



Radboud Universiteit Nijmegen

Regulating work in the gig-economy: How to deal with platforms such as Uber and Deliveroo?

A study on how specific offline gig-work could be regulated in the Netherlands with regard to working conditions.

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Preface

The idea for writing this thesis originally came from by ambition to research a certain subject which would allow me to contribute to a present-day discussion. My personal interest in wanting to know more about working in the gig-economy and the legal questions it poses, turned out be a perfect fit. In truth, my research only covers a small fraction of what is essentially a global issue. Nevertheless, I hope to have provided new insights, which will inspire others to research this legal issue further.

Nijmegen, May 2019

Introduction

When thinking about the use of a platform, one's mind would probably drift to the existence of an actual, tangible platform, like a drilling platform which can be found offshore to extract natural gasses. Diving into the art of these kinds of platforms would be interesting, but unfortunately for those interested minds, I have chosen to discuss and analyze a platform particularly less visible for the naked eye. The lack of visibility is caused by the fact that the platform I am referring to cannot be found in the 'real' world, but exists right next to it, in the digital one. New technologies and digitalization of everything around us have an impact on all kinds of different concepts in our economy.

In particular, the concept of traditional labour has been confronted by emerging new business models fuelled by the Internet and mobile devices.¹ While the traditional concept of labour consists of a worker being committed to an individual company², the new approach companies are using, is based on providing an online platform through which customers can be directly connected with individual service providers.³ In other words, the basic principle of having a two party based relationship between an employer and an employee has been succeeded by a triangular relationship between the worker producing or performing the service, the end-user of the service and the platform, which establishes itself as a digital intermediary which facilitates the whole process.⁴

These new kinds of business models are based on what has been called the 'gig-economy' or 'on-demand economy'.⁵ This thesis focuses on one particular model which I prefer to address as 'specific offline gig-work'. Throughout the thesis, digital platforms *Uber* and *Deliveroo* are used as the main examples of specific offline gig-work to substantiate my analysis. The companies behind the platforms have used the advantages of the digital era to create a new concept which brings together supply and demand, which is a logical consequence of the digitalization of our economy, as companies are supposed to re-invent themselves and adjust to new circumstances.

Taking *Uber* as an example, we can determine that the triangular relationship as mentioned above applies to the business model of this company. *Uber* owns an online platform which facilitates city transport. The *Uber* application matches a user with a taxi driver who is closest to its location and the user asks the driver to drive him or her to a location of choice. The drivers use their own cars and are given the freedom to decide when and how much they want to work. So, the driver is the service provider who performs the service, the user who asked for a ride is the end-user and *Uber* itself is the digital intermediary.

We are not dealing with a typical employee-employer relationship, because three parties are involved, but one could argue that the service providers who perform the service ultimately do so for an employer. In the case of *Uber*, one could therefore argue that the drivers are employees employed by

¹ R. Brescia, *Regulating the sharing economy: New and old insights into an oversight regime for the peer-to-peer economy*, Nebraska Law Review 2016/95, p. 88 & 89.

² A. Todolí-Signes, *The End of the Subordinate Worker? Collaborative Economy, On-Demand Economy, Gig Economy, and the Crowdworkers' Need for Protection*, International Journal of Comparative Labour Law and Industrial Relations (IJSCLLIR) 2017/33(2), p. 245.

³ A. Todolí-Signes, *The 'gig-economy': employee, self-employed or the need for a special employment regulation?*, European Review of Labour and Research 2017/23(2), p. 193-205.

⁴ A. Steward & J. Stanford, *Regulating work in the gig-economy: What are the options?*, The Economic and Labour Relations Review 2017/28(3), p. 420-437.

⁵ These terms do not form an exhaustive list as also other 'labels' have been used to describe this new business model. I will elaborate on the use and differences in terminology in chapter one.

Uber, because it conducts its core business through the service providers.⁶ But companies like Uber argue something different.

They deny that the workers are employees, casting themselves simply as technology firms and classifying their workers as independent contractors or being self-employed, pointing to those worker's freedom to set their own hours and freedom from direct supervision.⁷ Worker advocates accuse such companies of misclassifying their workers as independent contractors in order to avoid a host of employment law obligations and workers have sued several companies for employment-related harms.⁸ It seems as if the eternal battle between the freedom to conduct a business and flexibility of employers on the one hand and the proper protection of employees on the other hand has taken a new turn, presenting itself through this new way of doing business.

This thesis researches how specific offline gig-work could be regulated in the Netherlands in terms of Dutch and/or European labour law and by whom with regard to working conditions. The Netherlands is part of the free market and Europe is becoming more involved with social issues caused by such a free market.⁹ Issues concerning new forms of employment and adequate labour law protection are no longer limited to national legislation. Dutch labour law is (partially) harmonized by EU legislation, mostly by the use of directives.¹⁰ As defined in article 288 TFEU, directives set out the goals to be achieved but leave the Member States a discretion as to the 'form and methods' to be used.¹¹ In practical terms, the Member States must implement each directive into national law. This interaction between national law and EU law shapes the existing regime of labour regulation and the protection that can be derived from it in the Netherlands. Regulating specific offline gig-work on a national level can thus not be done without looking at the framework of EU directives. The Dutch legislator is therefore not entirely free to tackle employment issues by himself, the European legislator also plays an important part in it.

