darcy du Toit), appendix in Woodcock and Graham, *Gig Economy* (n 16) 146; ILO, 'World Employment and Social Outlook' (n 10) 203; DJT (German Lawyers' Conference), Resolution I. 2.a),

by existing European rules, such as Article 3(1) of the European Social Charter (Revised), which has been understood by the European Committee of Social Rights as covering 'all workers, including self-employed workers'.[101] Nevertheless, there are only a few examples in EU and national laws that extend binding rules on health and safety to self-employed workers:

- According to the European Court of Justice (ECJ), European Directive 90/270/EC on the minimum safety and health requirements for work with display screen equipment[102] concerns 'all "workstations" irrespective of whether they are used by workers within the meaning of the Directive'.[103]
- European Directive 2002/15/EC on the organisation of the working time of persons performing mobile road transport activities also applies to self-employed drivers.[104]
- In German law, minimum health and safety protections are ensured by the general duty of care outlined in section 618 of the Bürgerliches Gesetzbuch (BGB, Civil Code), which applies to service contracts if the contractor has to enter the premises of the customer to perform the task.[105]

Meanwhile, a 2003 European Recommendation that explicitly sought to improve the protection of health and safety at work for self-employed workers[106] only suggested access to information, awareness-raising campaigns and training, as opposed to binding rules. Hence, some work remains to be done here.

2016; Harris and Krueger, 'Proposal for Modernizing Labor Laws' (n 15) 10; Frankfurt Declaration (n 22); Fredman and Du Toit, 'One Small Step' (n 5); Huws and others, 'Work in the European Gig Economy' (n 58) 51; World Economic Forum, Charter of Principles for Good Platform Work, 2020, Principle 2 ('safety and wellbeing').

[101] The situation in Germany, for example, has been held not to be in conformity with the rules on the ground that certain categories of self-employed workers are not sufficiently covered by the occupational health and safety regulations (European Committee of Social Rights, Conclusions XX-2 (2013), 7); ILO, 'World Employment and Social Outlook' (n 10) 209; see M Freedland and N Kountouris, 'Some Reflections on the 'Personal Scope' of Collective Labour Law' (2017) 46(1) *Industrial Law Journal* 52, 66–67; for the general demand *cf* Collins, 'Independent Contractors and the Challenge of Vertical Disintegration' (n 32) 355.

[102] Directive 90/270/EEC of 29 May 1990 on the minimum safety and health requirements for work with display screen equipment [1990] OJ L 156/14, Art 2(1). This is just an example of the health risks associated with cognitive work (overlooked by Finkin, 'Beclouded Work' (n 72)).

[103] Joined Cases C-74/95 and C-129/95 *Criminal proceedings against X* [1996] ECLI:EU:C:1996:491, para 39.

[104] Directive 2002/15/EC of 11 March 2002 on the organisation of the working time of persons performing mobile road transport activities [2002] OJ L 80/35 (this provision is effective since 23 March 2009).

[105] Bundesgerichtshof (BGH, German Federal Civil Court), BGH 5 Febr 1952, Case GSZ 4/51, BGHZ 5, 62; for a similar rule in US law, see MH Rubinstein, 'Employees, Employers, and Quasi-Employers: An Analysis of Employees and Employers Who Operate in the Borderland Between an Employer-and-Employee Relationship' (2012) 14(3) *University of Pennsylvania Journal of Business Law* 605, 639.

[106] Council Recommendation of 18 February 2003, concerning the improvement of the protection of the health and safety at work of self-employed workers, OJ L 53/45.

7.4.2. Working Time

Working time is another issue the ILO views as closely tied to employment classification,[107] while at the same time acknowledging that placing limits on hours of work is an important health and safety issue that should be accessible to all workers.[108] Digital platform workers have repeatedly demanded working time regulation,[109] including compensation for overtime and holidays.[110] On some platforms, a right to disconnect from the app might even be necessary. Yet, there are some uncertainties as to how such regulations could be applied.

Digital platform workers are usually able to work when they decide to. The amount as well as the start and end of working times in digital platform work are highly driven by the social dynamics in the workers' sphere, not only by the platform's business necessities (which only exert indirect, albeit strong, influence). But such high flexibility and lack of long-term planning are not unique to digital platform work. Other forms of on-demand work display similar characteristics. Hence, the contention that platforms are unable to measure or document working time may be as wrong as it is in relation to other types of work on demand.[111]

Regarding some situations on digital platforms, there may be additional questions as to the attribution of working time to the platform. Harris and Krueger posed this question, for example, with regard to workers who are active on several platforms intermittently.[112] Their doubts regarding the accurate tracking of work time in such situations have largely been disproven, however, as platforms usually gather the data necessary for measuring working time in the course of their business of assigning and receiving tasks.[113] As far as the application of European Union working time law is concerned,[114] platforms are even required to gather such data, since the ECJ holds that 'Member States must require employers to set up an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured'.[115]

[107] ILO, 'World Employment and Social Outlook' (n 10) 209.

[108] ibid, 209. Formulated as a human right in Art 24 UN Universal Declaration of Human Rights of 1948; see also Art 158 TFEU.

[109] Prassl, *Humans as a Service* (n 72) 105–06; Cherry and Aloisi, 'Dependent Contractors' (n 6) 678; Rogers, 'Employment Rights' (n 74) 516; 519.

[110] City of Bologna's Charter (n 72); DJT (German Lawyers' Conference), Resolution I. 2.a), 2016; Frankfurt Declaration (n 22); Fredman and Du Toit, 'One Small Step' (n 5).

[111] See references above n 74.

[112] Harris and Krueger, 'Proposal for Modernizing Labor Laws' (n 15) 10, 13; *Canadian Union of Postal Workers v Foodora Inc* [2020] OLRB Case No. 1346-19-R, para 107 ('dual-apping').

[113] Prassl, *Humans as a Service* (n 72) 105–06 (he remarks that Alan Krueger himself had co-authored a paper on the Uber driver labour market, with detailed statistics of working hours and average hourly wages); Cherry and Aloisi, 'Dependent Contractors' (n 6) 678; Rogers, 'Employment Rights' (n 74) 516; 519; on the possible consequences for minimum pay regulations, see above at n 74.

[114] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [1988] OJ L 299/9; Art 31(2) Charter of Fundamental Rights of the European Union (2007/C 303/01), OJ C 303/1.

[115] Case C-55/18 *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE* [2019] ECLI:EU:C:2019:402, para 60.

In German law, the attribution of working time includes an additional element in that, in relation to overtime, the German labour courts also examine whether the work was ordered by the employer. For digital platform work, an order can be implied by the assignment of tasks.[116] Hence, measuring this should not constitute a problem on most digital work platforms.

Another issue concerns the calculation of waiting and stand-by time as working time. In general, according to EU law, stand-by time is working time.[117] In this respect, however, constellations on digital platforms display great differences. In the case of taxi drivers or food-delivery riders, waiting time between assignments may at least be partly attributable to platforms – even more than one platform at a time.[118] But what about, for example, crowdworking platforms on which 'waiting' rather consists of browsing for tasks that are only 'assigned' after the worker finds them? In these cases, waiting time may have to be framed as 'searching time'. A Eurofound study addressed this as an issue of income rather than working time and proposed 'that the unavailability of tasks be addressed by insurance for workers who are actually looking for longer-term work and not just for one-off tasks.'[119] The standards the ECJ developed in 2021 for the consideration of stand-by time as working time may complicate these matters further, as they link working time to 'constraints' on the use of time, thereby only taking into account constraints that are 'imposed' on the worker, in contrast to 'consequence[s] of natural factors or of his or her own free choice'.[120]

Lastly, working time is not only relevant as a health and safety issue, but also as an issue of remuneration, where the delimitations of what constitutes working time may be drawn slightly differently.[121] All in all, many policy issues are involved in regulating working time for digital platform workers.

7.4.3. Other Work-Related Risks

In addition to health and safety at work, labour rights relating to risks associated with work as such, cover aspects of professional development. Elements of a right to work that would therefore have to be adapted to digital platform workers

[116] Bundesarbeitsgericht (BAG, German Federal Labour Court) BAG 10 Apr 2013, Case 5 AZR 122/12, NZA 2013, 1100, para 17.

[117] Settled case law, based on Case C-303/98 *Sindicato de Médicos de Asistencia Pública (Simap) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana* [2000] ECLI:EU:C:2000:528; most recent decisions on delimitations of working time: Case C-518/15 *Ville de Nivelles v Rudy Matzak* [2018] ECLI:EU:C:2018:82; Case C-580/19 *RJ v Stadt Offenbach am Main* [2021] ECLI:EU:C:2021:183; Case C-344/19 *D. J. v Radiotelevizija Slovenija* [2021] ECLI:EU:C:2021:182.

[118] Labour Court, Ireland, Request for a preliminary ruling, Case C-214/20 *MG v Dublin City Council*, asking if a worker who is employed by a second employer while 'on call' for a first employer, accrues working time in relation to the first and second employer contemporaneously.

[119] Groen and others, 'Employment and Working Conditions' (n 80) 35; see also Fabo, Karanovic and Dukova, 'Adequate European Policy Response' (n 49) 172.

[120] Case C-344/19 *D. J. v Radiotelevizija Slovenija* [2021] ECLI:EU:C:2021:182, paras 39–40.

[121] See above at n 74.

include job mobility and freedom of movement,[122] but also vocational education and the validation of acquired experience.[123]

And then there are some issues relating to specific kinds of work. For example, conflicts with food-delivery riders have recurringly concerned compensation for bad weather, night work and bicycle maintenance.[124]

7.4.4. Regulating the Organising of Labour Markets

Differentiating between 'universal rights' and 'fair contracts' for workers on digital platforms can easily be justified by their different sources of legitimisation: general social and human rights, on one side, versus enabling competent action on private markets, on the other side. These different rights are situated in different regulatory frameworks – social policy versus contract law and digital law – and belong to different regulatory domains – human rights and social policy versus contract law, consumer law, and digital law. As a result, they relate to different paradigms and institutional systems, and they enable different actors and procedures (eg, for enforcement).

But what makes the set of basic working conditions identified by the ILO and other labour rights (as elaborated in this subsection) specifically work-related? Why do we need a particular labour law framework for working time and bad weather compensation, apart from universal and contractual rights? This is where we come to the core reason for proposing a new category of work relationship for digital work platforms. In order to establish universal rights for workers, independently of their status, categories are not relevant. Contractual rights also apply to any kind of work relationship, independently of status. Yet, the labour rights covered above in this section are the main reason why we might need a separate category in the first place, because regulation is not only about establishing rights. It is also about assigning accountability and legal responsibilities – and this is where the organisational form of employers and platforms must be taken into account. Accountability for rights under labour law should be assigned to the company that can actually and effectively act on them – and it should be assigned to the

[122] ILO, 'World Employment and Social Outlook' (n 10) 207; see Art 2 and Art 17 of CGIL, Carta dei diritti universali del lavoro (n 19); on the context of the right to work, *cf* M Körner, 'Das Internationale Menschenrecht auf Arbeit: Völkerrechtliche Anforderungen an Deutschland' (Berlin, 2004).

[123] Art L. 7342-3 Code du Travail (Labour Code, France); World Economic Forum, Charter of Principles for Good Platform Work, 2020, Principle 6 ('learning and development'); AJ Ravenelle, 'Just a Gig?: Sharing Economy Work and the Implications for Career Trajectory' in D Das Acevedo (ed), *Beyond the Algorithm: Qualitative Insights for Gig Work Regulation* (Cambridge University Press, 2021).

