Introduction

In its 2016 Communication ‘A European agenda for the collaborative economy’, the European Commission highlighted how:

The collaborative economy creates new opportunities for consumers and entrepreneurs. The Commission considers that it can therefore make an important contribution to jobs and growth in the European Union, if encouraged and developed in a responsible manner. Driven by innovation, new business models have a significant potential to contribute to competitiveness and growth. The success of collaborative platforms are at times challenging for existing market operators and practices, but by enabling individual citizens to offer services, they also promote new employment opportunities, flexible working arrangements and new sources of income. For consumers, the collaborative economy can provide benefits through new services, an extended supply, and lower prices. It can also encourage more asset-sharing and more efficient use of resources, which can contribute to the EU’s sustainability agenda and to the transition to the circular economy.

(European Commission 2016: 2)

The opportunities are great – but so are the potential downsides: many platform workers struggle with low pay, long hours, and precarious conditions.¹ In this contribution, we focus on the challenges this form of work organisation in the ‘on-demand’ or ‘gig economy’ pose to traditional labour market regulation, and explain how some of these might be met.

¹ In this chapter we use the terminology suggested by Eurofound, Employment and working conditions of selected types of platform work (Publications Office of the European Union 2018: 9): “Platform work is a form of employment that uses an online platform to enable organisations or individuals to access other organisations or individuals to solve problems or to provide services in exchange for payment”. The manusript was completed in December 2020, developments after this date like the proposal of the European Commission for a Directive on improving working conditions in platform work as presented in December 2021 are therefore not considered.
This is a timely endeavour as the political guidelines of the present President of European Commission Ursula Von der Leyen for the period 2019–2024 includes a passage touching on exactly this issue:

Digital transformation brings fast change that affects our labour markets. I will look at ways of improving the labour conditions of platform workers, notably by focusing on skills and education.

(Von der Leyen 2019a: 10)

This call is particularised in the mission letter to the Commissioner for Jobs, Nicolas Schmit, which puts an explicit emphasis on the improvement of working conditions of platform workers:

Dignified, transparent and predictable working conditions are essential to our economic model. I want you to closely monitor and enforce existing EU law in this area and to look at ways to improve the labour conditions of platform workers.

(Von der Leyen 2019b: 5)

In this chapter we explore different options to achieve this aim – ways to improve labour conditions for platform workers. To this end, the chapter is structured as follows. The first subsections briefly introduce platform work, highlighting salient aspects for subsequent debate: there is a broad spectrum of platforms, from physical service provision to exclusively digital work. Platform workers’ experiences are similarly varied, ranging from successful entrepreneurs to those stuck with monotonous tasks and long hours, remunerated significantly below minimum wage rates. The successive section then outlines the regulatory challenges arising from platform work: one of the very purposes of employment and labour law is to draw a distinction between the genuinely self-employed and those requiring protection, and to bring the latter within its protective scope. The multiplicity of contractual relationships and competing legal characterisations in the arrangements between platforms, workers, and customers, on the other hand, sits uneasily with the traditional binary divide. It is this mismatch which lies at the core of classification problems in the gig economy, and the resulting exclusion of platform workers from even the most basic labour standards.

In the following sections we develop different approaches for addressing this problem. They deal with interpretative approaches to the notion of employee and employer in an attempt to enlarge (or restore) the scope of employment law to include those working in the virtual realm. First, an approach based on Prassl’s functional-typological concept of the employer is outlined, developed on the basis of a catalogue of five employer functions (Prassl 2015). Then another re-interpretation of the employee is proposed, emphasising economic arguments over organisational ones. Both approaches have the advantage of requiring little legislative activity and may therefore be the most easily applicable, especially as judges are increasingly asked to adjudicate upon employment status in platform work.2

Another (much-disputed) approach to regulating work in the on-demand economy is based on the idea that an intermediate legal category, situated between the employee and the self-employed, might be the most apt to deal with the legal issues arising from platform work. The

successive section looks at existing models and recent litigation in Austria, Germany, and the United Kingdom to demonstrate the potentially different effects of such an approach.

The third and maybe most obvious way to deal with platform work discussed here is to introduce special legislation for platform work. This approach would follow established patterns of regulation for other forms of atypical work especially temporary agency work that is also construed as a multi-party relationship. On the European as well as national level, special legislative provisions have been enacted to deal with the specific problems arising from the multiplicity of contracts and contractual partners found in outsourcing and agency work. The next section reflects on this avenue and points out possible advantages of this approach, followed by a section that assesses the importance of coherent legal protection through the lens of the COVID-19 pandemic, which swept European and international labour markets in the spring of 2020.

Whilst the avenues to be chosen are thus potentially manifold, one thing is clear: there is an urgent need for legislators and practitioners to address the often vulnerable situation of persons working in the gig economy, offering maximum flexibility but getting very little security in return. This must be changed, while keeping in mind that any proposed solution or mix of solutions must be able to respond flexibly to changing economic and organisational models, but at the same time must offer conceptual coherence in the face of factual complexity.

### Platform work

Developments in information and communication technology (‘ICT’) and the Internet have made it easier than ever before to match demand and supply in real time, both locally and globally. This has led not only to fundamental changes in traditional work relationships, but also to the emergence of new forms of employment located in the grey and often unchartered territory between employment contracts and freelance work (Eurofound 2015; Aloisi 2016; De Stefano 2016a; Prassl 2018: Chapter 5). A particularly salient instance of this phenomenon is platform work, a relatively recent model also known as crowdsourcing of labour, gig work, on-demand work, or crowd employment. These notions describe an ICT-based form of organising the outsourcing of tasks to a large pool of workers. The work (ranging from transportation services and cleaning to digital transcription or programming tasks) is referred to in a variety of ways, including ‘gigs’, ‘rides’, or ‘tasks’, and is offered to a large number of people (the ‘crowd’) by means of an Internet-based ‘crowdsourcing platform’. This organisational model forms part of a larger set of processes known as ‘crowdsourcing’; with customers (or indeed employers) referred to as ‘crowdsourcers’. The resulting contractual relationships are manifold and complex: whilst the work is usually managed through an intermediary (the crowdsourcing platform), some will insist on direct contractual relationships between crowdsourcer clients and platform workers, whereas others will opt for tripartite contractual structures, akin to traditional models of agency work and labour outsourcing (Kittur et al. 2012; Leimeister et al. 2014b).