My approach to conduct this research is two-sided. Firstly, it aims at researching the legal classification of a specific offline gig-worker, focusing on the problem from a Dutch labour law and European labour law perspective. The new way of working generates revenues beyond 'traditional' linear employment relationships and enables people to work according to flexible arrangements.¹² Letting go of the traditional concept of work and emphasising on flexibility and digitalisation has been accompanied by legal uncertainty regarding the legal status or legal position of the specific offline gig-worker. Does he perform services on the basis of an employment contract or does he take on gigs as a self-employed person?¹³ Authors have spoken of possible disruptiveness of the current labour market regarding this classification issue.¹⁴ It is necessary to determine the legal classification of specific offline gig-workers to be able to examine the directives regarding working conditions effectively.

⁶A. Todolí-Signes, *The 'gig-economy': employee, self-employed or the need for a special employment regulation?*, *European Review of Labour and Research* 2017/23(2), p. 193-205.

⁷ *O'Connor v. Uber Techs, Inc (Uber II)*, 82 F. Supp. 3d 1133, 1138 (N.D. Cal. 2015) (summarizing Uber's arguments against employment status).

⁸ B. Rogers, *Employment as a Legal Concept*, Legal Studies Research Papers Series: Philadelphia: Temple University 2015, p. 480.

⁹ F.G. Laagland, *Vorbij de grenzen van het werknemersbegrip. Een Europese analyse van de zzp-plannen van het Nederlandse kabinet*, Rede uitgesproken bij de aanvaarding van het ambt van hoogleraar (Europees) arbeidsrecht aan de Faculteit der Rechtsgeleerdheid van de Radboud Universiteit op donderdag 27 september 2018, Nijmegen: Radboud Universiteit Nijmegen, p. 6.

¹⁰ W.H.A.C.M. Bouwens, M.S. Houwerzijl & W.L. Roozendaal, *Schets van het Nederlandse arbeidsrecht*, Deventer: Wolters Kluwer 2017, p. 501.

¹¹ A.C.L. Davies, *EU Labour Law*, Edward Elgar Publishing Limited 2012, p. 39.

¹² COM (2016) 356 final, *A European agenda for the collaborative economy*, p. 13.

¹³ F. Dekker, *Werken in de kluseconomie*, *Beleid en Maatschappij* 2018/45 (2), p. 190.

¹⁴ M. Smink and others, *Een eerlijke kluseneconomie*, *Beleid en Maatschappij*, 2018/45(2), p. 206.

Secondly, it aims at researching what protection those service providers can derive from a limited selection of European directives concerning working conditions (and the Dutch implementation thereof), and what that means for the freedom of the Netherlands to regulate these kind of platforms in terms of employment law.

Because the scope of this thesis is limited, I have chosen to focus on one particular theme of labour law protection: working conditions. This aspect of labour law protection is of primary importance as it directly affects the employee and the labour he performs. Entitlements to for example, safe working conditions, maximum working hours and holiday pay are essential protective measures, traditionally guaranteed to ‘ordinary’ employees.¹⁵ Specific offline gig-workers are currently not entitled to any protection, therefore it seems more than logical to research a theme which is aimed at the providing basic employment rights.¹⁶

As stated before, Uber and Deliveroo are used as the main test cases to substantiate the analysis. These two well-known platforms have been the subject of several legal procedures regarding the admissibility of their business model and the labour law protection they should or should not guarantee to the service providers who provide services through their platforms. Furthermore, comparing Uber and Deliveroo will shine a light on the different ways substance can be given to such a specific platform and will show how differences in organizing and facilitating the service delivery affect the aforementioned legal issues.

The thesis is structured as follows. Chapter one starts with discussing the use and differences in terminology regarding the new business model. It continues with outlining the concept of specific offline gig-work by describing Uber and Deliveroo and its characteristics.

Next, the legal framework of employee in Dutch labour law is set out in chapter two. This framework is then used to determine the legal classification of the services providers who work through Uber and Deliveroo in Dutch labour law. Also, it briefly explores a way of flexibly regulating atypical work in the Netherlands. Chapter three has a similar structure as chapter two. Firstly, it outlines the legal framework of worker in European labour law. Secondly, the framework is used to determine if the service providers who work through Uber and Deliveroo can be classified as workers in European labour law. Furthermore, it looks into the idea of flexibly regulating specific offline-work by using a new category of worker.

Following the outcome of the classifications, chapter four discusses the scope and content of the Framework Directive on Health and Safety (Directive 89/391/EEC), the Working Time Directive (Directive 2003/88/EC) and the Directive on the organization of working time of persons performing mobile road transport activities (Directive 2002/15/EC). It examines what labour law protection service providers who work through Uber and Deliveroo can derive from those directives and if that protection is sufficient or not. Moreover, it illustrates which form of flexible regulation as set out in chapter two and three is more appropriate to deal with specific offline gig-work. The thesis ends with chapter five, which provides an overview of the conclusions which can be derived from the first three chapters. Lastly, it discusses the research from chapter four, on the basis of which it provides recommendations on how to regulate platforms such as Uber and Deliveroo with regard to working conditions, while it also provides some general recommendations on how to deal with specific offline gig-work.