[124] Art 47-quater (3) Italian Disciplina organica dei contratti di lavoro (n 30) ('a supplementary allowance of not less than 10 per cent for work at night, on public holidays or in adverse weather conditions'); City of Bologna's Charter (n 72); ILO, 'World Employment and Social Outlook' (n 10) 246–47. See also Bundesarbeitsgericht, 10 Nov 2021, Case 5 AZR 334/21, ordering the food-delivery platform Lieferando to provide its employees with bikes and smartphones.

degree that it reflects the specific power imbalance present in the work relationship between platform and worker, ie the organisation of digital platform work.[125]

The characteristics of the regulatory domain of labour law make it necessary to discuss labour rights separately from universal rights and contractual rights. And this is where issues of organisation come into play, and the specific features of market organisers have to be considered: Prevailing labour rights and obligations were developed in a Fordist economic and organisational context. Against this backdrop, digital platform work environments, with mostly indirect mechanisms of control and often without the physical co-presence of workers, pose problems for implementing labour law rights. These rights often reflect back what has been taken for granted in labour law regulation without being mentioned expressly in classification exercises. It is no coincidence then that these rights are also the issues that even those who have strongly argued against new labour law categories could not avoid proposing independent regulatory approaches for, 'even if [they] were of a different nature to that governing employment relationships'.[126]

The following section shows how lessons from the regulatory domain of digital law can contribute to the debate on regulating digital work platforms. Since their emergence, debates on how to regulate digital platforms in general have been concerned with organising accountability and legal responsibility in a manner that adequately addresses their specific functions as market organisers. Hence, the next section explores what labour law can learn from these debates and experiences to date.

7.5. Making Market Organisers Accountable for Labour Rights

The preceding sections have left some loose threads. These threads relate to rights that have been specifically designed for employment relationships and the question of how their implementation and enforcement may need to be reconsidered in the context of digital work platforms. Concerns with such rights include, for example, the practical organisation of parental leave,[127] or protection from dismissal (beyond establishing fairness, ie ensuring a fair 'price' in return for the workers' integration into the organisation).[128] Other concerns include attributing responsibility for working time to the employer and calculating remuneration based on working time,[129] as well as how to organise accountability for health and safety, ie for the quality and conditions of the workplace, if the material workplace is not

[125] *cf* Bundesverfassungsgericht (BVerfG, German Federal Constitutional Court), 8 Apr 1987, Case 2 BvR 909/82 et al, BVerfGE 75, 108, 146–47.

[126] ILO, 'World Employment and Social Outlook' (n 10) 209, with a view to the approach defended by Goldman and Weil, 'Who's Responsible Here?' (n 5) 36–38.

[127] Above 7.2.3.

[128] Above 7.3.1.2.

[129] Above 7.4.2 and 7.3.1.3.

provided by the platform.[130] Similar concerns exist around ensuring 'equity in the use of management instruments'[131] and with regard to the promotion of 'personality in work' and measuring capabilities (or just employability) in an environment without fixed positions and career options.[132]

Some of the problems in implementing these rights on digital work platforms can be traced back to rather obvious features of employers that digital work platforms mostly lack. For example, digital work platforms tend to lack hierarchical and directional powers. How should compliance and the implementation of legal rules be organised in a partial organisation that relies on indirect mechanisms of control? After all, the ultimate aim of these indirect mechanisms is that they lead to an organised sharing of power and control between the platform and its users – with the platform defining the rules and controlling access: 'The intermediary keeps fragments of managerial control, which must, therefore, be coordinated with those of the final user.'[133]

A second issue has to do with the virtual character of digital work platforms, as many labour law rules implicitly assume that there is a physical workplace organised by the employer.[134] On digital work platforms, however, workers mostly create and shape their physical workplaces by themselves (eg, crowdworking), or they work in public spaces (eg, delivery and transport) or in various homes or spaces of third parties (eg, domestic work platforms).

These and other features of digital work platforms enable (deceptive) feelings of greater self-determination for workers and, at the same time, tend to exonerate platforms from accountability.[135] The following subsections look at regulatory models that address the triangular character of digital work platforms and the indirect forms of management and control they use.

7.5.1. Organising Accountability with the Help of Indirect Control

7.5.1.1. Triangularity: Labour Law Analogies

The triangular character of digital work platforms has given rise to regulatory ideas based on analogies in labour law and civil law (contract or tort law).[136]

[130] cf above 7.4.1.
[131] Fairwork Principles above ch 2, at n 5.
[132] Above 7.4.3.
[133] L Ratti, 'Online Platforms and Crowdwork in Europe: A Two-step Approach to Expanding Agency Work Provisions?' (2017) 38 *Comparative Labor Law & Policy Journal* 477, 492 ff.
[134] A Felstiner, 'Working The Crowd: Employment And Labor Law In The Crowdsourcing Industry' (2011) 32 *Berkeley Journal of Employment and Labor Law* 143, 178–79.
[135] On the role of space in platform work: E Sauerborn, 'Digitale Arbeits- und Organisationsräume. Räumliche Dimensionen digitaler Arbeit am Beispiel Crowdworking' [forthcoming] 28(3), *ARBEIT. Zeitschrift für Arbeitsforschung, Arbeitsgestaltung und Arbeitspolitik*, 241–62.
[136] For an overview on labour law rules for triangular work relationships, see ch 3, 3.1.2; triangularity is the main gist of the proposal of Frouin and Barfety, *Plateformes Numériques* (n 12) 43–44.

- Temporary Agency Work

EU regulation for temporary agency work has often been mentioned as a possible model for regulating digital work platforms,[137] starting with the application of EU Directive 2008/104.[138]

However, the regulation of temporary agency work in the EU has not been primarily concerned with the function of market organisers, but rather with the problems that arise when external organisations (the agencies) provide workers for user companies. It addresses the risk of employer responsibilities being outsourced to temporary work agencies,[139] by stipulating equal treatment of agency workers with core workers at the user company, and by partly establishing direct accountability of the user company. The focus of such regulation is on the user company instead of the agency and is therefore of marginal interest at best for thinking about how to hold digital work platforms accountable.[140]

- Homework

For crowdworking, analogies to homework have been widely used.[141] In German law, the determination of micro-crowdworkers as homeworkers has won quite a significant number of followers.[142] This approach makes sense for a variety of reasons. First, homework regulation – apparently the oldest regulatory model for

[137] D Biegoń, W Kowalsky and J Schuster, 'Schöne neue Arbeitswelt?: Wie eine Antwort der EU auf die Plattformökonomie aussehen könnte' (Berlin, 2017) 9–10; Prassl and Risak, 'Legal Protection' (n 51); Ratti, 'Online Platforms' (n 133) 497; *cf* N van Doorn, 'Platform Labor: On the Gendered and Racialized Exploitation of Low-income Service Work in the 'On-demand' Economy' (2017) 20(6) *Information, Communication & Society* 898.

[138] Directive 2008/104/EC of 19 November 2008 on temporary agency work [2008] OJ L 327/9; Ratti, 'Online Platforms' (n 133) 500 ff, 507. See also the models mentioned in J-Y Frouin and J-B Barfety, *Reguler les plateformes numériques* (Report for the French Prime Minister, 2020) 37.

[139] See the reservation made by Prassl and Risak, 'Legal Protection' (n 51) who posit that these rules only work in cases where crowdwork competes directly with offline employment.

[140] See, however, Don't Gig Up (n 97) 4 for application of Art 4 of Directive 2008/104/EC on temporary agency work (for registration, certification, or monitoring of platforms).

[141] R Krause, 'Digitalisierung der Arbeitswelt – Herausforderungen und Regelungsbedarf: Gutachten B' in Deutscher Juristentag (Ständige Deputation) (ed), *Verhandlungen des 71. Deutschen Juristentags Essen 2016* (CH Beck, 2016); BMAS, Weißbuch Arbeiten 4.0 (n 14) 175; WB Liebman and A Lyubarsky, 'Crowdworkers, the Law and the Future of Work: The U.S.' in B Waas and others (eds), *Crowdwork: A Comparative Law Perspective* (Frankfurt a. M. Bund-Verlag, 2017) 129 ff; Prassl, *Humans as a Service* (n 72) 74 ff; Finkin, 'Beclouded Work' (n 72).

[142] R Giesen and J Kersten, *Arbeit 4.0: Arbeitsbeziehungen und Arbeitsrecht in der digitalen Welt* (CH Beck, 2017) 110 ff; E Kocher, 'Crowdworking: Ein neuer Typus von Beschäftigungsverhältnissen?: Eine Rekonstruktion der Grenzen des Arbeitsrechts zwischen Markt und Organisation' in I Hensel and others (eds), *Selbstständige Unselbstständigkeit: Crowdworking zwischen Autonomie und Kontrolle* (Nomos, 2019); U Preis, 'Heimarbeit, Home-Office, Global-Office: Das alte Heimarbeitsrecht als neuer Leitstern für die digitale Arbeitswelt?' [2017] *Soziales Recht* 173, 173; R Waltermann, 'Digital statt analog: Zur Zukunftsfähigkeit des Arbeitsrechts' [2019] *Recht der Arbeit* 94, 98; B Waas, 'Crowdwork in Germany' in B Waas and others (eds), *Crowdwork: A Comparative Law Perspective* (Frankfurt a. M. Bund-Verlag, 2017) 177 ff; W Brose, 'Von Bismarck zu Crowdwork: Über die Reichweite der Sozialversicherungspflicht in der digitalen Arbeitswelt' [2017] *Neue Zeitschrift für Sozialrecht* 7, 14.

triangular work relationships[143] – acknowledges the active role of intermediators and, accordingly, outlines certain rights and obligations for which they are held accountable.[144]

Yet, homework regulations are still usually less comprehensive than one would wish for digital platform work. Moreover, the rules differ significantly between jurisdictions and have not been known to be very effective.[145] Most importantly, homework regulations fail to effectively address the most pertinent problems of digital platform work: indirect control and the lack of a physical workspace.

- Employment Agencies

Digital work platforms have also frequently been compared with placement or recruitment agencies, such as those regulated by the ILO Private Employment Agencies Convention No. 181 of 1997.[146] Regulations for these agencies do address some issues related to market organising functions, such as transparency, fairness, and non-discrimination, as well as, notably, a 'free-of-charge principle' for the mediation of labour activities.[147]

However, such private employment agencies are similar to temporary work agencies in that they mainly cater to user companies' interests in finding workers (or to workers' interests in finding work). They are not active at all in the organisation of the services performed by the workers. Moreover, the respective regulations are not at all designed to protect workers in relation to risks at work, but are instead geared towards ensuring fair play in intermediation.[148]

- Indirect Employers: Upstreaming Regulation

Apart from and beyond these specific regulations, general civil law rules have been developed in contract and tort law that envision holding companies accountable in relation to the 'fissuring' of organisations.[149] A variety of terms and legal concepts have been used for dividing employers' functions and responsibilities among more than one company, such as 'joint employer', 'indirect employer' or 'co-employer'.[150]

[143] *cf* Collins, 'Independent Contractors and the Challenge of Vertical Disintegration' (n 32) 354; Finkin, 'Beclouded Work' (n 72).

[144] For the international legal framework, see ILO Home Work Convention 177 of 1996; ILO, 'Promoting Employment and Decent Work in a Changing Landscape: General Survey, (Report III(B), International Labour Conference 109th Session' (Geneva, 2020) 5.

[145] An empirical review of the (lack of) effectivity of German homework law can be found in E Kocher and H Pfarr, *Kollektivverfahren im Arbeitsrecht: Arbeitnehmerschutz und Gleichberechtigung durch Verfahren* (Nomos, 1998) 149 ff.

[146] V de Stefano and M Wouters, 'Should Digital Labour Platforms be Treated as Private Employment Agencies?' (2019).

[147] Ratti, 'Online Platforms' (n 133) 494.

[148] Stefano and Wouters, 'Digital Labour Platforms as Private Employment Agencies' (n 146) suggest application for platforms such as LinkedIn or ZipRecruiter, but also Care.com (ie Betreut.de) and freelancer.com.

[149] Collins, 'Independent Contractors and the Challenge of Vertical Disintegration' (n 32); J Fudge, 'Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation' (2006) 44(4) *Osgoode Hall Law Journal* 609.

[150] For these concepts, see ch 3, at nn 39–43.