There is a nearly unlimited factual variety that characterises the emergence of online platforms, both in terms of crowdsourcing in general (crowdfunding, allocation of non-labour resources such as accommodation), and crowdsourcing of labour, or – as it is also called –

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3 Such as, notably, Amazon’s Mechanical Turk (www.mturk.com) see Strube (2014); for the German platform Clickworker see Lutz (2017).

4 This term derives from a combination of the words ‘outsourcing’ and ‘crowd’, and was used by Jeff Howe for the first time (Howe 2006).


crowdwork, in particular. It is therefore not useful, or indeed feasible, to construct an overall taxonomy of crowdsourcing platforms. For present purposes, however, a few fundamental distinctions may be drawn.

Crowdsourcing, first, can take place internally or externally, depending on whether the crowd comprises a company’s internal workforce or simply any number of individuals on a given platform. With external crowdsourcing, the crowdsourcer generally uses crowdsourcing platforms that already have an active crowd of registered workers. In this contribution, we will look solely at external crowdsourcing, as internal crowdsourcing is generally arranged within the context of existing employment relationships, and therefore poses fewer fundamental legal problems (Klebe and Neugebauer 2014: 4), regardless of whether the platform is operated by an independent enterprise or by the company itself (Eurofound 2015: 110).

Work crowdsourced to an external crowd, on the other hand, can be seen as clustered along a spectrum of services and arrangements. On the one end, we find physical services to be undertaken in the ‘real’ (offline) world, where the platform worker comes into direct contact with the customer. Examples include transportation delivered via apps such as Uber, domestic services (cleaning, repair work, etc.) delivered via platforms such as Helpling, and clerical work (e.g. customer service or accounting) provided by platforms like UpWork. Uber customers, for example, use an app on their smartphones to request rides from a specific location, information that is instantly broadcast to drivers in the area. Once the request has been accepted by a driver, she is directed to the passenger and onwards to the required destination, through her version of the Uber app. Payment is taken automatically from the customer by the platform, and after the taking of a commission of between 20 and 30%, passed on to the driver. Customers and drivers rate each other anonymously following each journey; the resulting scores are displayed to passengers and operators respectively before the next trip commences. Helpling operates in a similar way, even though the physical work takes place in the client’s home or business premises – customers log in on a platform or app, type in their postcode and when cleaning is required. They are then offered profiles of workers available in their vicinity, with further information about each individual, and an online facility to complete bookings. Payment is processed via the platform, and after completion of their tasks, all cleaners are rated by their customers, with the resulting score displayed online in order to inform future customers.

On the other end of the spectrum, there is digital work delivered in the virtual world, usually via an interface provided by the platform. The tasks involved here are often very simple, repetitive activities involving low pay and highly standardised or automated processes. These ‘microtasks’ include digital labelling and the creation of image descriptions, categorising data and products, and the translation or proofreading of short texts, with larger tasks often broken down into smaller subtasks to be worked on independently. These microtasks are then posted on platforms, where platform workers can find and complete them. The leading platforms for this kind of ‘cognitive piece work’ (Schmidt 2014: 378) or ‘Neo-Taylorism’ (Leimeister et al. 2014a: 32)

7 For a typology of platform work Eurofound (2018: 53 et seq.), Platform work: Types and implications for work and employment – Literature review.
10 www.uber.com/features.
11 Though the platform continues to experiment with varying the amount of commission payable, which is particularly harmful to part-time workers, as the percentage retained falls with the number of trips offered: www.cnet.com/news/uber-tests-30-commission-for-new-drivers-in-san-francisco/.
The legal protection of platform workers

include Amazon’s Mechanical Turk12 and Clickworker.13 Survey research has shown that 25% of the tasks offered on Amazon Mechanical Turk are valued at $0.01, 70% offer $0.05 or less and 90% pay less than $0.10 per completed task; thus equalling an average wage of about $2 per hour (Eurofound 2015: 115).

This segment of the labour market is also referred to as the ‘gig economy’, characterised by the prevalence of short-term contracts or freelance work, as opposed to permanent jobs. Workers earn their livelihood not from one open-ended full-time employment contract but, like musicians, from a series of ‘gigs’. For some, this is a working environment that offers flexibility with regard to employment hours, a diversity of different jobs, and the opportunity to earn additional income; to others, it represents precarious, low-paid work offering little legal protection.

Working in the platform economy

Historically, the main advantage of hierarchical employment relationships over contracts with independent contractors was understood to be the entrepreneur's degree of control, and the resulting decrease in transaction costs, whether in the search, selection, and training of workers, or the employer's tight control over the production process (Coase 1973). An increasing desire for labour flexibility, on the other hand, was the driver behind the more recent creation of different forms of atypical work, including agency work, part-time work, and fixed-term employment (Eurofound 2001; European Parliament 1998).

Platform work is a rather novel combination of these factors, insofar as platforms attempt to increase flexibility for the employer or customer and to reduce the costs of ‘empty’ or unproductive moments, whilst at the same time maintaining full control over the production process in order to keep transaction costs to a minimum. In order to meet these seemingly contradictory goals, two preconditions must be met: first, the crowd must be large enough in order to always have individuals available when needed, and to maintain enough competition between platform workers to keep prices low. This is usually achieved through platforms’ large and active crowds, with different platforms specialising in different segments of the crowdsourcing market.

Secondly, instead of the command-and-control systems inherent in ‘traditional’ employment relationships, crowdsourcers and platforms rely on ‘digital reputation’ mechanisms to guide the selection of platform workers and to ensure efficient performance control. Individual models vary, but the fundamental approach is consistent: platform workers are awarded points, stars, or other symbols of status by the crowdsourcer or customer after completing a task.14 Quality control itself can thus be crowdsourced by the platform to its customers or other crowdsourcers, tapping the ‘wisdom of the crowd’ (Surowiecki 2004) in order to determine the performance levels of each individual platform worker.