¹⁵ A. Aloisi, *Commoditized Workers. Case Study Research on Labour Law Issues Arising from a Set of On-Demand/Gig Economy Platforms*, *Comparative Labour Law & Policy Journal* 2015/37(3), p. 683.

¹⁶ Other themes such as equal treatment and reorganisation (collective dismissal, employee participation, transfer of undertaking) are also important, but less of an priority than working conditions.

Chapter one: A new type of business model

In the introduction I already mentioned that this thesis only focuses on one particular type of business model that can be derived from the new business model, so it is part of a larger whole. In the following paragraphs I will discuss definitions which have been used in literature to address the new business model and the different types that come along with it. Furthermore, I will propose the usage of a proper definition to address the type of model this thesis deals with and elaborate on the concept and characteristics of the particular type by using Uber and Deliveroo as primary test cases.

§1.1. Use and differences in terminology

The model tends to be addressed by being part of the gig-economy and on-demand economy, which are used interchangeably.¹⁷ However, they do not have the same meaning. Gig-economy refers to a business model which focuses on irregular work or ‘gigs’ facilitated by a digital platform¹⁸, whereas on-demand economy covers a series of different business altogether which all share the idea of using an online platform to match supply and demand.¹⁹ On-demand economy could therefore be used to describe a business model where the internet allows platforms to have large pools of workers waiting for a customer’s request, like ‘gigs’, but it can also be used in a broader sense.²⁰ In literature, authors have tried to explain the use of different terminology and provide more clearance in the matter. De Stefano, for example, argues that the term gig-economy includes labour-platforms which can be distinguished in two categories²¹:

- i. Crowdwork, involving working activities that can be completed and delivered through online platforms.
- ii. Work on-demand via apps, involving the execution of traditional working activities such as transport or delivery which are organised through online platforms managed by companies which may retain control over important aspects of the work.

By dividing the labour-platforms in two categories, De Stefano essentially wanted to establish a distinction between on the one hand work that can be performed completely online and on the other hand work that requires an actual, physical performance. His description of each category is clear, but the terminology he uses is not. The first category is addressed as ‘crowdwork’ where De Stefano refers to the definition of Howe: it consists of outsourcing work, traditionally carried out by an employee, to an indefinite and usually large number of people in form of an open call.²²

¹⁷ A. Aloisi, *Commoditized Workers. Case Study Research on Labour Law Issues Arising from a Set of On-Demand/Gig Economy Platforms*, *Comparative Labour Law & Policy Journal* 2015/37(3), p. 653.

¹⁸ A. Stewart & J. Stanford, *Regulating work in the gig economy: What are the options?*, *The Economic and Labour Relations Review* 2017/28(3), p. 420-437.

¹⁹ A. Todolí-Signes, *The End of Subordinate Worker? Collaborative Economy, On-Demand Economy, Gig Economy, and the Crowdworkers’ Need for Protection*, *International Journal of Comparative Labour Law and Industrial Relations (IJSCLLIR)* 2017/33(2), p. 245.

²⁰ *Ibid.*

²¹ V. De Stefano, *The Rise of the ‘Just-in-Time’ Workforce: On-Demand Work, Crowd Work and Labour Protection in the Gig-Economy*, ILO Conditions of Work and Employment Series no. 71, Geneva: International Labour Office 2015, p. 1 ; A. Stewart & J. Stanford, *Regulating work in the gig economy: What are the options?*, *The Economic and Labour Relations Review* 2015/28(3), p. 420-437.

²² J. Howe, *The rise of Crowdsourcing*, *Wired*, 1 June 2016. Available at: <https://www.wired.com/2006/06/crowds/> (last accessed: 21 October 2018).

This definition does not exclude working activities organised by online platforms which need physical performance, while De Stefano stated that only working activities that can be completed and delivered through online platforms can be considered as crowdwork.

Therefore, ‘work on-demand via apps’ could qualify as crowdwork as well and should have been a subcategory of crowdwork, instead of being considered as a different category. This illustrates the confusion that surrounds the use of the appropriate terminology.

Todolí-Signes has taken another approach to clarify the terminological confusion by using the term on-demand economy, which covers as mentioned above, a broad range of businesses, as a starting point to distinguish between three different business models, being: sharing economy, online crowdsourcing and offline crowdsourcing.²³

- i. Sharing economy, involving companies that offer owners the opportunity to share their goods with potential users through online platforms.
- ii. Online crowdsourcing, involving work that can be performed virtually through online platforms without any physical work by the service provider.
- iii. Offline crowdsourcing, involving work organised by online platforms that has to be performed physically by the service provider.