These concepts are mostly designed to 'upstream' regulation by piercing the corporate veil and to hold 'lead firms' and 'de facto dominant' companies responsible, which are slightly different issues than those we are concerned with in the case of market organisers.[151] Nevertheless, these regulations' ultimate objective of thinking about enforcement with a 'focus on the top'[152] also lends itself to considerations around holding companies liable for independent contractors,[153] which, in turn, offers an interesting model for shaping the legal accountability of digital work platforms.[154]

7.5.1.2. Due Diligence

Another regulatory model that could be fit for regulating decentralised organisations, is 'due diligence', a concept that has been widely used to shape accountability in the regulatory domain of human rights.[155] The general idea behind due diligence regulations is to assign accountability in a way that effectively addresses institutions and/or organisations in a manner that makes them implement the rules in question, and enforces the rules against them if they do not. Hence, such regulations consider the ways in which organisations manage and regulate themselves internally. Due diligence involves identifying and assessing risks (in our case, for workers' rights), taking appropriate action in response to such risks, tracking the effectiveness of these responses, and communicating both the risks and measures taken to address them to affected stakeholders.[156]

Regulation establishing due diligence standards entails ascertaining levels of management and activity and allocating legal accountability accordingly. These approaches have already been used and further developed not only for the regulation of companies that make use of digital platforms, but also for the regulation of digital platforms as such, in order to identify 'active' platforms for other areas of the law.[157] For digital work platforms that are not hierarchically structured (and can therefore not be considered employers in the strict sense), organising

[151] An important example is the German Act on Corporate Due Diligence Obligations in Supply Chains of July 16 2021 which will enter into force in 2023 (https://www.csr-in-deutschland.de/SharedDocs/Downloads/EN/act-corporate-due-diligence-obligations-supply-chains.pdf?__blob=publicationFile&v=3).

[152] D Weil, *The Fissured Workplace: Why Work Became So Bad For So Many and What Can Be Done to Improve It* (Harvard University Press, 2014) 214 ff.

[153] M Motala, 'The 'Taxi Cab Problem' Revisited: Law and Ubernomics in the Sharing Economy' (2016) 31(3) *Banking & Finance Law Review* 467, 510.

[154] See, eg, Goldman and Weil, 'Who's Responsible Here?' (n 5) 37 and the references in the next section (7.5.1.2).

[155] Most famously, UN Guiding Principles on Business and Human Rights (n 78), Section II The Corporate Responsibility to Respect Human Rights, Principles 15 and 17; see also European Council, Recommendation CM/Rec(2018)2 (n 93); *cf* C Schubert and M-T Hütt, 'Economy-on-demand and the Fairness of Algorithms' [2019] *European Labour Law Journal* 3.

[156] Due diligence obligations can be seen as a means of forcing a 'rule of law' on companies' 'internal state' (*cf* M Burawoy, *Manufacturing Consent: Changes in the Labor Process under Monopoly Capitalism*, 10th edn (University of Chicago Press, 2010) 109 ff).

[157] For this concept, ch 2, at n 53 ff;, see above ch 1, at n 42/43; ; ch 2, 2.3; ch 5, at n 111 f; ch 6, at n 2.

accountability and compliance with the help of procedural and reflexive rules, as well as with incentives, seems like a good idea.[158] Adding high degrees of obligatory transparency would implicitly link compliance and the respective governance mechanisms with the 'trust pyramid',[159] ie with reputation,[160] and thereby create economic incentives for compliance.[161] However, the law would have to sanction deficits in these respects.[162]

At least in the area of safety and health at work, such regulatory models are not new. 'Duties of care' and similar procedural rules (starting with risk assessments[163]) are rather commonly used,[164] even for hierarchical organisations. Recent jurisprudence of the European Court of Justice on the EU Working Time Directive 2003/88/EC offers good examples of such concepts in the domain of labour law, strictly speaking. The ECJ presupposed due diligence by employers as necessary to enable workers to actually take the paid annual leave to which they are entitled, and placed a procedural requirement on employers 'to set up an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured'.[165]

7.5.1.3. Platforms as Regulators

Orly Lobel has pointed out that 'the platform economy … frequently comes with built-in regulatory devices'.[166] This statement refers to the fact that digital platforms' managerial structures are mostly coded and objectified in technological infrastructures.[167] Regulation could build on these features, for example by

[158] E Kocher, 'Unternehmen als Adressaten des Arbeitsrechts: Die Bedeutung der rechtlichen Erzwingbarkeit durch externe Akteurinnen und Akteure' in D Alewell (ed), *Rechtstatsachen und Rechtswirkungen im Arbeits- und Sozialrecht* (Rainer Hampp Verlag, 2013); Weil, *Fissured Workplace* (n 151) 214–34; Woodcock and Graham, *Gig Economy* (n 16) 121; Don't Gig Up (n 97) 8 also uses the concept of 'procedural rights', in relation to digital rights and social targets.

[159] O Lobel, 'The Law of the Platform' (2016) 101(1) *Minnesota Law Review* 87–166, 156.

[160] Weil, 'Fissured Workplace' (n 151), 234.

[161] ibid, 205 (incentives 'to oversee coordination, particularly for health and safety'); for a 'selective' use of incentives for compliance in the Israeli 'Act to Improve the Enforcement of Labour Laws': G Davidov, 'Special Protection for Cleaners: A Case of Justified Selectivity?' (2015) 36(2) *Comparative Labor Law & Policy Journal* 219, part IV.

[162] Hensel, 'Horizontale Regulierung des Crowdworking' (n 29), 236 ff ('regulated self-regulation'); on these concepts in more detail: S Deakin and R Rogowski, 'Reflexive Labour Law, Capabilities and the Future of Social Europe' in R Rogowski, R Salais and N Whiteside (eds), *Transforming European Employment Policy: Labour Market Transitions and the Promotion of Capability* (Cheltenham, UK, Northampton, MA, USA, Edward Elgar, 2011); Kocher, 'Unternehmen als Adressaten' (n 157).

[163] Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ L 183/1, Art 6(2) and passim.

[164] *Cf* Goldman and Weil, *Who's Responsible Here?* (n 5), 37.

[165] Case C-55/18 *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE* [2019] ECLI:EU:C:2019:402, para 60; *Max-Planck-Gesellschaft zur Förderung der Wissenschaften e.V. v Tetsuji Shimizu* C-684/16 [2018] ECLI:EU:C:2018:874, para 46.

[166] Lobel, 'Law of the Platform' (n 158) 142 ff.

[167] C Gerber and M Krzywdzinski, 'Brave New Digital Work?: New Forms of Performance Control in Crowdwork' in SP Vallas and A Kovalainen (eds), *Work and Labor in the Digital Age* (Emerald Publishing Limited, 2019) (who focus on the possible obscuring of power relations through their technological representation); for the concept of 'internal state', see Burawoy, *Manufacturing* (n 155) 109 ff.

making platforms share the data on legally relevant issues with labour inspectorates, or with workers and their representatives.[168]

Similar proposals have been put forward with regard to automated data processing techniques and respective algorithms. If public agencies developed testing tools that incorporated legal standards, even options for the certification of algorithms (possibly by public agencies) would arise.[169]

7.5.2. Sharing Responsibilities

Other regulatory ideas that intend to shape the governance of digital work platforms – in order to enable labour rights enforcement strictly speaking – build on concepts for the sharing of responsibilities.[170] One argument put forward in favour of '[separating] the question of what workers' entitlements should be from the question of where their economic burdens should fall' comes from Cynthia Estlund, who posits that labour law should avoid the disincentives for employment created by taxing it.[171] She suggests identifying which obligations and burdens should fall to the employing company in order to influence its structures and behaviour, with the remaining responsibilities to be shared.[172] Sharing responsibilities in the right way could also further the portability of benefits.[173]

Proposals for sharing mostly financial burdens among companies and platforms are often modelled on social insurance law and other social benefits (eg, health insurance, unemployment insurance, injured workers' compensation and paid leave). Responsibility-sharing arrangements for digital work platforms could be organised like multi-employer plans and/or involve the financial and organisational participation of platforms, workers, clients and the state.[174] Vocational training and skill development[175] could also be organised in this way.

[168] Fabo, Karanovic and Dukova, 'Adequate European Policy Response' (n 49) 171; *cf* A Sundararajan, *The Sharing Economy: The End of Employment and the Rise of Crowd-based Capitalism* (The MIT Press, 2016) 155 ff; see further notions of the 'smart labour contract' as explored by A Villalba Sánchez, 'New Forms of Work and Contractual Execution: Towards the "Smart Labour Contract"' in L Mella Méndez and A Villalba Sánchez (eds), *Regulating the Platform Economy: International Perspectives On New Forms Of Work* (Routledge, 2020) 96 ff.

[169] Schubert and Hütt, 'Economy-on-demand' (n 154) 12.

[170] Frankfurt Declaration (n 22); Code of Conduct 'Ground Rules for Paid Crowdsourcing/Crowdworking', 2017 (n 22); Risak and Lutz, 'Gute Arbeitsbedingungen' (n 17); Harris and Krueger, 'Proposal for Modernizing Labor Laws' (n 15) 15–17.

[171] Estlund, 'What Should We Do After Work?' (n 37) 301–19.

[172] ibid, 301–19.

[173] Taylor, *Good Work* (n 13) 76.

[174] Frankfurt Declaration (n 22); Code of Conduct 'Ground Rules for Paid Crowdsourcing/Crowdworking', 2017 (n 22); Risak and Lutz, 'Gute Arbeitsbedingungen' (n 17); S Hill, *Raw Deal: How the 'Uber Economy' and Runaway Capitalism Are Screwing American Workers* (St. Martin's Press, 2017) 225 ff; 236; Harris and Krueger, 'Proposal for Modernizing Labor Laws' (n 15) 15–17; 17–21; Goldman and Weil, 'Who's Responsible Here?' (n 5) 51–53 (they consider only 'non-mandatory benefits' in their 'outer ring'); Hensel, 'Soziale Sicherheit' (n 43); Weber, 'Setting Out' (n 43); *cf* Don't Gig Up (n 97) 8 for a procedural approach to digital platform workers' social security and platforms' tax compliance.

[175] Part of the 'outer ring' in Goldman and Weil, 'Who's Responsible Here?' (n 5) 51–53.

German law has developed quite a variety of regulatory models for the sharing of responsibilities and burdens related to labour rights. Important examples are sectoral systems of social insurance, like the system deployed in the construction and building sector, as well as the systems for some manufacturing crafts such as bakers, chimney sweepers, horticulture or forestry (*Sozialkassen*, social funds). These systems organise holidays, vocational training, pensions and working time accounts, and they compensate for wage fluctuations in sectors where a frequent change of employers and/or longer seasonal breaks and pauses in employment are common. The funds are organised in cooperation between the respective employers' association and trade union, and financed by regular contributions from employers.

For crowdwork, Germany's social security scheme for artists (*Künstlersozialkasse*) has often been invoked as a possible regulatory model,[176] as it has been designed to deal with problems of contingent work and 'autonomous' work of uncertain status (and unlike the *Sozialkassen* does not depend on social partners' institutionalisation). Enzo Weber has developed an idea of how such a regulatory system could work on transnational platforms. Platforms would have to pay a fixed percentage of the remuneration into a personal social security account for each crowdworker and the accrued amounts would then be transferred to the relevant national social security systems, where all further steps could be handled within existing structures. He proposes the account system be administered by an international institution like the ILO or the World Bank.[177]

7.6. Collective Rights for Workers on Organised Markets

The less the regulation of digital platform work relies on individual rights and the more it is organised around due diligence, the more weight is placed on governance mechanisms and the more indispensable the collective participation of workers becomes.[178] Participation and cooperation of different actors, including those most directly affected, has always been an important feature of procedural and reflexive regulation. In this vein, digital rights advocates have been arguing in favour of users' participation in the governance of any kind of digital platform.[179]

[176] Hensel, 'Soziale Sicherheit' (n 43).

[177] Weber, 'Setting Out' (n 43); Weber, 'Digital Social Security' (n 43).

[178] *cf* Burawoy, *Manufacturing* (n 155) 109 ff on the relevance of collective bargaining for private companies' 'internal state'.

[179] eg European Council, Recommendation CM/Rec(2018)2 of the Committee of Ministers to Member States on the roles and responsibilities of internet intermediaries.