The potential upsides of this emerging model for firms and workers alike should not be underestimated.15 Through the use of platforms, businesses ranging from restaurants to IT service providers can draw on a large crowd of flexible workers to reduce or even eliminate the cost of unproductive time at work, and rely on reputation mechanisms to maintain full control over the production process or service delivery. The resulting competition between platform

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12 www.mturk.com/mturk/welcome.
14 On some platforms, including Uber, customers are rated by crowdworkers in turn: cf. Langlois (2015).
15 www.telegraph.co.uk/technology/uber/12086500/In-praise-of-the-gig-economy.html
workers will ensure that quality remains high whilst wages are low. As Lukas Biewald, then CEO of the platform Crowdflower, put it bluntly in 2010,

> Before the Internet, it would be really difficult to find someone, sit them down for ten minutes and get them to work for you, and then fire them after those ten minutes. But with technology, you can actually find them, pay them the tiny amount of money, and then get rid of them when you don’t need them anymore. (Marvit 2014)

Platform work similarly offers significant potential upsides for (at least some of its) workers, first and foremost, in terms of flexibility: platform workers can decide when to work, where to work, and what kinds of tasks to accept. Platform work might therefore be more compatible with other duties, such as childcare. The flexibility and potentially limited nature of individual engagements can also help the underemployed, providing additional income to their regular earnings, and (at least through virtual work platform work) allowing those excluded from regular labour markets due to disabilities or other factors to find opportunities for gainful employment (Zyskowski et al. 2015). Finally, there are an increasing number of genuinely successful small entrepreneurs, focused on particular niches or offering special skills, for whom platform work has become a very profitable source of new business.

At the same time, however, it is important to note that working conditions for the vast majority of platform workers appear to be poor, irrespective of the work being delivered (Marvit 2014). The lack of unions or organising powers, the oligopoly of but a few platforms offering certain kinds of tasks, and constant economic and legal insecurity result in a massive imbalance of bargaining power, noticeable primarily in low wage-rates and heavily slanted terms and conditions in platform use agreements. In the case of virtual platform work, global competition and dislocated physical workplaces further aggravate these problems, as a lack of regulation leads to what some have called ‘digital slaves’ (Rosenblum 2013) working away in their ‘virtual sweatshops’.17

Two problems in particular are repeatedly highlighted: low wages, and workers’ dependence on their ratings with a particular platform. As regards the former problem, for example, some reports suggest that the average wage on Amazon’s Mechanical Turk is less than $2 per hour (Ross et al. 2010), considerably below the US minimum wage. A related aspect is insecurity as regards payment: in accordance with the general terms and conditions of microtasking-platforms, crowdsourcers have the right to reject the work without having to give a reason or providing payment, whilst still receiving the fruits of a worker’s labour.

Various systems of ‘digital reputation’, or rating mechanisms, which form one of the core elements of platform work, raise a second set of difficult questions: a customer-input based system of stars or points not only puts platform workers in a state of permanent probation, but also infringes their mobility as it ties them to particular platforms. As the more attractive and

17  See so-called ‘gold farming’ (professional online gaming to collect virtual money in games like World of Warcraft): Dibbel (2016).
18  In the US there are different minimum wages, depending on the Federal State. Cf. www.dol.gov/whd/minwage/america.htm.
19  For an illustration in the context of Mechanical Turk, see Martin et al. (2014).
20  There are also increasing reports of discrimination and bias hampering the operation of rating systems: see www.bostonglobe.com/news/science/2013/08/08/the-pitfalls-crowdsourcing-online-ratings-vulnerable-bias/
better paid tasks are only offered and assigned to those who have the best reputation, and as a worker's digital reputation is not transferable between individual platforms, a change of platforms will be difficult – a fact which also further impairs the bargaining position of platform workers.

As far as the volume of platform work is concerned, 173 platforms organising services are active throughout Europe (Fabo et al. 2017). Around 2% of the working age population (16–74 years) in 14 member states have platform work as their main occupation. Around 6% derive a substantial income from platform work (at least 25% of their average income from a 40-hour working week) and almost 8% perform tasks on digital platforms at least once a month (Pesole et al. 2018). Like agency work, platform work therefore is not that widespread but a relevant phenomenon nevertheless. This is the case not only because of the numbers, but also because it challenges the standard employment relationship at its core which will be pointed out in the following section.

**Regulatory challenges**

**Working conditions in the platform economy**

It cannot be denied that platform work offers significant potential benefits for (at least some of) its workers, first and foremost, in terms of flexibility and in the creation of new working and business opportunities. At the same time, however, working conditions for the vast majority of platform workers appear to be poor, irrespective of the work being delivered. As this has been laid out earlier it suffices to highlight the two most pressing problems platform workers themselves raise: low wages, unstable work, and workers’ dependence on their ratings with a particular platform that hinders workers’ mobility. The first is mostly a result of the legal uncertainty of the legal status of the platform workers as well of the lack of worker representation in this industry.

**The underlying (legal) problems**

One of the very purposes of employment and labour law is to draw a distinction between the genuinely self-employed and those requiring protection against many of the problems already outlined, bringing the latter group within its protective scope. Most jurisdictions have developed a more or less elaborate legal framework regulating the employment relationship based on the idea of the existence of an imbalance of bargaining power when negotiating pay and conditions of work (Freedland and Davies 1983: 14, 69). This usually includes the right to organise, to bargain collectively and to take collective action. Self-employed persons, on the other hand, do not enjoy any of these rights, including minimum wages, sick pay, or protection against unfair dismissal. Indeed, they may even be forbidden from coming to mutual arrangements over basic terms, such as minimum payments, as this might contravene competition or anti-trust laws.21

It is therefore important to analyse where the line is drawn between the status of an employee and a self-employed person or independent contractor. As we have pointed out elsewhere (Prassl and Risak 2016: 633), this becomes very hard when more than two parties are involved, as the

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received analytical approach was developed in the context of bilateral employment relationships. Employment law thus struggles with the crowdsourcing of labour given the involvement of an intermediary or platform in addition to the platform workers and crowdsourcers. A traditional analysis would split the three-party arrangements underlying platform work scenarios into a series of bilateral contractual relationships, and attempt to classify each relationship separately. The economic situation of platform workers, however, is not accurately reflected in the sum of these fragments of contracts. Looking only at individual relationships at a time, without also considering their interwoven nature because of the crowdsourcing platform, is akin to determining the nature of a cloth by looking only at its differently coloured threads of wool, without taking into account the knitting pattern. The received analytical approach tends to ignore complex multi-party relationships, and analyses the resulting fragments without reference to the broader context and economic effects of platform work. This, then, is at the core of its shortcomings when faced with multiple parties: there is little analysis of contractual relationships as an interdependent net of contracts that only makes sense as a whole.