The first business model Todolí-Signes describes refers to companies such as Airbnb, where owners can rent out their homes for a selected period of time to potential users. This market is primarily focused on sharing goods with others and not on providing services or performing working activities. Businesses similar to Airbnb²⁴ lie outside the scope of labour law, because the main element of the transaction does not revolve around service delivery and an imbalance of positions cannot be established.²⁵ Both online and offline crowdsourcing fall under the scope of labour law, because they do actually involve working activities and revolve around service delivery. As stated above, the main difference between the two can be found in the way services are delivered, either virtually or physically. Todolí-Signes also adds another important distinction within the two categories of crowdsourcing, namely the use of a generic or specific platform.²⁶ Generic platforms offer any kinds of tasks²⁷, while specific platforms only offer a particular service, like the transport service of Uber and the delivery service of Deliveroo.

In the light of Todolí-Signes’ terminology, the business model this thesis discusses could be addressed as consisting of ‘*specific offline crowdwork*’ or ‘*offline crowdwork using a specific platform*’. While De Stefano only tried to categorise ‘gig-economy’ in essentially online or offline crowdwork,

²³ A. Todolí-Signes, *The End of Subordinate Worker? Collaborative Economy, On-Demand Economy, Gig Economy, and the Crowdworkers’ Need for Protection*, International Journal of Comparative Labour Law and Industrial Relations (IJSCLLIR) 2017/33(2), p. 245.

²⁴ Bla Bla Car for example, which in the essence is a carpool business. Owners charge users for driving along to certain destinations.

²⁵ A. Todolí-Signes, *The End of Subordinate Worker? Collaborative Economy, On-Demand Economy, Gig Economy, and the Crowdworkers’ Need for Protection*, International Journal of Comparative Labour Law and Industrial Relations (IJSCLLIR) 2017/33(2), p. 246.

²⁶ A. Todolí-Signes, *The End of Subordinate Worker? Collaborative Economy, On-Demand Economy, Gig Economy, and the Crowdworkers’ Need for Protection*, International Journal of Comparative Labour Law and Industrial Relations (IJSCLLIR) 2017/33(2), p. 247.

²⁷ Amazon Mechanical Turk is an example of a platform where users can provide a wide range of small administrative tasks, for example categorising products or labelling of pictures.

Todolí-Signes went a step further in categorising ‘on-demand economy’ and also added the distinction of generic or specific platform to the categories of online and offline crowdwork. I prefer the latter, because otherwise the range of online and offline platforms still remains too broad to successfully label the business model.

§1.2. A proper definition

The usage of different terminology and specifications in the foregoing paragraph leads to the following list of definitions:

Gig-work, involving crowdwork that can be performed either virtually through online platforms or has to be performed physically by the service provider.

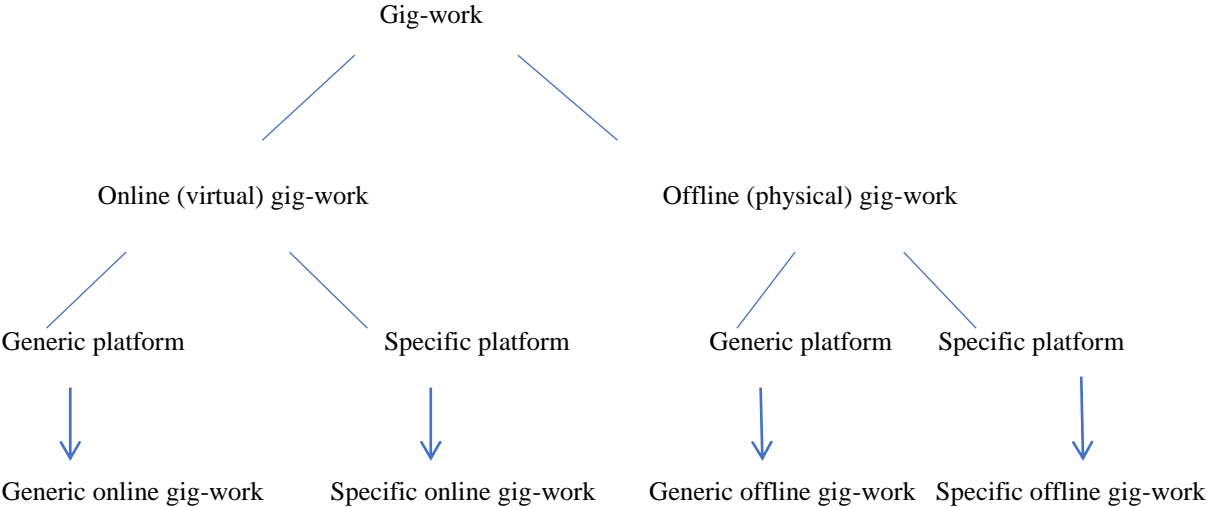
- Online gig-work, involving work that can be performed virtually through online platforms without any physical work by the service provider.
- Offline gig-work, involving work organised by online platforms that has to be performed physically by the service provider.

- Generic platform, involving a platform which offers different kinds of services.

- Specific platform, involving a platform which offers a particular service.

- Generic online gig-work, involving work that can be performed virtually through generic online platforms without any physical work by the service provider.
- Specific online gig-work, involving work that can be performed virtually through specific online platforms without any physical work by the service provider.
- Generic offline gig-work, involving work organised by generic online platforms that has to be performed physically by the service provider.
- Specific offline gig-work, involving work organised by specific online platforms that has to be performed physically by the service provider.