7.6.1. Issues for Regulation

In labour law, these issues take on a completely different meaning. Voice for workers – ie collective representation, collective action and collective bargaining – constitute the most basic and essential labour rights.[180] Consequently, no regulatory proposal for digital work platforms comes without demands for rights to collective organisation and representation,[181] collective action,[182] and collective bargaining.[183] Sometimes, more specific rules are mentioned, such as individual rights to communication with the platform, including complaints,[184] or rights to anonymous communication among the workers,[185] eg with the help of 'WorkerTech' technology that could facilitate communication and collective action.[186] Other specific regulations proposed have included the protection of collective action through anti-victimisation rules[187] and rights of trade unions to get into contact with workers on digital platforms that they cannot access via a physical workplace.[188]

[180] See the role of Conventions 87 (Freedom of Association and Protection of the Right to Organise, 1948) and 98 (Right to Organise and Collective Bargaining, 1949) in the ILO Declaration on Fundamental Principles and Rights at Work of 1998.

[181] Art L. 7342-6 Code du Travail (Labour Code, France); City of Bologna's Charter (n 72); Frankfurt Declaration (n 22); Proposal for a Draft Convention on Platform Work (Sandra Fredman, Darcy du Toit), appendix in Woodcock and Graham, *Gig Economy* (n 16) 146; Fairwork Principles above ch 2, at n 5; Don't Gig Up (n 97) 7; 9 ff; World Economic Forum, Charter of Principles for Good Platform Work, 2020, Principle 2 ('voice and participation'); Frouin and Barfety, *Plateformes Numériques* (n 12) 59–82; on the new Polish law, see Z Muskat-Gorska, 'Polish Legislative Reform Tests a More Principled Approach to Collective Rights of Self-Employed Workers' [2020] *Comparative Labor Law & Policy Journal* Dispatch No. 22; on the City of Seattle Ordinance 124968 'relating to taxicab, transportation network company, and for-hire vehicle drivers … adding a new Section 6.310.735 to the Seattle Municipal Code', authorising collective-bargaining processes for platforms between 'driver coordinators' (for example Uber, Lyft, Eastside for Hire) and 'independent contractors who work as for-hire drivers': CF Szymanski, 'Collective Responses to the New Economy in US Labor Law' in L Ratti (ed), *Embedding the Principles of Life Time Contracts: A Research Agenda for Contract Law* (eleven international publishing, 2018) 191; Aloisi, 'Digital Transformation' (n 72) 198–200; Harris and Krueger, 'Proposal for Modernizing Labor Laws' (n 15) 15–17; Hensel, 'Soziale Sicherheit' (n 43) 913; Krause, 'Digitalisierung der Arbeitswelt' (n 141) B 107; JM Hirsch and JA Seiner, 'A Modern Union for the Modern Economy' (2018) 86(4) *Fordham Law Review* 1728, 1777–78; Liebman and Lyubarsky, 'Crowdworkers' (n 141) 115; Prassl, *Humans as a Service* (n 72) 105; Goldman and Weil, 'Who's Responsible Here?' (n 5) 39–41.

[182] Art L. 7342-5 Code du Travail (allowing coordinated refusals of services by workers by disallowing dismissals, disconnection or any other sanctioning of such action); Prassl, *Humans as a Service* (n 72) 113 ff; Woodcock and Graham, *Gig Economy* (n 16) 136; Hill, *Raw Deal* (n 173) 241–42; Finkin, 'Beclouded Work' (n 72); Krause, 'Digitalisierung der Arbeitswelt' (n 141); Weil, *Fissured Workplace* (n 151) 253.

[183] Art 47-quarter (1) Disciplina organica dei contratti di lavoro (n 30); *cf* Linder, 'Dependent and Independent Contractors' (n 34) 223.

[184] Krause, 'Digitalisierung der Arbeitswelt' (n 141) B 107; Cohen, *Between Truth and Power* (n 93) 303 ff; Smith and Leberstein, 'Rights on Demand' (n 31) (a 'voice on the job').

[185] Giesen and Kersten, *Arbeit 4.0* (n 142) 175.

[186] Taylor, 'Good Work' (n 13) 77.

[187] Hirsch and Seiner, 'Modern Union' (n 180) 1777–78; Liebman and Lyubarsky, 'Crowdworkers' (n 141) 115; this was in fact the issue in Tribunale Ordinario di Bologna (Bologna Labour Court), order of 31 Dec 2020, No R.G. 2949/2019, when finding fault with the Deliveroo algorithm.

[188] Krause, 'Digitalisierung der Arbeitswelt' (n 141) B 107; BMAS, Eckpunkte zur Weiterentwicklung des Mindestlohns und Stärkung der Tarifbindung, March 2021, II.3. (designed as a general rule, with no particular focus on digital platforms workers).

7.6.2. Examples of Collective Action and Collective Bargaining

Independently of existing rights and entitlements, digital platform workers have advanced demands for collective organisation, collective action and collective bargaining, although the lack of physical workplaces – and therefore a lack of opportunities to meet and form communities – have proven to severely obstruct their efforts in this regard. The 'anti-institutional affects of the online community' as well as the reluctance of traditional trade unions to take on self-employed workers have also posed barriers.[189]

Nevertheless, there have been quite a few examples of collective representation in digital platform work to date. A 2018 Eurofound study mentions many new worker initiatives in EU member states, but notes that they mostly have low degrees of institutionalisation and are often focused on providing information and fostering exchange, and less so on taking action to improve working conditions.[190] In the US, fast-growing organisations like the Freelancers Union and Working America (an organisation of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)) carry out similar activities, but also without engaging in collective bargaining.[191] Other examples include traditional trade unions offering membership to solo entrepreneurs and particularly platform workers.[192] Finally, a number of independent grassroots movements by platform workers also exist, such as 'Turkernation' or 'Turkopticon',[193] which offer crowdworkers digital tools for collective action, as well as organisations created by offline platform workers in transport and food delivery.[194]

[189] Giesen and Kersten, *Arbeit 4.0* (n 142) 153 ff; for empirical evidences of the complicated relationship between crowdworkers and trade unions: A Al-Ani, 'Arbeiten in der Crowd: Generelle Entwicklungen und gewerkschaftliche Strategien' (Berlin, 2015).

[190] Groen and others, 'Employment and Working Conditions' (n 80) 58.

[191] Hirsch and Seiner, 'Modern Union' (n 180) 1746 ff; more on the Freelancers Union below text at n 260; for the petition website coworker.org, see Taylor, 'Good Work' (n 13) 77.

[192] Overview by Aloisi, 'Digital Transformation' (n 72) 17–20 (IG Metall (German Metalworker's Union); GPA-DJP (Gewerkschaft der Privatangestellten – Gewerkschaft Druck, Journalismus, Papier; Austrian union of private sector employees, printing, journalism and paper); CFDT (Confédération française démocratique du travail; French Democratic Trade Union Confederation), Fédération Générale des Transports et de l'Environnement (French General Trade Union Confederation of Transport and Environment); *cf* V Barth and R Fuß, 'Crowdwork und die Aktivitäten der IG Metall' (2021) 75(2) *Zeitschrift für Arbeitswissenschaft* 182.

[193] LC Irani and MS Silberman, 'Turkopticon: Interrupting Worker Invisibility in Amazon Mechanical Turk' (CHI '13: CHI Conference on Human Factors in Computing Systems, Paris France, 2013).

[194] Woodcock and Graham, *Gig Economy* (n 16) 94, 104, 113; Hirsch and Seiner, 'Modern Union' (n 180) 1749 ff on the New York Uber Guild (affiliated with a regional branch of the International Association of Machinists and Aerospace Workers Union (IAM)); an example for the organisation of food-delivery riders by a anarcho-syndicalist union is analysed in legal terms by A Degner and E Kocher, 'Arbeitskämpfe in der „Gig-Economy"?: Die Protestbewegungen der Foodora- und Deliveroo-Riders und Rechtsfragen ihrer kollektiven Selbstorganisation' (2018) 51(3) *Kritische Justiz* 247.

A worldwide database of such initiatives is currently being built by the Digital Platform Observatory, funded by the European Union, which also collects information on collective action.[195] In addition, an 'Index of Platform Labour Protest' is being developed at the University of Leeds.[196] Key preliminary findings from these and other research initiatives show that traditional trade unions actually play an important role, especially in Western Europe, where they are primarily associated with legal initiatives, while grassroots unions prevail in the Global South, mostly associated with strikes and similar actions. Notably, the research has not corroborated differences between offline and online platform work in terms of forms of protest.[197] However, it has shown that forms of virtual communication and online protest play an important role in collective action, even across national borders,[198] though the results of these actions are often hard to identify.[199]

On the other side of the social dialogue, bargaining partners are often either missing[200] or hesitate to negotiate with workers' representatives.[201] The partners who concluded the 2017 'Code of Conduct for Crowdsourcing' in Germany created an important, but still rather singular example in this respect.[202] Although collective agreements for the platform economy are rare,[203] they are important. Those that exist have covered collective representation and recognition, as such, but also material labour rights and standards.[204] The most famous example is the agreement between the Danish trade union 3F and hilfr.dk, a digital platform providing domestic work to households. The agreement offers workers 'employee' status after they complete 100 hours of work, as well as insurance coverage, procedures to deal with profiles and ratings, and dispute resolution (ie, arbitration

[195] Digital Platform Observatory, a joint initiative of ETUC (European Trade Union Confederation), IRES (Institut de Recherches Économiques et Sociales) and ASTRÉES (Association travail emploi Europe société), funded by the European Commission: digitalplatformobservatory.org/; see also the case studies from Germany, Italy, Poland, France, Spain and Sweden by Don't Gig Up on www.dontgigup.eu/resources/ (set up by European trade unions and funded by the European Commission).

[196] Leeds Index, funded by the Leeds University Business School, FES (Friedrich-Ebert-Stiftung), and the ILO: business.leeds.ac.uk/research-ceric/dir-record/research-projects/1721/leeds-index-of-platform-labour-protest; for on overview for the timespan January 2017 to July 2020: ILO, 'World Employment and Social Outlook' (n 10) 215; see also the overview of collective action in EU member states by Groen and others, 'Employment and Working Conditions' (n 80) 58.

[197] On these differences, see references in n 193.

[198] Fabo, Karanovic and Dukova, 'Adequate European Policy Response' (n 49) 171; *cf* J Bronowicka and M Ivanova, 'Resisting the Algorithmic Boss: Guessing, Gaming, Reframing and Contesting Rules in App-Based Management' in PV Moore and J Woodcock (eds), *Augmented Exploitation: Artificial Intelligence, Automation and Work* (Pluto Press, 2021).

[199] Groen and others, 'Employment and Working Conditions' (n 80) 58.

[200] Weil, *Fissured Workplace* (n 151) 253 ff; overview by Groen and others, 'Employment and Working Conditions' (n 80) 58.

[201] Aloisi, 'Digital Transformation' (n 72) 13.

[202] Above at n 22.

[203] For example, Liebman and Lyubarsky, 'Crowdworkers' (n 141) 125–26; Szymanski, 'Collective Responses' (n 180) 194.

[204] Liebman and Lyubarsky, 'Crowdworkers' (n 141) 125–26 mention a five-year-agreement on collective representation by an Uber drivers' association; Aloisi, 'Digital Transformation' (n 72) analyses the recognition of the trade union GMB by British Hermes in this context.

rather than access to labour courts).[205] This agreement has been strongly criticised by the Danish Competition Council,[206] which highlights a major legal hurdle for advancing collective rights on digital work platforms: Before collective rights can be acknowledged, established, or extended, barriers in the realm of competition law must first be cleared.

7.6.3. Collective Bargaining and Competition Law

It is not only the growing number of collective agreements that are in need of 'immunisation'[207] against competition rules. Any form of regulation for marketplaces and cooperation on platforms – such as recommendations for terms and conditions by collective actors, or collectively negotiated recommendations for prices and 'wages' of independent contractors – must be justified with respect to competition law. All forms of collective action and bargaining may potentially be deemed illegal according to competition law.[208] Hence, the applicability of competition law (ie, antitrust rules[209]) has become one of the most pressing issues in the debate on regulating digital platform work.