**Possible solutions**

In the following sections, we will point out four different ways to deal with the regulatory challenges, starting with the one that is the least ‘intrusive’ (i.e. requiring the least changes in labour regulation and jurisprudence) through to the one requiring the most detailed legislative activity. We start out with an approach that focuses on who is the employer based on a functional concept asking who can best meet the responsibilities deriving from the employer functions (see following section). Another approach is the widening of the notion of the employee, which up to now (at least in some jurisdictions) has been primarily based on organisational criteria and less on the economic dependency on a single or few contractual partners. Another approach might be the introduction of an intermediate category or – where it already exists – its application to virtual platform workers. The last regulatory avenue explored is the one of special statutory regulation of platform work, similar to temporary agency work. This will be further discussed in the following sections.

The different ways of dealing with the issues of virtual platform workers are complementary rather than mutually exclusive to one another. They also do not solve the problems to a different extent: while an extension of the notion of the employee will bring platform workers (or at least some of them) into the protective scope of employment law, this solution does not clearly solve those issues connected with multiple-party work relationships. And of course, the different paths for reform do very much depend on the status quo and general approach to labour law in any given jurisdiction; where employment regulation is primarily based on collective bargaining, for example, the extension of the possibilities to do so will be the focus, while in those systems with close-knit statutory protection, the extension of the scope of application of key protective norms will be more crucial.

**A functional concept of the employer**

As *The Concept of the Employer* (Prassl 2015) suggests, in order to restore congruence to the application of employment law norms, the very definition of the employer must carefully be reconceptualised as a more openly functional one, whether through judicial recognition of that notion in litigation, or through legislative action. Present space limitations prohibit an extensive rehearsal of the development of that notion; two crucial steps can nonetheless be highlighted. First, the argument that the traditional unitary analysis of the employer has long been
accompanied by functional elements: employment law identifies, at least indirectly, a series of five employer functions – from hiring workers to setting their rates of pay – and regulates them in one or several areas – from anti-discrimination law to minimum wage provisions.

For purposes of this analysis, a ‘function’ of being an employer is one of the various actions employers are entitled or obliged to take as part of the bundle of rights and duties falling within the scope of the open-ended contract of service. These functions are rarely set out explicitly: indeed, in most jurisdictions, the definition of the employer is seen as an afterthought in determining the scope of worker-protective norms. Upon closer inspection, however, it quickly appears that the concept implicitly mirrors the definition of the employee or worker, allowing for a ‘reverse-engineering’ of employer functions out of factors defining the employee (Prassl 2015: 24–25).

In trawling the established tests of employment status, such as control, economic dependence, or mutuality of obligation for these employer functions, there are endless possible mutations of different fact scenarios, rendering categorisation purely on the basis of past decisions of limited assistance. The result of this analysis of concepts underlying different fact patterns, rather than the actual results on a case-by-case basis, is the following set of functions, with the presence or absence of individual factors becoming less relevant than the specific role they play in any given context. Individual elements can vary from situation to situation, as long as they fulfil the same function when looked at as a whole.

The five main functions and their functional underpinnings of the employer are:

1. Inception and termination of the employment relationship
   This category includes all powers of the employer over the very existence of its relationship with the employee, from the ‘power of selection’ to the right to dismiss.

2. Receiving labour and its fruits
   Duties owed by the employee to the employer, specifically to provide his or her labour and the results thereof, as well as rights incidental to it.

3. Providing work and pay
   The employer’s obligations towards its employees, such as, for example, the payment of wages.

4. Managing the enterprise-internal market
   Coordination through control over all factors of production, up to and including the power to require both how and what is to be done.

5. Managing the enterprise-external market
   Undertaking economic activity in return for potential profit, whilst also being exposed to any losses that may result from the enterprise.

Key to this concept of the multi-functional employer is the fact that not one function mentioned is relevant in and of itself. Rather, it is the ensemble of the five functions that matters: each of them covers one of the facets necessary to create, maintain, and commercially exploit employment relationships, thus coming together to make up the received legal concept of employing workers or acting as an employer – and being subject to the appropriate range of employee-protective norms.

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22 Whilst subsequent examples are drawn primarily from common law jurisdictions, we suggest that the approach is capable of being similarly developed in civilian jurisdictions.

23 The ‘equipollency principle’ (Äquivalenzprinzip): Nogler (2009).

24 For earlier attempts at such lists see, e.g., Freedland (2003: 40).
A functional conceptualisation of the employer, then, is one in which the contractual identification of the employer is replaced by an emphasis on the exercise of each function – whether by a single entity, as demonstrated immediately following, or in situations where different functions may be exercised from more than one locus of control.\textsuperscript{25} Indeed, in the platform work context, one particular challenge arises from the fact that functions may sometimes be jointly exercised by platforms, customers, and potentially even the platform worker herself. The shared exercise between two or more entities, or one where functions are parcelled out between different parties, arise where platform work arrangements lead to a fragmented exercise of employer functions – it is in those scenarios that the functional model of the employer will now be put to the test: there may be elements of genuine self-employment, platforms performing employer roles, and even customers potentially becoming subject to regulatory obligations.

In order to reconcile these contradictions, and ensure a consistent application of employment law in the face of factual complexity, our conceptualisation of the concept of the employer needs to move from the current rigidly formalistic approach to a flexible, functional concept. In more concrete terms, the following working definition has been offered by Prassl (2015: 155):

the entity, or combination of entities, playing a decisive role in the exercise of relational employing functions, and regulated or controlled as such in each particular domain of employment law.