Such a list might call for a more visual understanding of how the different terms and definitions relate to one another. Therefore, I constructed the simplified outline below:



First off, I have taken ‘gig-work’ as the umbrella term, instead of using ‘gig-economy or on-demand economy’, because the word ‘economy’ implies to cover more than simply work related issues and ‘on-demand’ also can refer to non-working activities. Both are not well-equipped to address what we are dealing with, whereas ‘gig-work’ does the job effectively: we are dealing with work which consists of irregular work opportunities, more commonly known as ‘gigs’.

In contrast to De Stefano and Todolí-Signes, I would propose to replace the term ‘crowdwork’ or ‘crowdsourcing’ with ‘gig-work’. Since we are talking about gig-work, why add another term to the mix which causes only unnecessary confusion. And moreover, gig-work is essentially crowdwork, as large crowds are waiting to perform a particular service either virtually or physically. Finally, the type of platform that is used, determines which kind of gig-work is applicable.

If we go back to defining the business model this thesis focuses on, the taxi service of Uber and the delivery service of Deliveroo, we start from the top: yes, we are dealing with gig-work.²⁸ The services provided have to be performed physically and both platforms are specific, they only offer a particular service. Thus, we can say that we can address the business model as consisting of organising and facilitating ‘**specific offline gig-work**’.

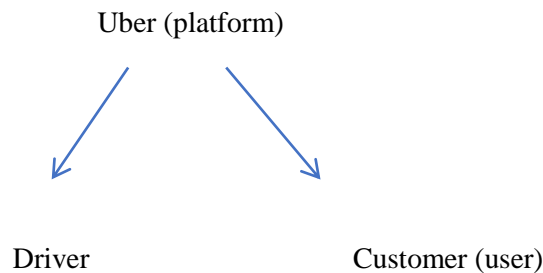
§1.3. Characteristics of specific offline gig-work

Since we have gotten our terminology straight, what actually characterises specific offline gig-work? What is so different about this business model in relation to ‘a normal way’ of working? Well, it is always easier to use concrete examples to examine the characteristics, in this thesis those examples being Uber and Deliveroo. Let’s take a closer look at both types of specific offline gig-work.

²⁸ In paragraph 1.3.3 I will extensively analyse the characteristics of ‘gig-work’, for now the requirement of consisting of irregular work opportunities suffices.

§1.3.1. Uber

Uber profiles itself as a game-changing company that allows riders to make on-demand pre-bookings via the Uber platform with a touch of their smartphone for quality transportation services provided by partner drivers.²⁹ This summarises the concept of Uber, which was founded in the USA and has expanded globally, while maintaining the same operation of the platform in every country. I stated in the introduction that Uber is based on a triangular relationship:



The interesting part of this triangle from a labour law perspective is, not surprisingly, the relationship between the platform and the driver, as the drivers are the ones who perform the transport service Uber facilitates. So, how do you become a driver? According to Uber, most people can become drivers. The requirements vary city by city but there are a few minimum requirements: meet the minimum age, being legally allowed to drive in your country and of course, possession of a smartphone is required. If so far, so good, you can sign up online. To get through the authorisation process you need to upload the required documents³⁰ and complete a driver screening.

Then remains the question, are you going to use your own car or not? Preferably, you will use your own car, but if you do not own one, Uber also facilitates the possibility of leasing a car. If you want to use your own car, it has to be part of the vehicle options Uber has. There are several options and Uber provides a list which consists of all the allowed vehicles per option.³¹ Furthermore, the preferred vehicle has to comply with certain regulations which can also vary by city. Using your own car also means providing your car registration and insurance. Finally, if everything is approved and verified, you are ready to hit the road.

Uber addresses the drivers as ‘partners’, which implies the existence of an equal or horizontal relationship between the platform and the driver. However in practise, one can observe that the use of that particular terminology can strike as quite misleading. As a driver, you are given the flexibility to set your own hours and decide when and how long you want to work. But you are not able to charge whatever you want. No, Uber calculates the fares based on how far and how long the trip took to

²⁹Uber 2018, Career List. Available at: <https://www.uber.com/nl/careers/list/42217/> (last accessed: 24 September 2018)

³⁰ Those required documents consist of no less than valid documentation to drive in your country, proof of residency in your city or province and a driver profile photo.

³¹ For example, in the Netherlands there are three options. Most drivers choose for UberX, because the car can have a maximum age of ten years, while UberBlack and UberVan demand a maximum age of five and seven years respectively. For comparison, in France a driver has five options and the maximum age for UberX is only six years, with the exception of electric and hybrid cars, which are allowed to be ten years old. See for more detailed information <https://www.uber.com/en-NL/drive/resources/vehicle-requirements/> (last accessed: 24 September 2018) and <https://www.uber.com/fr/drive/resources/vehicle-requirements/> (last accessed: 24 September 2018).

complete.³² Averagely, the driver gets paid 75% of the fare, while Uber takes a 25% commission.³³ The driver's cut might seem reasonable, but drivers are also responsible for their own running expenses, including petrol, taxes³⁴ and insurance.