7.6.3.1. Price-Fixing on Digital Platforms

To identify the relevant issues in competition law, it makes sense to start with digital platforms' price-fixing, which, for a long time, went unquestioned in relation to competition law. Only now that the market-organising character of digital platforms has become more apparent have competition lawyers started to admit that transparency may not be enough to adequately promote fair competition in the context of digital platforms. Competition law addresses the setting of market-related rules by digital platforms, as well as their retention of exclusive property rights, power over big data, and gatekeeper functions in relation to

[205] ILO, 'World Employment and Social Outlook' (n 10) 214.

[206] ibid, 214; Countouris and Stefano, 'Executive Summary' (n 26).

[207] Frank Bayreuther, 'Entgeltsicherung Selbstständiger' [2017] NJW 357.

[208] Hießl, 'Comparative Analysis' (n 71), based on reports for Austria, Belgium, France, Germany, Ireland, Italy, the Netherlands, Poland, Slovenia, Spain, Sweden in the same book; For US law (antitrust liabilities): Hirsch and Seiner, 'Modern Union' (n 180) 1777–78; Liebman and Lyubarsky, 'Crowdworkers' (n 141) 106. On the Seattle ordinance mentioned above (n 180) *US Chamber of Commerce v City of Seattle* 11 May 2018, Case 17-35640 (US Court of Appeals for the 9th circuit) (the judgment removed payments to drivers from the possible subjects of collective bargaining; the ordinance has never been implemented and was replaced by a new regulation that has not run up against similar barriers); see Szymanski, 'Collective Responses' (n 180) 191; 198; Aloisi, 'Digital Transformation' (n 72) 200; for vivid examples, on the background of Australian law, see S McCrystal, 'Organising Independent Contractors: The Impact of Competition Law' in J Fudge, S McCrystal and K Sankaran (eds), *Challenging the Legal Boundaries of Work Regulation* (Hart Publishing, 2012); for German law, eg Walzer, *Crowdworker* (n 61) 220.

[209] On the terminology, see ch 2, n 14.

access to economic activity.[210] In cases where a platform markets its own goods and services on the platform it operates, ie where the platform competes directly with some of its users, particular dependencies or conflicts of interest have been called into question.[211] Consequently, competition law is back in the game of regulating digital platforms. As far as digital work platforms are concerned, Uber has already been the target of an antitrust suit in the US in relation to its fixing of prices for 'independent contractors'.[212]

7.6.3.2. Collective Bargaining and Competition Law

The fact that Uber's price-fixing has been questioned while hierarchical employers' determination of wages is not an issue under competition law points to another issue: While promoting competition on markets, competition law, on its flipside, also allocates coordination rights for those mechanisms that are not considered to be market mechanisms. It usually does so for firms ('firm exemption' or 'immunity').[213] But coordination rights or immunities[214] have also been granted for collective bargaining across a range of national jurisdictions, with the help of labour exemptions and immunities, or collective bargaining rights, respectively.[215] This is how competition law and labour law have, in the past, entertained a 'complementary rather than antagonistic relationship'.[216]

However, as the opposition between 'market' and 'firm' suggests, competition law is based on a binary model of 'organisation' versus 'market' that is similar to the model that has proven so complicated in labour law: It bans rule-setting on

[210] LM Khan, 'The Separation of Platforms and Commerce' (2019) 119 *Columbia Law Review* 973; J Crémer, Y-A de Montjoye and H Schweitzer, 'Competition Policy for the Digital Era: Final Report' (Brussels 2019); H Schweitzer, 'Digitale Plattformen als private Gesetzgeber: Ein Perspektivwechsel für die europäische "Plattform-Regulierung"' (2019) 27(1) *Zeitschrift für Europäisches Privatrecht* 1; *cf* ch 2, at n 50.

[211] Schweitzer, 'Digitale Plattformen' (n 209), 12; Khan, 'Separation of Platforms and Commerce' (n 209), using as examples Amazon/Alexa (985–96), Alphabet/Google search (997–1000), Facebook (1001–04) and Apple (1005–07). She advocates 'a general framework for separating platforms and commerce' (1065).

[212] *Meyer v UberTechs. Inc.* [2017] was, however, not decided on the merits of antitrust law (above n 83); *cf* S Paul, 'Uber as For-Profit Hiring Hall: A Price-Fixing Paradox and its Implications' (2017) 38 *Berkeley Journal of Employment and Labor Law* 233; N Passaro, 'How Meyer v Uber Could Demonstrate That Uber and the Sharing Economy Fit into Antitrust Law' (2018) 7 *Michigan Business & Entrepreneurial Law Review* 259.

[213] S Paul, 'Antitrust As Allocator of Coordination Rights' (2020) 67 *UCLA Law Review* 378.

[214] The choice of terminology depends on the legal construction of the respective legal figures.

[215] For US law Paul, 'Antitrust As Allocator' (n 212) who contends that labour exceptions to antitrust rules in the US have been formulated more narrowly than (intra-)firm immunities; for EU law, see below 7.6.3.2.2.

[216] I Lianos, N Countouris and V de Stefano, 'Re-thinking the Competition Law/Labour Law Interaction: Promoting a Fairer Labour Market' (2019) 10(3) *European Labour Law Journal* 291, 298 ff; *cf* B Waas and C Hießl (eds), *Collective Bargaining for Self-Employed Workers in Europe: Approaches to Reconcile Competition Law and Labour Rights* (Bulletin of comparative labour relations, Wolters Kluwer, 2021) with a juxtaposition of the 'labour law framework' and the 'competition law framework'.

markets and allows it within coordinated organisations. As a consequence, fragmented and fissured organisations are not easily captured in competition law. To date, small businesses and independent contractors have mostly been denied collective bargaining rights.[217] As this book is focused on labour law, I will not comprehensively cover the legal questions involved in competition law.[218] Nevertheless, the following insights into relevant legal debates in EU law, German law and US law, are meant to show how the approach taken in this book can help forge new approaches in competition law as well.

7.6.3.2.1. Collective Bargaining Approach

As for international law, ILO Convention 87 on the freedom of association and protection of the right to organise applies to 'workers and employers, without distinction whatsoever' (Article 2). This has been interpreted by the ILO Committee on Freedom of Association (CFA) as explicitly covering self-employed workers and solo entrepreneurs.[219]

With regards to US law, scholars have suggested granting antitrust immunity to those independent contractors who compete more or less exclusively with 'regular employees' and other self-employed persons,[220] based on considerations of fair competition, in this case between workers. This is a very different line of reasoning than that at the core of the German debate on the extension of collective bargaining rights beyond the employment relationship. In German law, the line between competition law and labour law is primarily drawn by establishing the reach of workers' rights, thereby limiting the reach of competition law and creating what would be called an immunity in US law. It is the constitutional

[217] For US law: Paul, 'Antitrust As Allocator' (n 212); E Kennedy, 'Freedom from Independence: Collective Bargaining Rights for "Dependent Contractors"' (2005) 26(1) *Berkeley Journal of Employment and Labor Law* 143, 168–78 (referring to s 1 Sherman Antritrust Act; s 6 Clayton Act). For EU law Lianos, Countouris and Stefano, 'Re-thinking' (n 215); V Daskalova, 'The Competition Law Framework and Collective Bargaining Agreements for Self-Employed: Analysing Restrictions and Mapping Exemption Opportunities' in B Waas and C Hießl (eds), *Collective Bargaining for Self-Employed Workers in Europe: Approaches to Reconcile Competition Law and Labour Rights* (Wolters Kluwer, 2021) 21 ff.

[218] *cf* the excellent analysis by Daskalova, 'Competition Law Framework' (n 216).

[219] ILO Committee on Freedom of Association (2012) Report No 363, Case 2602, para 461 (mentioning particularly the case of agricultural workers, heavy goods drivers and those who practise liberal professions, who should nevertheless enjoy the right to organise); Case 2888, para 1087: self-employed workers and those employed under civil law contracts; see Freedland and Kountouris, 'Some Reflections' (n 101) 56; 64 ff; M Schlachter, 'Streikrecht außerhalb des Arbeitsverhältnisses?' in T Dieterich and others (eds), *Individuelle und kollektive Freiheit im Arbeitsrecht: Gedächtnisschrift für Ulrich Zachert* (Nomos, 2010) (on ILO Convention 141 (concerning Organisations of Rural Workers and Their Role in Economic and Social Development); for a comprehensive analysis, see V de Stefano, 'Not as Simple as it Seems: The ILO and the Personal Scope of International Labour Standards' [2021] *International Labour Review*; N Countouris and V de Stefano, 'The Labour Law Framework: Self-Employed and Their Right to Bargain Collectively' in B Waas and C Hießl (eds), *Collective Bargaining for Self-Employed Workers in Europe: Approaches to Reconcile Competition Law and Labour Rights* (Wolters Kluwer, 2021).

[220] Kennedy, 'Freedom from Independence' (n 216) 168–78.

guarantee of collective bargaining rights in Germany that has been interpreted as giving precedence to collective agreements over competition law.[221]

German jurisprudence has already started to draw a line between solo entrepreneurs and those independent contractors who employ at least one employee. As the latter group could be considered employers in the context of collective bargaining,[222] they are not supposed to act in the role of employees in collective bargaining. This is different for solo self-employed workers, some of whom are already covered by section 12a of the Collective Bargaining Act (and are therefore competent to conclude collective agreements), provided that they can be seen as 'economically dependent', ie as employee-like persons.[223] Economic dependence has also been suggested, for example by the Deutscher Gewerkschaftsbund (DGB, German Trade Union Confederation), as the relevant test to be used to include digital platform workers in collective bargaining.[224]

These examples already extend the coverage of collective bargaining rights beyond the category of employee. They do not, however, demonstrate a uniform argument as to the criteria for doing so. An EU perspective may be able to show in more depth which legal and policy issues must be taken into account here.

7.6.3.2.2. Competition Law Approach

In EU law, there is long-standing jurisprudence by the European Court of Justice that freedom of competition[225] does not bar collective labour agreements intended to regulate working conditions. The ECJ justifies its position that collective

[221] F Bayreuther, *Sicherung der Leistungsbedingungen von (Solo-)Selbständigen, Crowdworkern und anderen Plattformbeschäftigten* (HSI-Schriftenreihe Band 26, Bund-Verlag, 2018) 90–93; *cf* Bundesregierung, Begründung zu dem Entwurf eines Gesetzes gegen Wettbewerbsbeschränkungen, BT-Drs. 2/1158 (1955) 30.

[222] Bundesarbeitsgericht (German Federal Labour Court, BAG), BAG 31 Jan 2018, Cases 10 AZR 279/16 and 695/16 (A), BAGE 162, 1–11 according to which an 'employer is any person who employs or wishes to employ at least one employee or a person similar to an employee'. (The court had to decide if a collective agreement that stipulates vocational training in the chimney sweep trade covers a self-employed chimney sweeper on the employers' side, even he does not intend to employ employees or persons similar to employees).

[223] Section 12a Tarifvertragsgesetz (TVG, Collective Bargaining Act). See also Schlachter, 'Streikrecht' (n 218), 634; 639; 643 who contends (on the basis of international law) that the right to strike in Art 9(3) of the Grundgesetz (GG, German Basic Law) also covers, for example, dairy farmers and other self-employed workers; for the specific rules for farmers in EU competition law, see Daskalova, 'Competition Law Framework' (n 216) 42 (Omnibus Regulation 2017/2393). On the category of employee-like persons, see above ch 3, 3.4.2.6.

[224] DGB, Position on Platform Work, March 2021 (n 30); *cf* F Bayreuther, 'Selbständige im Tarif- und Koalitionsrecht' [2019] *Soziales Recht* 4, 5; 11.