Calling for a functional definition of the employer is not a completely novel approach to the problems arising from multilateral employment arrangements. Judy Fudge (2003: 636 et seq.), for example, has long noted the “need to go beyond contract and the corporate form, and adopt a relational and functional approach to ascribing employment-related responsibilities in situations involving multilateral work arrangements in employing enterprises” (Deakin 2001: 79 et seq.).

In order to embrace a functional approach, however, the law’s underlying methods of reasoning need to evolve in part. The present sub-section thus sets out to consider the meaning of ‘functional’ in the proposed functional concept on a more abstract level, in the hope that this will allow for a clearer account of that approach. It further aims to develop functional typology as a richer concept than simply a contrast to the perceived formalism of the current bilateral-contractual approach (Fudge 2006), thus avoiding at least some of the dangers of the ‘transcendental nonsense’ which can result from the indiscriminate use of the ‘functional approach’ as a panacea to various analytical problems, “often . . . with as little meaning as any of the magical legal concepts against which it is directed” (Cohen 1935).

The key idea of this functional approach is to focus on the specific role different elements play in the relevant context, instead of looking at the mere absence or presence of predetermined factors. The presence of a contract of employment (or other contract) can thus be an important indicator in particular fields (for example the obligation to pay wages), but it is by no means the only one. A functional concept of the employer is one where the employing entity or entities are defined not via the absence or presence of a particular factor, but via the exercise of specific functions. This exercise of specific functions extends to include a decisive role in their exercise, in order to take account of the judicial recognition in existing cases that as regards employer

\textsuperscript{25} The term \textit{locus} of control is designed to avoid additional complexities arising out of the fact, noted inter alia by Freedland (2003), that even in traditional companies without external influence, management control is often exercised by more than one person amongst a group of relatively senior executives.
functions the right to play a decisive role in a particular function is as relevant as the actual exercise thereof.

We have applied this concept to existing platform models in a paper and reached the following conclusions (Prassl and Risak 2016: 636 et seq.): an examination of the transportation service Uber’s business model demonstrated that, where a platform exercises all employer functions, it can easily be identified as an employer, with drivers consequently to be seen as workers, rather than independent contractors. Most platforms, on the other hand, lead to a fragmentation of employer functions as demonstrated in the case of TaskRabbit which provides household services. We concluded that, just as different functions may be exercised by various parties, concomitant responsibility should be ascribed to whichever entity – or combination of entities – has exercised the relevant function. As a result, multiple entities may come to be seen as employers for different purposes; the model is able at the same time to recognise elements of (genuine) self-employment, as the concluding examples have demonstrated.

Redefining the notion of the employee

Two of the core questions of labour law relate to the scope and justification of employment protection; put differently: who is protected, and why? The scope of employment should extend to those in need of protection because of their unique situation. This leads us to the second question, namely what makes the employment relationship so special and the employee in need of special protection. One of the most frequently cited underlying rationales of labour law is the twofold economic dependence of the employee. This refers, first, to the fact that resources (e.g. materials, machines, or an organisation) are typically needed to perform the work and that employees have, at least historically, depended on the employer to provide them. Secondly, it implies dependence of the employee on ‘selling’ his or her labour in exchange for remuneration from the employment relationship to sustain his or her living. Some legal orders, however, do not refer to these economic arguments, focusing instead on the way the work is actually performed. Especially the second aspect (dependence on salary to earn a living) is considered impractical, as employers often have no means of ascertaining whether their contractual partners actually have other sources of income or their reasons for working more generally.

The European Court of Justice applies a similar approach. It is settled case law that the essential feature of the employment relationship is that for a certain period of time one person performs services for and under the direction of another person in return for which she receives remuneration. It is of major importance that a person acts under the direction of his or her employer as regards, in particular, the freedom to choose the time, place, and content of the work, that the employee 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. In its first decision on platform work of 22 April 2020 dealing in concreto with the applicability of the Working Time Directive 2003/88/EC to ‘neighbourhood parcel delivery couriers’ organised via an online platform, the European Court of

26 For Austria cf. Risak (2010: 36); Brodil and Risak (2020: 14); for Germany cf. Weiss and Schmidt (2008: 45).
28 ECJ in Allonby, EU:C:2004:18, para. 72.
Justice again applied the traditional criteria mentioned earlier. It was not even discussed in this order of the court to adapt them to the platform work environment let alone develop them further. There is good reason to do so as we will argue in the following.

For decades this organisational approach focusing on the restricted self-determination when working on the one hand delivered satisfactory results and on the other was practical and relatively easy to apply. This was based on the fact that only those having enough resources were able to become self-employed and that they were able to negotiate for pay that satisfied their needs. On the other hand, those working under the close supervision of another person often did not have enough bargaining power when negotiating pay and conditions of work (Freedland and Davies 1983: 14, 69). In those circumstances, it is rather unproblematic to equal organisational and economic dependency in the past. This picture, however, has changed due to a number of factors and has led to the emergence of a growing number of self-employed: advances in digital technologies, the widespread availability of handheld devices, and ever-increasing high-speed connectivity have combined with the realities presented by several cycles of economic downturn, shifts in lifestyle, and generational preferences (Lobel 2016: 2). These new ‘solo-entrepreneurs’ and freelancers are very different from the ones in the past, where ‘liberal professions’ such as lawyers, architects, and other high-skilled professionals had the power to bargain for high remuneration and controlled their own working conditions. Platform workers active in the virtual realms of the gig economy today resemble the workers of the 19th century who did not have any other alternatives than to sell their labour in a highly competitive market. They compete with a large reserve army of virtual labour unlike those self-employed in liberal professions. They are also similar to traditional employees as they do work in person and thereby sell their labour and not an end product. Finally, they are also vulnerable as they earn their livelihood by doing this vis-à-vis only one or a very limited number of immediate contractual partners (viz., the platforms). The only difference between them and traditional employees is the fact that they are formally free to work on what and when they choose – but this freedom may often be no more than formal, due to an economic situation which does not leave them a lot of alternatives to selling their labour in a certain way to certain contractual partners (Risak and Lutz 2017: 358).