Uber denies there being any kind of employee-employer relationship. The Uber Community Guidelines describe several scenario's which allow Uber to deny a driver access to the platform or even go as far as issuing permanent deactivation of the account.³⁵ So, essentially cutting off a self-employed driver of performing his 'own' service and by doing so exercising a form of 'control' over drivers. Above all, Uber expects the drivers to deliver quality. Todolí-Signes stated rightly so that as a traditional company would do, a company dedicated to transport services wishes to keep its brand highly valued and in order to achieve this, the platform needs to ensure that the workers on the platform provide a good service.³⁶ In Uber's case, it most importantly tries to achieve high quality performance of the transport service by measuring the Star Ratings given by users and the Cancellation Rate of drivers.³⁷ After every trip, a user is able to rate the driver on a scale of one to five stars, as well as give feedback on how the trip went. If your average Star Rating falls below the minimum that is required in the city you drive, even after receiving multiple notifications that your rating is failing, you will lose access to your account. The Cancellation Rate works the other way around, there being a maximum cancellation rate in each city and if after multiple alerts your rate continues to exceed the maximum limit, you may lose access to your account. These control-mechanisms do indicate a presence of subordination in the relationship between Uber and the driver, on which I will elaborate more in paragraph 1.3.3.

§1.3.2. Deliveroo

Deliveroo profiles itself as a food delivery service, which has a goal to create the best food delivery experience in the world.³⁸ Founded in 2013 in the United Kingdom, the business has already spread to several countries in and outside Europe, using the same operational system in every country. While Deliveroo's business model qualifies as a type of specific offline gig-work, it does not like Uber, correspond perfectly with the aforementioned triangular relationship:

³² These fares can increase during times of high demand for rides, for example when there are not enough drivers in a specific area to accommodate the number of users requesting a ride. See also: <https://www.uber.com/info/how-much-do-drivers-with-uber-make/> (last accessed: 24 September 2018).

³³ N. Change, *Uber hikes its fares as petrol price rises*, The Times Live, 1 August 2018. Available at: <https://www.timeslive.co.za/news/consumer-live/2018-08-01-uber-hikes-its-fares-as-petrol-price-rises/>, J. Van Bergerijk, *Overleven als Uberchauffeur*, De Volkskrant. Available at: <https://www.volkskrant.nl/kijkverder/2017/uber/>, P. Westerberg, *Uber vs. taxi: dit verdient een Uberchauffeur*, De Geldpers, 5 March 2017. Available at: <https://degeldpers.nl/uber-vs-taxi-verdient-uber-chauffeur/> (last accessed: 24 September 2018).

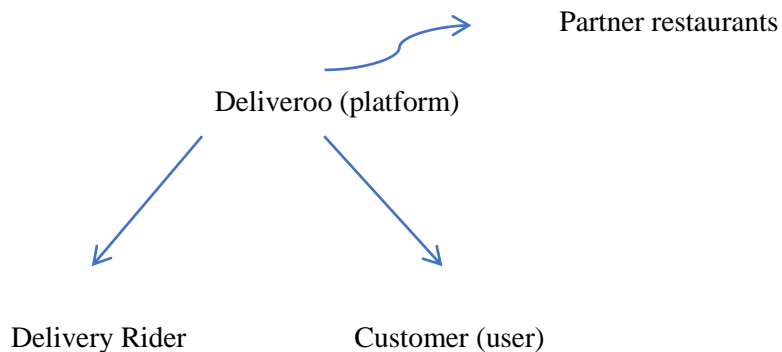
³⁴ Uber states that as an independent contractor running your own business, taxes from your earnings are not withheld by the government. This means that it is your responsibility to file taxes at the end of the year.

³⁵ Uber 2018, Community Guidelines. Available at: <https://www.uber.com/en-AU/legal/community-guidelines/anz-en/> (last accessed: 24 September 2018).

³⁶ A. Todolí-Signes, *The End of Subordinate Worker? Collaborative Economy, On-Demand Economy, Gig Economy, and the Crowdworkers' Need for Protection*, International Journal of Comparative Labour Law and Industrial Relations (IJSCLLIR) 2017/33(2), p. 247-248.

³⁷ Apart from Star Ratings and the Cancellation Rate, the Uber Community Guidelines also refer to scenario's involving *Acceptance Rates, Safety, Zero Tolerance for Drugs and Alcohol, Compliance with Law, Background Checks, Unacceptable Activities, Fraud, Accurate Personal Information and Discrimination* on the basis of which Uber can decide to deny access to or deactivate your account.

³⁸ Deliveroo 2018, About Deliveroo. Available at: <https://nl-en.roocommunity.com/contact-about/> (last accessed: 2 October 2018).