[225] Now Art 101(1) TFEU (Treaty on the Functioning of the European Union [2012] OJ C 326/391) prohibits 'all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market'.

agreements do not fall within the scope of Article 101(1) TFEU based on such agreements' promotion of dialogue between management and labour:

> It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to [what is today Art 101(1) TFEU] when seeking jointly to adopt measures to improve conditions of work and employment. … It therefore follows from an interpretation of the provisions of the Treaty as a whole … that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of [what is today Art 101(1) TFEU].[226]

As for a definition, or rather characterisation, of the kind of agreements that are exempt from EU competition law, the ECJ states that, first, the agreement must have been

> concluded in the form of a collective agreement and [be] the outcome of collective negotiations between organisations representing employers and workers. … Second, as far as its purpose is concerned, [the] agreement … contributes directly to improving … working conditions, namely … remuneration.[227]

While this jurisprudence did not discuss the scope of application of collective agreements, a parallel judgment did so by commenting on the category of 'worker' in the context of competition law. The case of *Becu et alt.* concerned rules set up by a joint committee of workers and employers, for the 'recognition' of workers who would be seen fit to perform dock work in port areas, for fixed rates, in the Ghent (Belgium) port.[228] The ECJ here applied the Lawrie-Blum definition of 'worker' in EU law[229] and remarked that '[t]hat description is not affected by the fact that the worker, whilst being linked to the undertaking by a relationship of employment, is linked to other workers by a relationship of association.'[230] While in the case of *Porto di Genova*, the ECJ saw it as a breach of European law to 'confer on an undertaking … the exclusive right to organize dock work and require it for that purpose to have recourse to a dock-work company formed exclusively of national workers',[231] it distinguished the situation in *Becu et alt.* as concerning

[226] Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECLI:EU:C:1999:430, paras 55–60; Joined Cases C-115-117/97 *Brentjens' Handelsonderneming BV v Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen* [1999] ECLI:EU:C:1999:434, paras 52–57; Case C-219/97 *Maatschappij Drijvende Bokken BV v Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven* [1999] ECLI:EU:C:1999:437, paras 41–47.

[227] Joined Cases C-115-117/97 (n 225) paras 58–61; Case C-219/97 (n 225) paras 48–51; *cf* Daskalova, 'Competition Law Framework' (n 216) 27 ff.

[228] Case C-22/98 *Criminal proceedings against Jean Claude Becu, Annie Verweire, Smeg NV and Adia Interim NV* [1999] ECLI:EU:C:1999:419, para 28; Case C-179/90 *Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA* [1991] ECLI:EU:C:1991:464, para 13.

[229] See above ch 3, 3.4.1.1.

[230] Case C-22/98 (n 227) para 28; Case C-179/90 (n 227) para 13.

[231] Case C-179/90 (n 227) para 24.

something more akin to collective representation. The main gist of the decision in *Becu et alt.* lies in the explanation of why the collective organisation of workers is, in legal terms, something different than the economic activities of an 'undertaking' (which competition law addresses). It distinguishes 'the undertakings for which they perform dock work' by virtue of an employment contract as different from the workers' collective self-organisation:

> [Nothing shows] that the recognised dockers … are linked … by any … form of organisation which would support the inference that they operate on the market in dock work as an entity or as workers of such an entity.[232]

The ECJ states that *because* the respective workers carry out economic activities as part of the undertaking for which they work, they cannot be independent market actors; their activities will be considered internal to the company:[233]

> Since they are, for the duration of [the employment] relationship, incorporated into the undertakings concerned and thus form an economic unit with each of them, dockers do not therefore in themselves constitute 'undertakings' within the meaning of … competition law.[234]

Such was the state of art when the ECJ decided the case of *FNV Kunsten*, the first case to explicitly question collective agreements for self-employed workers.[235] The ECJ's reasoning in the case has been analysed above, showing that it only *seems* to stick to a binary system of employment classification.[236] At closer view, it uses criteria developed in competition law (like the category of 'undertaking') to identify the 'worker' for purposes of collective bargaining. In this sense, it looks at organisational integration and (lack of) market access rather than instructions and subordination. Revisiting the decision in light of this book's analyses the binary model of employment[237] helps clarify why the decision is so opaque upon first view. The ECJ got caught up in its attempts to model the labour law binary of 'organisation' and 'market' onto competition law and ended up using competition law to modify the criteria for 'worker'. The assumption that there are no intermediate categories in European competition law[238] has since become outdated, because this decision ended up using a modified idea of 'worker' to define the non-application of competition law.[239]

[232] Case C-22/98 (n 227) para 29.

[233] Daskalova, 'Competition Law Framework' (n 216) 25.

[234] Case C-22/98 (n 227) para 26.

[235] Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* [2014] ECLI:EU:C:2014:2411.

[236] Ch 3, 3.4.1.2.

[237] Ch 3, 3.4.4 and 3.5.3.

[238] K Bourazeri, 'Neue Beschäftigungsformen in der digitalen Wirtschaft am Beispiel soloselbstständiger Crowdworker' [2019] *Neue Zeitschrift für Arbeitsrecht* 741; J Mohr, 'Das Verhältnis von Tarifvertragsrecht und Kartellrecht am Beispiel solo-selbständiger Unternehmer' [2018] *Europäische Zeitschrift für Arbeitsrecht* 436.

[239] E Kocher, *Europäisches Arbeitsrecht*, 2nd edn (Nomos Verlag, 2020) Ch 7, para 58 ff; Degner and Kocher, 'Arbeitskämpfe' (n 193); Bayreuther, 'Selbständige' (n 223) 5; 11.

With this in mind, it is only a small step to recognise that economic actors like self-employed workers – who depend on market organisers' control of market access, contractual terms, and digital working tools – cannot be considered 'undertakings' and 'independent economic operators' in the context of competition law, and in turn, must enjoy rights to collective action.[240] In EU law, this interpretative step only requires applying the concept the ECJ has already developed in its jurisprudence on the relationship between Article 101 TFEU and collective bargaining rights.

This forms the background of the initiative the European Commission undertook in spring 2021. After having identified collective organisation of workers as a central challenge on digital work platforms,[241] it has now started a consultation process that will hopefully end up explicitly endorsing collective bargaining rights for digital platform workers,

> to ensure that EU competition law does not stand in the way of collective agreements that aim to improve the working conditions of solo self-employed people (i.e. self-employed without employees). … The initiative seeks to achieve this objective by clarifying the applicability of EU competition law to collective bargaining by solo self-employed.[242]

In the light of this analysis, it would make perfect sense to decouple labour law status from access to collective bargaining rights.[243]

7.7. Results and Outlook

Based on the assumption that it could be helpful in some instances to use a new category for digital work platforms in order to assign specific rights and obligations to platform workers, this chapter has looked at the issues of regulation that could make good use of such a new category. It first identified human rights, equality, social security and rights for parents as objects of universal social rights that should be guaranteed independently from employment status. It then identified a second area of rights that need not be confined to a particular status: the field of general standards for fair contracts. It argued that 'Principles of Life Time Contracts' should cover all contracts governing long-term cooperation grounded in or that could give rise to power imbalances. Such principles would include protection against unfair termination, the ensuring of minimum payments and

[240] *cf* further Khan, 'Separation of Platforms and Commerce' (n 209); Schweitzer, 'Digitale Plattformen' (n 209) 7; Paul, 'For-Profit Hiring Hall' (n 211); Passaro, 'Meyer v Uber' (n 211).

[241] European Commission, Summary Report on the open public consultation on the Digital Services Act Package, 15 Dec 2020, ec.europa.eu/digital-single-market/en/news/summary-report-open-public-consultation-digital-services-act-package.

[242] European Commission, Consultation 'Collective Bargaining Agreements for Self-employed – Scope of Application EU Competition Rules', Feedback Period 5 Mar 2021–31 May 2021; inception impact assessment 6 Jan 2021, Ares(2021)102652.

[243] Daskalova, 'Competition Law Framework' (n 216) 34 ff.

access to justice. In addition, digital platform contracts should, in general, be designed so as to enable economic activities by users, including workers.

This left us with quite a confined group of rules that address labour standards in the strict sense, in particular health and safety at work, working time and other work-related risks, including the fostering of capabilities. The regulation of these standards relies on an assumption that implementation can easily be organised by employers through hierarchy. And this is where specific rules for digital work platforms are needed. This chapter suggested that such rules could draw on regulatory models for due diligence procedures that have already been developed for fragmented and triangular forms of organisation. It also suggested that such rules could hold digital work platforms responsible in their inherent capacity as rule-setters and data-collectors. Regulatory models developed for social security that divide responsibility among companies could also be helpful for sharing financial burdens.

In any case, this chapter emphasised that independent collective organisation of workers, collective action and collective bargaining are indispensable for furthering social standards in digital platform work. Collective organisation only gains in significance through the permeable form of market organisers that digital work platforms exhibit, for which this chapter proposed several procedural and reflexive forms of regulation. The law can foster collective organisation through concrete rights and guarantees for workers and trade unions, but also by removing barriers. Most importantly, competition law must renounce its claims to banning collective agreements for digital platform work: Economic actors like self-employed workers who depend on market organisers' control of market access, contractual terms, and digital working tools must enjoy rights to collective action and, consequently, immunity from competition law.

7.7.1. Works Constitutions

In the German system, there is yet another mechanism that establishes participation and co-determination of workers in governance mechanisms: works councils according to the Betriebsverfassungsgesetz (BetrVG, Works Constitution Act). It is one question if digital platform workers should be able to establish works councils at digital work platforms themselves, and yet another question if (and how) digital platform workers could participate in the works constitutions of those companies that make use of the services digital work platforms offer.[244] Both questions involve legal issues that are quite specific to German law and, hence, I will leave them aside for now.

[244] *cf* J Neugebauer and T Klebe, 'Crowdsourcing. Für eine handvoll Dollar oder Workers of the crowd unite?' (2014) 62(1) *Arbeit und Recht* 4; Al-Ani, 'Arbeiten' (n 188) 44–45; for the EU framework of consultation, see Directive 2002/14/EC of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community [2002] OJ L 80/29; *cf* Art 39 of CGIL's Carta dei diritti universali del lavoro (n 19).

7.7.2. Institutional Alternatives for Codetermination

As far as workers' participation and collective organisation is concerned, it is also interesting to compare the demands of the initial YouTubers Union campaign and the subsequent FairTube campaign,[245] which differed mainly on the question of institutionalisation. While the YouTubers Union (created by digital activists) initially asked for transparency and a human person to talk to in case of problems, the later FairTube campaign (jointly organised by the YouTubers Union and the German industrial trade union IG Metall) offered more specific ideas on institutionalisation, such as independent conciliation in case of conflicts (eg with the help of an ombudsperson), and codetermination (eg, by way of an advisory council). This shows what actors from the regulatory domain of labour law[246] have to offer: institutional ideas on how to organise cooperation in asymmetrical relationships. Tripartite commissions would be another institutional form that could be modelled, eg in German law, on commissions for work situations that lack effective collective bargaining, such as homework or the care sector.[247]

7.7.3. The Solo Entrepreneur – A Category of Her Own?

Lastly, I would like to point out that some of the regulatory ideas developed for digital platform work take examples from rules set up for artists and similar solo self-employed workers. This is the case, for example, with the Canadian Status of the Artist Act, which establishes collective bargaining,[248] or with the German Künstlersozialversicherung (social security scheme for artists), which holds artists' clients responsible for the respective financial contributions.[249] Another example is freedom of association and collective bargaining rights. There are good reasons for extending such rights beyond not only subordinate, but also economically dependent workers,[250] to all self-employed solo entrepreneurs[251] – independently of the criteria mentioned for digital platform workers.[252]

[245] For the case, see above ch 1, at nn 1 ff.
[246] For the concept, see above ch 2, 2.1.
[247] For this function of the commission in s 4 Heimarbeitsgesetz (HAG, Home Work Act), see Bundesverfassungsgericht (BVerfG, Federal Constitutional Court,), 27 Febr 1973, Case 2 BvL 27/69, BVerfGE 34, 307; for similar commissions in German law *cf* ss 4-12 Mindestlohngesetz (MiLoG, Minimum Wage Act); s 12 Arbeitnehmerentsendegesetz (AEntG, Posting of Workers Act); for church organisations, see BAG 20 Nov 2012, Cases 1 AZR 179 and 611/11, BAGE 143, 354; 144, 1 (criticised by E Kocher, L Krüger and C Sudhof, 'Streikrecht in der Kirche im Spannungsfeld zwischen Koalitionsfreiheit und kirchlichem Selbstbestimmungsrecht. Ein goldener Mittelweg zwischen Kooperation und Konflikt?' (2014) *Neue Zeitschrift für Arbeitsrecht* 880).
[248] G Davidov and B Langille, 'Beyond Employees and Independent Contractors: A View from Canada' (1999) 21 *Comparative Labor Law & Policy Journal* 7, 37.
[249] Hensel, 'Soziale Sicherheit' (n 43) uses it as a model for crowdworkers' social security.
[250] *cf* Prassl and Risak, 'Legal Protection' (n 51) (for 'vulnerable self-employed' persons).
[251] Termed 'freelancers' by, eg, G Davidov, 'Freelancers: An Intermediate Group in Labour Law?' in J Fudge, S McCrystal and K Sankaran (eds), *Challenging the Legal Boundaries of Work Regulation* (Hart Publishing, 2012); on the term 'autonomous worker', see ch 6, at n 91.
[252] See above nn 24/25.