Against this background it makes sense to open up a range of employment rights, not least the rights to organise, to bargain collectively, and to take collective action, to this group of vulnerable self-employed. At first glance, this might be in conflict with European Union competition and anti-trust law, as Art. 101 TFEU forbids all agreements and concerted practices which have as their object or effect the prevention, restriction, or distortion of competition: collective agreements could be characterised as a restriction on competition between employees, thus contravening that provision. The European Court of Justice has held, however, that agreements entered into within the framework of collective bargaining between employers and employees and intended to improve employment and working conditions must, by virtue of their nature and purpose, be regarded as not falling within the scope of Art. 101(1) TFEU. In our view, it is therefore crucial to either redefine the notion of the employee or take specific legislative initiatives in order to open up collective bargaining to this group of self-employed with limited bargaining powers. In December 2015, for example, the Seattle City Council unanimously

31 ECJ in Yodel Delivery Network Ltd, ECLI:EU:C:2020:288.
enacted legislation granting the city’s drivers “a voice on the job and the opportunity to negotiate for improved working conditions at their companies”.33

Redefining the notion of the employee, or specifically including the self-employed within the scope of certain employment law norms, would also widen the scope of application of individual labour law (i.e. the set of rules granting individual rights and entitlements and therefore protecting employees from unfair and unhealthy working conditions). This body of laws usually encompasses, among others, minimum wages, working time restrictions, right to paid sick leave, and holidays, as well as protection against dismissals. If the economic situation of the employee is the reason why these rights and entitlements have been developed in the first place, it is hard to argue why not to extend the scope of their application to persons in the same situation only based on the argument that they are not formally integrated enough into the business of their contractual partners.

That redefining the concept of worker is not an easy endeavour became evident by the fierce opposition to even include a very traditional definition of ‘worker’ into recent EU legislation, the Directive (EU) 2019/1152 on transparent and predictable working conditions. It has to be seen as a success that in Recital 8 it is mentioned that – provided that they fulfil the criterion of subordination – platform workers among others could fall within the scope of this Directive.

Introduction or extension of an intermediate category

Another option to protect virtual platform workers that has been mooted is a suggestion that the law might recognise an intermediate category of worker between employee and independent contractor (Lobel 2016: 10; Harris and Krueger 2015). In this way, the argument runs, the level of protection may be graded, and the fact that the personal integration of some platform workers is less intense and that they enjoy a certain level of flexibility and freedom can actually be used to their advantage.

The examples are numerous: in Canada, jurisprudence has developed the category of dependent contractor for cases in which a contractor has worked exclusively or largely exclusively for one client for an extended period. They are then deemed a dependent contractor for purposes of termination notification and representation.34 In Italy, lavoro etero-organizzato relationships enjoy some level of statutory protection,35 and in Germany and Austria some employment regulations are to be applied also to employee-like (arbeitnehmerähnliche) persons. In Austria, these persons are defined as persons who perform work/services by order of and on account of another person without being in an employment relationship, but who may be considered employee-like due to their economic dependence. Only some provisions of labour law apply to those employee-like persons, for example, those on the competence of the labour courts,36 agency work,37 employee liability,38 and anti-discrimination.39 In Germany, the intermediate category is defined similarly, and is also covered by the Act on Collective Agreements (Tarifvertragsgesetz), and may therefore

36 The Labour and Social Courts Act s 51 (3) 2.
37 The Act on Agency Work s 3.
38 The Employees’ Liability Act s 1 (2).
39 The Equal Treatment Act ss 1 (3) 2 and 16 (3) 2.
conclude collective agreements with normative effect. In the United Kingdom the extension of employee rights beyond the employment contract seems to be the furthest developed, as discussed in our analysis of the 2016 Uber decision, immediately following.

Instead of building on these specific domestic experiences, Harris and Krueger (2015) have instead argued in favour of the statutory introduction of a novel third, intermediate category to capture gig economy workers: their ‘independent worker’ status would be entitled to some protection, including collective bargaining and elements of social security provision, whilst being denied recourse to basic standards such as wage and hours protection. This approach differs from existing models, insofar as platforms would immediately be relieved of some of employers’ most costly obligations — whilst continuing to litigate over independent contractor status.

As an exasperated US District Judge famously noted, the task of determining worker status is often akin to being “handed a square peg and asked to choose between two round holes”.40 Adding a third round hole is therefore unlikely to solve any classification problems. Indeed, it appears that even those jurisdictions that have recognised a third category have done so without resolving any of the fundamental classificatory problems. If anything, more confusion is introduced, as became evident during recent UK litigation against Uber, with legal arguments focused on the third category recognised in English employment law.

In Aslam v. Uber BV the Central London employment tribunal ruled on 28 October 2016 that Uber drivers were workers for purposes of s. 230(3)(b) of the Employment Rights Act 1996, rather than independent contractors, as the company had long maintained. In a clear and powerful judgement, the tribunal found that the company’s “resorting in its documentation to fictions, twisted language and even brand new terminology” merited “a degree of scepticism” (at paragraph [87]), and found that drivers were workers. As a result, Uber’s drivers will now be entitled (subject to a series of pending appeals) to a small number of core rights attached to worker status, including, importantly, the National Minimum Wage Act 1998 and the Working Time Regulations 1998.41

Such basic protection will overcome some of the worst problems faced by Uber drivers — not least because the tribunal (rightly) ruled that a driver is ‘working’ for the entire time that his (the vast majority being male, as noted in the decision) Uber drivers’ app is switched on, and he is able and willing to accept rides, not just when he has a passenger in his car. In the longer run, however, Uber drivers — even when classified as workers — will face many of the problems encountered by zero-hours workers across the United Kingdom (Adams et al. 2015): from low income to struggling with unpredictable shifts due to a lack of guaranteed work. This, then, is the fundamental problem with the creation of a novel third status category: not only would it fail to alleviate the uncertainty and classificatory problems identified previously; it would provide platform workers with a lower degree of protection even though, as previous discussion has shown, they might often be amongst the most vulnerable participants in the labour market.