As you can see, it seems that we are dealing with four parties here instead of three. In short, it works as follows: Deliveroo has concluded contracts with several ‘partner’ restaurants involving offering meals and taking orders. Customers are the ones who order meals via using the Deliveroo website or application on their smartphone and the riders are the ones who use the Deliveroo application to the pick-up and deliver the meals to the customers. Instead of eating their meals at the restaurant itself, customers choose to eat their meals somewhere else. The nature of the service performance of the restaurants does not change in this construction, they do what they always have done: serve meals and sell them. The only difference is that they are using a third party to deliver their meals for them. Deliveroo, on the other hand, created a new service performance by organising and facilitating the delivery service. A rider has no contractual relationship and no interaction with the restaurants whatsoever, he only picks up meals. Furthermore, the restaurant does not seem to exercise any control or supervision with regard to the rider and his service performance.³⁹ Based on those findings, I would argue that the restaurants do not in any way fulfil an employment related role with regard to the riders, only Deliveroo possibly does. So, again the relationship between the platform and the actual service performer, the rider, has to be researched further.

You do not need much to sign up for a career in the delivery business of Deliveroo. Being sixteen years or older, owning a safe bike or scooter and a smartphone will get you almost there. Once you have joined the ‘Roo Community’ you are offered the flexibility to work whenever you want. You have access to rider gear provided by Deliveroo’s web shop, which consists of a backpack, thermal bag and coat, but you can also use your own gear if they meet the safety and quality standards.⁴⁰ For every delivery you complete, you receive a fee based on the distance of the order. Additionally, you can get tips. Deliveroo also provides ‘incentives’ which a rider can earn on top of the fee and tips in question if a rider delivers a particular target of orders. Moreover, Deliveroo offers ‘Free Rider Insurance’ which entails protection against loss of income, third party liability cover and insurance for treatment and medical cost, only if an incident or accident causing the damages occurred while you were working.⁴¹ Lastly, you are obliged to sign a ‘Supplier Agreement’ which states that:

‘You are a supplier in business on your own account who wishes to join Deliveroo’s supplier pool, on and subject to the below terms and conditions, and are able to meet the service standards Deliveroo expects as more fully set out in the Schedule to this Agreement. You are a self-employed supplier and therefore acknowledge that you are neither an employee of Deliveroo, nor a worker within the meaning of any employment rights legislation.’

³⁹ E.Verhulp, *Platformwerkers verdienen meer!*, Arbeidsrecht 2018/1, p. 6.

⁴⁰ Deliveroo 2018, Frequently Asked Questions. Available at: <https://nl.roocommunity.com/2018/01/29/faqnl/> (last accessed: 2 October 2018).

⁴¹ Deliveroo 2018, Free Rider Insurance. Available at: <https://roocommunity.com/free-rider-insurance/> (last accessed: 2 October 2018).

In other words, Deliveroo explicitly and undoubtedly qualifies the relationship between the platform and the rider as a horizontal one. This means that by signing the contract, a rider agrees with being a self-employed supplier and not a worker, who would be protected by labour law legislation and be entitled to minimum rights.⁴² Being qualified as self-employed would not be such a bad thing, however, Deliveroo is in control of setting out its policy. It can exercise unilateral control to change the terms on which they engage their workforce, for example by removing or adding provisions and clauses to the contracts.⁴³ I mentioned before that using rider gear provided by Deliveroo is optional, but that was not always the case. Before, you had to pay a deposit and in return you received an equipment pack. Deliveroo stated that it changed this condition in favour of the riders, so they could also work for other food delivery companies with their non-branded gear.⁴⁴ It may sound like a fair argument, but purchasing such a gear is expensive and especially a burden if riding for Deliveroo is your primary source of income.⁴⁵

§1.3.3. Analysis of the characteristics

As mentioned in paragraph 1.3, both Uber and Deliveroo facilitate specific offline gig-work and although they do not focus on the same performance of services, their way of execution does show similarities.

- Providing a low threshold to apply: both platforms claim that almost everyone is able to join their community and looking at their minimum requirements as described above, that is essentially true. They are not seeking particularly qualified individuals, they want numbers to expand their territory and grow globally.⁴⁶
- Guaranteeing flexible working hours: the most appealing aspect of involving oneself in performing offline services through an online platform such as Uber and Deliveroo is being able to decide when and how much you want to work. No more contractual obligations regarding fixed hours you have to comply with.
- Decreasing supervision or managing: the two aforementioned characteristics result in there being plenty of service providers who all work different hours and in different places. It would be impossible to supervise all those service providers directly and sufficiently, so therefore the platforms rely on their clients for feedback. Also, without there being supervision while performing the services, service providers are put in a less dependent position.
- Showing signs of control or subordination: while both platforms explicitly deny there being any kind of employee-employer relationship between the service provider and the platform, there are some aspects relating to each platform that beg to differ.

⁴² In the Netherlands the contract explicitly states that parties expressly do not wish to enter into an employment contract within the meaning of article 7:610 of the Dutch Civil Code.

⁴³ A. Tims, *Gig-economy ruling has Deliveroo riders without rights and buying their own kit*, The Guardian, 19 November 2017. Available at: <https://www.theguardian.com/business/2017/nov/19/gig-economy-ruling-deliveroo-riders-equipment-basic-employment-rights> (last accessed: 2 October 2018).