7.7.4. Cooperatives

A last issue worth mentioning is the experience of worker cooperatives that give workers complete (democratically exercised) control over undertakings – a form of organisation that goes far beyond mere participation in another person's undertaking.[253] In particular, riders for messenger and food-delivery platforms have developed social communities that have not only given rise to collective action, but also to experiments with self-administration and cooperatives. The Crow Cycle Courier Collective, situated in Berlin, serves as an example. It describes itself as '100% self-administered, independent and sustainable', and all workers as 'equal partners' in a collective ('everyone takes on all tasks').[254] The internationally organised CoopCycle Federation not only gives an overview of similar organisations, but has also developed a web application for their purposes.[255]

The CROW collective is also a good example for the need to distinguish between legal forms and social forms of organisation. Although organised as a private company in the legal form of partnership under civil law,[256] it exhibits characteristics of cooperatives, ie organisations that are owned by their members, who participate collectively and equally in administration and tasks, and who work according to a subsistence principle by which all profits are used for the members' livelihood. For example, the legal form of the Societas Cooperativa Europaea (SCE, European Cooperative Society) operates on 'principles of democratic structure and control and the distribution of the net profit for the financial year on an equitable basis', as well as on 'the primacy of the individual' and 'the "one man, one vote" rule'.[257] But the formal legal form can be used for all kinds of social organisations and, indeed, has been applied to organisations as diverse as the German meat producer Westfleisch and the campaign platform WeMove.

Another example with quite distinctive economic objectives is the freelancers' cooperative Smart, which first developed in Belgium[258] and now exists in eight European countries (Austria, Belgium, France, Germany, Italy, the Netherlands, Spain and Sweden).[259] The cooperative provides its members not only with administrative services (eg, invoicing, debt collection and budget management), consultation, insurances (eg, professional liability insurance and an upfront payment guarantee), but also offers to employ its members (with different legal

[253] Woodcock and Graham, *Gig Economy* (n 16) 139.

[254] crowberlin.de/uber-uns/ ('selbstverwaltet, eigenverantwortlich und nachhaltig … Kollektiv bedeutet: bei CROW übernimmt jeder Mensch sämtliche Aufgaben. Als gleichberechtigte Partner*innen funktionieren wir ohne Vermittlung oder Plattformen und sind überzeugte Velophile').

[255] coopcycle.org/en/federation/; ILO, 'World Employment and Social Outlook' (n 10) 88; 248 (Box 2.3) also mentions cooperatives in the area of taxi, house-cleaning and healthcare.

[256] Gesellschaft bürgerlichen Rechts (GbR, Civil-law corporation).

[257] Recitals 7 and 8, Arts 1(3), 58 and 59 of Regulation (EC) 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) [2003] OJ L207/1; Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees [2003] OJ L207/25.

[258] smartbe.be/en/.

[259] smart-eg.de/en/; ILO, 'World Employment and Social Outlook' (n 10) 248.

benefits depending on national social security schemes, immigration laws, etc). As for labour law obligations, it is a rather hybrid institution in many respects, holding workers themselves accountable for acquiring and executing assignments, while offering access to benefits linked to employment status without the cooperative taking on any economic risk of its own. It is unclear, however, how it cares for organisational responsibilities (eg, health and safety). The food-delivery platform Deliveroo, when it still existed in Belgium, reportedly used Smart as an intermediary, with digital platform workers being employed by the Smart cooperative rather than Deliveroo itself.[260]

The US Freelancers Union, founded by Sara Horowitz, offers yet another example of the blurring of lines between self-organisation, the sharing economy and the start-up industry. It sells and acts as a broker for health insurances for freelancers, and has been reported to have created an insurance company (which eventually closed down) and to have opened clinics.[261] Its highly emotional communication, which displays little respect for public-sector strategies,[262] shows parallels to the ways in which start-ups often present themselves: The discourses about sharing and communities are often marketing instruments intended to speak to sectors of markets to be created while addressing them.[263]

Discourses on cooperatives have much in common with discourses on the sharing economy in that they both involve values and policies that may or may not be reflected in the organising principles of particular organisations.[264] This is one more reason not to draw conclusions from legal forms, but to instead analyse business models and concrete forms of organisation.

7.8. The Challenge of Transnationality

Regulation of digital work platforms also faces another major challenge: the transnational operation of many such platforms. Digital technologies related to information and communication have been instruments for the reconfiguring of almost every aspect of the global economy.[265] Labour markets have also been rapidly transnationalised with the help of digital work platforms, the effects of which often differ quite significantly for the Global South than for the Global

[260] Callum Cant, Interview with Douglas Sepulchre (Brussels Collective de Coursiers) and Kyle (Deliveroo worker from Gent), 31 Oct 2018, notesfrombelow.org/article/slaveroo-belgian-riders.

[261] www.freelancersunion.org/; Hill, *Raw Deal* (n 173) 211; Sundararajan, *Sharing* (n 167) 187 ff.

[262] Hill, *Raw Deal* (n 173) 213.

[263] *cf* S Kirchner and E Schüßler, 'The Organization of Digital Marketplaces: Unmasking the Role of Internet Platforms in the Sharing Economy' in G Ahrne and N Brunsson (eds), *Organization Outside Organization: The Abundance of Partial Organization in Social Life* (Cambridge University Press, 2019) on the ways digital platforms have been creating new market orders via theorisation and framing.

[264] See the criticism of the sharing economy discourse above ch 2, at nn 51–52.

[265] *cf* UNCTAD, 'Trade and Development: Power, Platforms, and the Free Trade Delusion' (New York, Geneva, 2018).

North. For instance, what is considered precarious pay in the North, may constitute rather reasonable income in the South.[266]

The globalisation of the digital economy is in tension with law's national foundations, as national regulation seldom reaches beyond national borders. The national rules used for private international laws (ie, rules for conflict of laws) usually establish the applicable law by focusing on the physical place of work. The implementation of such rules would require a global digital work platform to comply with the national laws of every state in which one of its workers is situated,[267] which is really asking a lot.

On the other hand, regulation by supranational or international institutions is limited, non-binding, not directly enforceable, or non-existent.[268] That is why transnational regulation has mostly been constructed as a network of private law contracts, soft law, and political and economic incentives[269] – a regulatory model quite close to the framework proposed above for digital work platforms (7.5.1). Nevertheless, as Miriam Cherry proposes, an international governance system modelled on the ILO Maritime Labour Convention (designed for transnational operations) would be a highly useful instrument,[270] and could at least partly counter the emergent transnational rule of digital work platforms.[271]

[266] Heeks, 'Decent Work' (n 8) 5–15; for a more general perspective on the role of transnational standards in developmental policies, see E Kocher, 'Private Standards in the North – Effective Norms for the South?' in A Peters and others (eds), *Non-State Actors as Standard Setters* (Cambridge University Press, 2009); nevertheless pressing for regulation: UNCTAD, *Trade and Development* (n 264) 96.

[267] MA Cherry, 'Regulatory Options for Conflicts of Law and Jurisdictional Issues in the On-demand Economy' (2019) 12–28 with a comparison of the international private laws of California, India and the EU (Regulation EC593/2008/EC of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6); for the conflict of social security laws, see E Eichenhofer, 'Plattformarbeit und Internationales Recht', *Festschrift für Ulrich Preis* (CH Beck, 2021).

[268] *cf* Cherry, 'Regulatory Options' (n 266) 29–30.

[269] E Kocher, 'Transnational labour law?: "Corporate social responsibility" and the Law' in M Saage-Maaß and others (eds), *Transnational Legal Activism in Global Value Chains: The Ali Enterprises Factory Fire and the Struggle for Justice* (Springer, 2021); on the adaptation for digital work platforms *cf* Cherry, 'Regulatory Options' (n 266) 33–36.

[270] Cherry, 'Regulatory Options' (n 266) 33 ff; ILO, 'Work for a Brighter Future' (n 26) 44; for a transnational governance model for social security of digital platform workers, see Weber, 'Digital Social Security' (n 43).

[271] *cf* Cohen, 'Platform Economy' (n 87) 199 (digital platforms as 'emergent transnational sovereigns').

8

Results and Conclusions

Overall, this book is more about labour law than it is about digital work platforms. While regulating digital work platforms requires much more than labour law, it does also need an adequate labour law framework. The search for this framework has led this book deep into labour law justifications for work categories as well as labour law theories. This last chapter summarises the results of this exploration and their potential implications for regulation. Though this book's findings can only offer a limited contribution to the comprehensive regulation of digital work platforms, they provide a solid basis for ensuring that a strong labour law approach – ie an understanding of the power imbalances and social dynamics on digital platform work – plays a role in the ongoing digital law debate. The term 'fairness' has become central in debates about digital rights at work.[1] It may also address the basic concern of labour law: ensuring social protection against the risks of being dominated by working in an organisation owned by another. Labour law is the one domain designed to enable what could, after all, be termed 'fairness' at work.

The following section (8.1) briefly reviews the book's train of thought, while the next section (8.2) is dedicated to situating the book's most important results in the context of current policy perspectives.

8.1. Results

This book analyses the challenges digital work platforms present to the regulatory models that labour law has been developing for the past 150 years. To this end, it follows the methodological cues of the typological method of labour law classification, which invites legal operators to classify work relationships according to the primacy of facts, thereby focusing on the specific business model and work organisation at hand, instead of chasing after singular (and possibly arbitrary) attributes of the relationship.[2] Only by taking this approach seriously can labour lawyers prevent classification exercises from turning into 'transcendental nonsense', as

[1] KV Stone, *From Widgets to Digits: Employment Regulation for the Changing Workplace* (Cambridge University Press, 2004) 96 ff ('procedural fairness'); Fairwork principles (ch 2, at n 2 ff); J Woodcock and M Graham, *The Gig Economy: A Critical Introduction* (Polity, 2020) 117–29.

[2] Ch 3, 3.3.

only the primacy of facts principle can effectively establish that '[s]omewhere on the way some [legal] term will … be defined in non-legal terms.'[3]

A closer look at labour law theory (chapter four) shows why these 'non-legal terms' tend to be taken from organisation theory: What really characterises labour law is its concern with power imbalances. Of these, many exist in a work relationship. Labour law, as a domain of private law dedicated to regulating relationships that are based on contract, is designed to address those very power imbalances that are created through the contract and in the contractual relationship, ie the power held by the employer, or, in other words, by the company making use of the work in order to create products or services it offers on markets. These power imbalances arise out of workers being made part of a work organisation.