Beyond the United Kingdom, the experience with this intermediate category is similarly varied. While its introduction does not, at first glance, appear to change anything to the disadvantage of traditional employees because of employers moving over to this now-legitimate group, the Italian example seems to indicate otherwise. De Stefano (2016b: 20) points out that the workers that would qualify for full protection as employees under the traditional legal

41 The Employment Tribunal’s findings were upheld in the Employment Appeal Tribunal and by a majority (Underhill LJ dissenting) in the Court of Appeal. The UK Supreme Court dismissed Uber’s final appeal on 19 February 2021 [2021] UKSC 5.
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tests would likely become deprived of many rights if they were crammed into an ‘intermediate bucket’. He warns that regulating dependent self-employment as a distinct group is no panacea for addressing the changes in business and work organisation driven by the disintegration of vertical firms. Some argue, on the other hand, that as existing law no longer protects a growing number of persons who once would have enjoyed the status of employees and who are now slipping out of the protective scope of labour law due to their increased formal freedom and flexibility, there is nonetheless the need for such intervention. It is arguable, for example, that the lack of any intermediate status effectively provides greater incentives for employers to reclassify their workers as independent contractors and that an intermediary category may well provide them with those rights they actually need (Lobel 2016: 12). In our view, however, current proposals are flawed insofar as they do not even recognise the full set of ‘basic’ employment rights, including the right to organise and to bargain collectively as well as the application of minimum wage legislation, and as they would lead to little additional clarity or faster dispute resolution.

From the point of view of EU-law, a further difficulty arises from the issue of the applicable law and the choice of law in situations where platforms operate across multiple jurisdictions. In cases concerning cross-border contractual relationships, Regulation (EC) Number 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I Regulation) \(^42\) applies, according to which there is freedom of choice regarding the applicable law (Article 3). However, this is limited when it comes to employment contracts (Article 8). In these cases, the level of protection cannot fall below that which would be provided in the absence of choice. Platform workers who are not considered to be employees thus lack significant protection, not only as regards the application of statutory protection is concerned, but also insofar as they – or better their contractual partners – may choose any law without any restrictions. It is very likely that platforms will include the choice of a legal order that is favourable for them in their terms and conditions and thereby make it harder again for the platform workers to enforce even the limited number of rights they have. An extension of the limitation of the choice of law provisions for employees to the intermediate category therefore seems of the essence.

**Special legislation**

The last option to be highlighted in this contribution is the creation of a special legislative act dealing with the issues involved with platform work, as has been done in many European countries with temporary agency work in the transposition of the Temporary Agency Work Directive 2008/104/EC. This is the most complicated solution as it must take into account that the platform economy is very diverse and that a one-size-fits-all-approach will hardly work. We can therefore only sketch in very rough strokes what such an act might look like.

The aim would be to ensure the protection of platform workers and to improve the quality of platform work. It should also take into account that platform work may contribute to the creation of jobs and to the development of flexible forms of working by introducing creative and innovative business models but also keep in mind that there is nothing innovative about precarious work. The primary goal thus would be the creation of a level playing field for those platforms that endorse an approach that is platform worker friendly, rather than one based on low labour costs and value extraction.

The heart of such an Act should be a rebuttable legal assumption that the underlying contractual relationship is an employment contract between the platform worker and the platform. Attempts to classify the legal relationships underlying the gig economy have shown that it is very hard to get an insight into how the work is actually organised by the platform and the mechanisms behind it. This knowledge is of significant importance to prove before a court of law that an employment contract has been concluded – but, as the platform worker has no means of getting to the information necessary to do so, this often amounts to the impossibility of providing the court with the necessary evidence. The proposed legal assumption would recalibrate the massive imbalance of information and thereby justify a departure from the otherwise existing contribution of the burden of proof (Risak and Lutz 2017: 356).

A core provision might thus be – as in the case of agency work (Art. 5 of Directive 2008/104/EC) – a principle of equal treatment with a corporate customer’s existing workforce, to ensure that jobs are not crowdsourced just for the sake of contravening minimum wage and other employment provisions. The basic working and employment conditions of platform workers shall therefore be at least those that would apply if they had been recruited directly by the crowdsourcer to occupy the same job for the duration of working on tasks or actively looking for them – if the general availability is part of the business model, as is the case with most platforms. This would also establish the equal treatment of temporary agency workers and avoid the circumvention of the laws protecting them by switching over to platform work.

It should be noted, however, that this equal-treatment-approach very likely only works in cases where the platform worker is actually working for a business that would otherwise employ an employee and that actually crowdsources labour. In cases where the contractual partner is a consumer and the alternative is contracting directly with a self-employed person (e.g. with a cleaner) avoiding the intermediary (e.g. the platform TaskRabbit), the equal treatment principle cannot apply. In these cases, no crowdsourcing of employment contracts takes place and a host of other issues arise, not least as regards the application of minimum wages to those platform workers.

Other topics that seem to be important might be the prohibition of certain clauses in contracts with platform workers and the terms and conditions of the platforms. This can refer to the notorious clauses that enable the contractual partner to refuse to accept a completed task without having to give a reason and refrain from paying the advertised remuneration or provisions that the result may be kept even in those cases. Other possible issues are non-compete clauses as well as clauses that restrict the hiring of platform workers by crowdsourcers (Risak and Lutz 2017: 357). Finally, workers should also be permitted to port their ratings across different platforms to ensure that their expertise and experience is adequately recognised.

The very tricky question for legislation will be to draw the role and the responsibility of the crowdsourcing platforms in a transparent way in order to give platform workers certainty of their legal position in this set-up, without, however, suffocating those crowdsourcing models that are based on genuine self-employment (and thus not necessarily in need of statutory protection). This final concern, however, should not be – in our view – a hindrance to, or excuse from, protecting those genuinely in need of protection. Finally, it should also be noted that any platform work-specific legislation ought not to fall into the trap of technological exceptionalism, and recognise that, fundamentally, platform work should be regulated as work first and foremost.

Some, but by far not all of these issues are also addressed in the so-called ‘Platform to Business’ (P2B) Regulation (EU) 1150/2019, which applies only to self-employed platform workers.

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workers. This concerns in particular the restriction, suspension, and termination of platform access (Article 4), restrictions of competition (Article 10), and internal dispute resolution (Article 11). The provisions on rankings (Article 5), on the other hand, concern the appearance of platform workers on the platform and not customer ratings. An extension of the scope of application to platform employees who qualify as employees would therefore not do justice to their interests. For this reason, specific legislation on platform work should be given preference on the EU level if the P2B Regulation is not to be massively expanded in terms of content.

Platform work in times of crisis

The COVID-19 pandemic has served as a stark reminder of just how far the gig economy’s risk has been shifted towards a breaking point: medical staff apart, many of the jobs which have become subsumed by gig models are amongst those facing high coronavirus risks. Official advice to workers is clear: self-isolate if you experience symptoms. Work from home, even if you don’t. Only head out to work equipped with suitable protective kit, from face masks and shields to gloves and hand sanitiser. And maintain social distancing at all times.

For gig workers, that’s easier said than done: self-isolation is rarely financially viable; working from home impossible; and social distancing tough to implement in practice. Take self-isolation, first. As we have seen, employees are entitled to receive pay, even when they’re off sick. They’ll be protected from layoffs. And employers in many countries will receive government support to finance these schemes. It’s easy, in other words, to self-isolate when you don’t have to worry about income continuity – a luxury not enjoyed by independent contractors.

The same is true for home working: by definition, it’s impossible to work from home when your job involves picking up goods in a warehouse or dashing around town delivering food. (There are some purely digital gigs, of course – but earnings quickly take a hit when workers face regular interruptions, such as home-schooling kids where schools are closed). Those on low incomes are particularly hard hit. A recent survey by economists in Oxford, Zurich, and Cambridge shows just how close the correlation between earnings and the ability to work from home is in times of COVID-19: workers on less than US$ 20k are half as likely to be able to do their job from home when compared with those on incomes of more than US$ 40k.

When gig workers head to work, finally, they are exposed to a much higher frequency of high-risk contacts – whether its door handles and turnstiles, or customers and fellow workers. Protective equipment is scarce – and expensive, even if you can find it. In the early summer of 2020, a court ruling in France exposed a long list of health- and safety-related shortcomings in Amazon’s warehouses, leading to their temporary closure.

A high-risk gamble – for all of us

Put together, the absence of employment rights quickly leads to a double whammy for gig workers: not only is it impossible to stay at home, whether sick or not – but when they are forced to go out, it’s into a world of frequent high-risk exposure.

45 www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public
And the risks are by no means limited to workers: customer health is also at stake. A lack of employment protection leaves gig workers who suspect that they might have come into contact with COVID-19 with an invidious choice. Go to work, and risk spreading the infection – or stay at home, unable to make rent and pay for necessities. No wonder, then, that workers around the world report having to go to work, even when public safety advice dictates that they should stay at home.

**Changing tides**

How can we make gig work safe, for workers and customers alike? As the pandemic drags on, a number of options have emerged: some platforms are rolling out contactless deliveries, and stepping in to provide their workers with financial assistance and protective equipment – even if not always voluntarily. Several countries have begun to offer financial protection to the self-employed.

Those are promising fixes in the short term. But their longer-term sustainability is questionable: platforms’ offerings have come under criticism for being ‘not enough’, and workers have walked out over lack of safety precautions. Government support schemes for the self-employed can take far too long to make payments to workers in dire financial straits, have the potential to create serious moral hazard, and will be impossible to finance for extended periods of time.

In the long run, the only sustainable and efficient solution lies in risk diversification – which is precisely what the different options explored in this paper offer. Recognising that gig workers are employees is now more important than ever. Even before the advent of the crisis, the tide had already begun to turn. The past few months have seen a flurry of legal activity across the world, whether it’s the enactment of AB5 in California, or a series of rulings by senior courts in Europe. Given the tight control exercised by platforms over all elements of product and service delivery, judges and legislators consistently fail to be impressed by independent contractor claims.

The assertion that employment law somehow leads to rigid, inflexible work, finally, is simply untrue. Legally, there is nothing at all in any employment law system we have ever studied to stop employers from giving workers full employment rights, as well as unlimited flexibility, from flexible shift arrangements to unmeasured working time. Any suggestion that employment rights are inherently incompatible with flexibility is a myth – and in times of COVID-19, a dangerous one for us all.

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Conclusion

In this contribution, we set out to explore a series of potential legal solutions to the problem that platform workers in the gig economy offer a lot of flexibility but get little security in return. In concluding, it is important to note that whilst the phenomenon of ‘gigs’ and ‘platforms’ is indeed a novel one, the legal implications – particularly as regards employment law – are much less so. Seen from a historical labour law perspective, platform work is but the most recent threat to emerge to the law’s quest for underlying coherence in the scope of protective norms in the face of dramatic changes in the labour market: online platforms or ‘apps’ act as intermediaries in a spot-market for labour, providing clients with workers for a wide range of jobs referred to as ‘gigs’, ‘rides’, or ‘tasks’ that are, from a legal perspective, not all that different from traditional outsourcing and agency relationships, or the more recent phenomenon of zero-hours contracts in the United Kingdom.

At first glance, the advantages for business, customers, and workers resulting from the ‘gig economy’ are immense: platform work does away with many of the regulatory costs traditionally associated with employing individuals; customers can receive a nearly infinite number of services at cut-price rates; and workers can find flexible work to suit their schedules and income needs. Upon closer inspection, however, a series of problems arising from this fragmentation of traditional work arrangements quickly emerges – in particular for workers, who often find themselves outside the scope of employment protective norms as a result of digital platforms’ business models, thus suffering low pay, no job security, and challenging working conditions.

Each of the models scrutinised has its peculiar advantages and drawbacks. Present space limitations do not permit for a detailed summary, but three points may nonetheless be made. First, the importance of recognising that whichever regulatory solutions are adopted, we should be careful of reinventing the wheel: many of the problems we encounter are not novel, so efforts should be made to fit platform work into existing regulatory structures, with only partial additions as and when required. Second, new regulatory measures, if adopted, should not lead to the dilution of workers’ rights, as might be the case with some ‘third status’ proposals, in particular. Finally, and perhaps most importantly, given the vast heterogeneity of platforms, users, and working conditions, it is unlikely that an easy solution could be found: platform work can cater to the needs of successful entrepreneurs, but it can also become a low-wage trap. Only a sophisticated and responsive approach will be able to address the vast range of problems identified.

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