Accordingly, chapter five analyses not only the ways in which labour law classification and organisational theories are interlocked, but also the approaches that have been developed in organisation theory to explain the differences between vertically integrated hierarchical organisations and horizontally integrating partial organisations. It focuses, in particular, on the organisational concept of 'market organisers', which quite aptly describes the organisational practices of digital work platforms, or at least those that cannot *per se* be classified as 'employers'. While employers in the strict sense control the person of the worker by controlling the complete work process, digital work platforms only predefine and structure work activities. They usually do not hold individual workers directly accountable for their activities. Although digital platform workers are held in precarious situations and incentivised to follow the platform's cues, many of them are formally free to choose when and how much they work. Workers are not dominated by control, but by information asymmetry and invisible processes of assignment. Yet, there is one thing that market organisers have in common with employers: They shut workers off from free access to the markets of products and services. This makes it impossible for workers to effectively act as independent service providers, which is one of the main reasons why they should be covered by employment law: They work for someone else.

While the theoretical analyses in chapters four and five prove the point deductively, chapter three analyses the pitfalls of the employment category for digital platform work inductively. It also shows that, when confronted with digital platform work (mostly transport and food-delivery platforms), courts all over the world have had to be creative in order to be able to classify digital platform work in terms of the employment category. First, they tend to move abstract criteria for employment towards an understanding of employment as organisational integration. Secondly, the non-legal terms they use to analyse indicators for employment tend to address digital work platforms' indirect mechanisms for governing workers rather than hierarchy and direct instructions.

Some legislators and policymakers have already begun developing specific regulation for digital work platforms, and there is an incremental process under

[3] FS Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 *Columbia Law Review* 809, 820–21; 833; *cf* ch 3, 3.6, at n 409.

way of learning how to deal with these new phenomena in labour law. Chapters six and seven suggest what the insights gained in this book could contribute to policymakers' endeavours. While chapter six suggests that a new category could be the right instrument to effectively classify workers on digital work platforms, ie to capture indirect mechanisms of worker control, chapter seven identifies the labour law rights and obligations that would necessarily be attached to the new category. After all, the majority of the rights workers need are universal human rights or general contractual rights. There is only a limited number of rights at work that are designed exclusively for employment, and some of these will have to be reformulated to address indirect control and the social dynamics of virtual workplaces.

At the end, some additional reservations should be made. Most importantly, Judge Chhabria's metaphor of pegs (work relationships) having to be fitted into holes (classification categories)[4] is vivid but inaccurate. Labour lawyers cannot just sit and ponder about which of two (or more) holes to choose; the classification exercise is rather akin to fitting rising dough into the smallest baking moulds. That is why, in relation to the internet and all things digital, metaphors involving water have become abundant.[5] Digital work platforms are not a uniform phenomenon and the business models involved are in constant flux; we are surfing on a series of lakes and rapidly growing streams.[6]

8.2. Labour Law and the Law of the Labour Market

As for defining concrete policies, all of the issues discussed in this book require further analysis in relation to each jurisdiction. There is no single regulatory model to be applied across diverse legal orders. Rather, regulation of digital work platforms requires embedding in a jurisdiction's specific legal context, and it must also be thought of as part of a broader debate on law and political economy. This is what concepts that consider law's economic sociology are about. Concepts for both the law of the labour market[7] or a labour constitution that would embody a clear normative labour law concept[8] must take into account not only political, economic and social institutions or contexts, but also the relationships between a variety of regulatory domains, ranging from labour law and social security law to constitutional law.

[4] Ch 3, n 5.

[5] M Bickenbach and H Maye, *Metapher Internet: Literarische Bildung und Surfen* (Kulturverl. Kadmos, 2009).

[6] See also U Huws and others, 'Work in the European Gig Economy – Employment in the Era of Online Platforms: Research Results from the UK, Sweden, Germany, Austria, The Netherlands, Switzerland and Italy' (Brussels, 2017) 13: 'nailing jelly'.

[7] SF Deakin and F Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (Oxford University Press, 2005); *cf* MA Cherry, 'Beyond Misclassification: The Digital Transformation of Work' (2016) 37 *Comparative Labor Law & Policy Journal* 577; J Fudge, 'The Future of the Standard Employment Relationship: Labour Law, New Institutional Economics and Old Power Resource Theory' (2017) 59(3) *Journal of Industrial Relations* 374.

[8] R Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (Oxford University Press, 2017).

Socio-economic analyses have already uncovered 'the wider function of the employment relationship as the bridge between the modern business enterprise and the welfare state'.[9] It is no coincidence, then, that the employment category has come to be questioned at the same time that distinctions between worlds of welfare and varieties of capitalism seem to be collapsing,[10] and 'informational capitalism' has been identified as the socio-economic background for which the law must account.[11]

This is not to say that the concrete roles played by digital work platforms to date on different markets and in different regions of the world are not characterised by social policies, labour market segmentation and social welfare systems. Rather, these regional and national structures largely 'determine who works on platforms and to what extent'.[12] After all, digital work platforms can only thrive to the extent that a contingent workforce exists.[13]

8.3. A Quarry of Regulatory Ideas

In the law of the labour market, labour law has a very limited role to play if we just consider the concrete rights and obligations it assigns. In order to establish universal rights, including equality rights, independently of employment status, labour law's categories are evidently irrelevant. The same is true for most contractual rights, including minimum wage and certain protections against unfair termination – such rights should apply to any kind of work relationship, independently of status. Only the application of those rights and working conditions that are particularly work-related, such as health and safety, working time and professional development, should be restricted to workers under labour law.

With this framework, the book presents examples and models that can be used in future regulation for digital work platforms, such as new laws on crowdwork[14]

[9] S Deakin, 'The Contract of Employment: A Study in Legal Evolution' (2001). Working Paper 203, 29; also Fudge, 'Standard Employment Relationship' (n 7) (who fears that 'the wealthy and stable (for advanced industrialized nations) post-war period was an historical anomaly in the longer history of capitalism'; Stone, *From Widgets to Digits* (n 1).

[10] J Pilaar, 'Assessing the Gig Economy in Comparative Perspective: How Platform Work Challenges the French and American Legal Orders' (2018) 27 *Journal of Law and Policy* 47, 92 in his comparison of the French and US case.

[11] JE Cohen, *Between Truth and Power: The Legal Constructions of Informational Capitalism* (Oxford University Press, 2019); A Kapczynski, 'The Law of Informational Capitalism' (2019/2020) 129(5) *Yale Law Journal* 1276.

[12] M Krzywdzinski and C Gerber, 'Varieties of Platform Work: Platforms and Social Inequality in Germany and the United States' (2020). Weizenbaum Series 7.

[13] O Lobel, 'The Law of the Platform' (2016) 101(1) *Minnesota Law Review* 87–166, 131; see ch 1; on the role of digital work platforms in developing countries, see ch 7, 7.8.

[14] M Risak and D Lutz, 'Gute Arbeitsbedingungen in der Gig-Economy – was tun?' in M Risak and D Lutz (eds), *Arbeit in der Gig-Economy: Rechtsfragen neuer Arbeitsformen in Crowd und Cloud* (ÖGB-Verlag, 2017) (who propose an Austrian act on crowdwork).

as well as transport and delivery platforms,[15] an EU-Platform Work Directive,[16] collective agreements, soft law codes of conduct, and platform certifications. The conceptual ideas the book defends can also be used by courts that are ready to innovatively develop existing labour law categories, as many have already done for transport and food delivery.[17]

But regulation is not only about establishing rights. It is also about assigning accountability and enforcing legal responsibilities – and this is where the organisational form of employers and platforms must be taken into account. This is where labour law regulation can draw on due diligence concepts and other experiences from digital law and human rights law.[18]

On the other hand, labour law as a regulatory domain[19] can also teach digital law something, due to its sensitivities to power imbalances and decades of experiences in dealing with them. Two features of labour law stand out in this regard, the import of which I would like to stress here at the end: the use of status for the framing of regulation (8.3.1.), and the recognition of collective organisation and resistance as integral components of the legal regulation of organisations (8.3.2.).

8.3.1. Status as a Tool for Framing

Although strictly speaking, the categories of employment (or market organising, respectively) are only linked to a limited set of rights and obligations, categories shape the world of work far beyond their immediate fields of application. With categories solidifying specific bundles of rights and obligations, classification effectively assigns a status. It is with good reason that employment status is used as reference point not only in labour law, but also in other regulatory domains like tax law and social security. Creating a status is a way of institutionalising work and framing regulation.[20]

Therefore, great care and foresight are needed to decide if the creation of a new status would be a useful regulatory instrument in a particular context. The pros and cons of creating a new status for market organisers have already been discussed in chapter six. Here, it is worth emphasising that any decision in favour or against a new status would have to take into account not only labour law, but also surrounding regulatory domains linked to the status. It is worth deliberating about whether market organisers in general ought to be regulated, or if regulation

[15] See ch 6, 6.1.2.3 and 6.5.

[16] D Biegoń, W Kowalsky and J Schuster, 'Schöne neue Arbeitswelt?: Wie eine Antwort der EU auf die Plattformökonomie aussehen könnte' (Berlin, 2017) 10–11; similarly M Risak, 'Fair Working Conditions for Platform Workers: Possible Regulatory Approaches at the EU Level' (Berlin, 2018).

[17] Ch 3, 3.5.2; *cf* ch 6, 6.1.2 and 6.4.

[18] Ch 7, 7.5.

[19] On this approach, see ch 2, 2.1 and 2.2.

[20] *cf* R Dukes and W Streeck, 'From Industrial Citizenship to Private Ordering?: Contract, Status, and the Question of Consent' (Köln, 2020) and the discussion ch 6.

should limit its reach to those digital work platforms that are not yet covered by the labour law of the respective legal system. Care should also be taken to distinguish the category of market organisers from other possible categories that focus on the social situation of the worker, such as solo self-employment or freelance work.[21]

Independently of these considerations, a status that really fits the specific organisational form of digital work platforms can provide transparency and greater legal certainty as to platform workers' rights and obligations. Under the right circumstances, this can become a huge boost for enforcement – and also a point of reference for social identification and collective organisation of platform workers.

8.3.2. Power and Collective Resistance

Mark Freedland has pointed out certain 'paradoxes of precarity': If regulation opens ways for employers to avoid the implementation of workers' rights, work arrangements will develop 'which are so essentially casual and precarious that it is [these workers] who are in the greatest need of that regulatory protection'.[22] Another such paradox exists with regard to enforcement: Precariousness and the lack of enforcement happen to be mutually dependent. Labour law protection can only ever be effectively enforced if workers overcome their fear of using the law to defend their interests. Labour law can help create transformative situations, but precariousness can be a barrier against using it. Only solidarity and collective action provide effective ways out of this vicious circle.[23]

The history of digital work platforms has already contributed to proving this point. And we have also seen diverse forms of resistance, trade union action and new social movements emerging against platform power.[24] Today, rights to collective organisation, collective action and collective bargaining are among the most pressing issues for the labour law of digital work platforms.[25] Hopefully, this book can contribute to convincing policymakers that it is high time to take action.

[21] See also the category of the 'autonomous worker' as proposed by H Arthurs, 'Fairness at Work: Federal Labour Standards for the 21st Century. Final Report of the Federal Labour Standards Review' (Gatineau, 2006) 64 and E Dockès (ed), *Proposition de code du travail* (Dalloz, 2017) 7; on the notion of 'freelancer', see G Davidov, 'Freelancers: An Intermediate Group in Labour Law?' in J Fudge, S McCrystal and K Sankaran (eds), *Challenging the Legal Boundaries of Work Regulation* (Hart Publishing, 2012); *cf* the indefinite description 'other precarious workers' by MA Cherry and A Aloisi, 'Dependent Contractors in the Gig Economy: A Comparative Approach' (2017) 66(3) *American University Law Review* 635.

[22] M Freedland, 'New Trade Union Strategies for New Forms of Employment: A Brief Analytical and Normative Foreword' (2019) 10 *European Labour Law Journal* 179, 181.

[23] E Kocher, 'Arbeit, Kollektivautonomie und Solidarität' in S Baer and U Sacksofsky (eds), *Autonomie im Recht – Geschlechtertheoretisch vermessen* (Nomos Verlag, 2018) 345–47.

[24] More generally on these dynamics, SR Clegg, D Courpasson and N Philipps, *Power and Organizations* (Sage, 2006) 363 ff.

[25] See ch 7, 7.6.

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