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Todolí-Signes speaks of economies of scale or the need for a critical mass and becoming a global business, which can lead to a monopoly or oligopoly situation. A. Todolí-Signes, *The 'gig-economy: employee, self-employed or the need for a special employment regulation?*, European Review of Labour and Research 2017/23(2), p. 193-205.

First off, Uber evaluates the drivers foremost by the ratings they receive and if those ratings are not good enough, this could lead to temporary or even permanent deactivation of a driver's account. In the O'Connor case the US Court ruled that Uber cannot be only a technological company bringing together supply and demand, if Uber is able to intervene in how work is done. The European Court of Justice also ruled in a Spanish affair that Uber provides a transportation service and can thus not simply be a technological company.⁴⁷

Interestingly, the UK Employment Tribunal and the French Employment Tribunal do not see eye to eye on this matter. Uber lost its case before the court and the judges ruled that Uber is a transportation business which wrongly classified the drivers as self-employed contractors, while the French court that Uber is in the business of intermediation and not that of a transportation service and therefore did not act as an employer.⁴⁸

A control or subordination aspect regarding Deliveroo can be found in the ability to unilaterally control the terms on which they conclude contracts with the riders. If you want to be a rider, you are obliged to sign the contract and if you do not sign, it ends there. In a Dutch case the judge ruled that the relationship between Deliveroo and a rider could not be qualified as there being an employee-employer one, because the rider had knowingly agreed to become a self-employed supplier. The court also stated that if offering such contracts by platforms as Deliveroo is deemed undesirable, it is up to the legislator to take measures.⁴⁹

⁴⁷ CJEU 20 December 2017, ECLI:EU:C:2017:981 (C-434/15) (*Asociación Profesional Elite Taxi vs. Uber Systems Spain SL*).

⁴⁸ H. Osborne , *Uber loses right to qualify UK drivers as self-employed*, the Guardian, 28 October 2016. Available at: <https://www.theguardian.com/technology/2016/oct/28/uber-uk-tribunal-self-employed-status> (last accessed: 2 October 2018). A. Ram, *Uber wins French employment case*, the Financial Times, 8 February 2018. Available at: <https://www.ft.com/content/240b1da0-0cbd-11e8-8eb7-42f857ea9f09> (last accessed: 2 October 2018).

⁴⁹ Ktr. Amsterdam 23 July 2018, ECLI:RBAMS:2018:5183, *JAR* 2018/189, para. 28 (*X/Deliveroo*).

Chapter two: Classification of a specific offline gig-worker in Dutch labour law

In chapter one I limited the scope of this thesis to **specific offline gig-work**, which consisted of a specific service offered by a digital platform that is performed physically by a service provider on an irregular basis. I determined such a digital platform to be a **specific offline platform**, while I used the term **specific offline gig-worker** for such a service provider. It would be wrong to assume that all specific offline platforms can be regarded as equal. On the contrary, those platforms can still differ greatly from each other, considering the fact that each platform has given its own execution to a similar business model and by doing so creating an own identity.⁵⁰ Also, every labour relationship between a specific offline gig-worker and a specific offline platform can be different and should be assessed individually. Therefore, it is important to state that classifying a specific offline gig-worker in general cannot be done in an absolute manner, but classifying a legal relationship between a particular specific offline platform and a group of specific offline gig-workers in general is possible.⁵¹

In the following paragraphs I will firstly set out the legal framework of employee in the national law of the Netherlands, before applying the legal framework in attempt to provide an adequate assessment of the legal status of Uber drivers and Deliveroo riders. Based on that classification, I will briefly explore so-called flexible labour relationships in Dutch law. These flexible labour relationships deviate from the general or traditional employment relationship, meaning that they do not involve an employee who has, generally speaking, a non-fixed-term employment contract on the basis of which he works forty hours a week. This paragraph will shortly outline a way of flexible regulation in the Netherlands.

§2.1. Legal framework of employee in Dutch labour law

I have consistently addressed that the legal uncertainty regarding the legal status of a specific offline gig-worker revolves around the distinction between him being an employee or a self-employed person. Saying something meaningful regarding this proposed classification requires explaining when one actually classifies as one or the other.

In Dutch labour law, legal definitions or concepts of those two classifications do not exist as such. Instead, I am bound to use the legal definition of the contract of employment to determine whether the parties to the contract can be classified as employee and employer, or possibly something else entirely.

Contract of employment

The definition of the contract of employment is laid down in article 7:610 of the Dutch Civil Code (hereafter: DCC). This provision states that a contract of employment is a contract whereby one party, the employee, undertakes to perform work in the service of the other party, the employer, for remuneration during a given period.⁵² This legal definition contains three prominent elements:⁵³

⁵⁰ J.H. Bennaars, *Is platformwerk een bedreiging of een kans voor het arbeidsrecht? Het antwoord is ja*, *ArbeidsRecht* 2018/28 (6/7), p. 10.

⁵¹ This follows from Dutch Supreme Court 14 April 2006, ECLI:NL:HR:2006:AU9722, *NJ* 2007/447 (*Beurspromovendi*) and also Ktr. Amsterdam 15 January 2019, ECLI:NL:RBAMS:2019:198, *JAR* 2019/23, para. 19 (*FNV/Deliveroo*).

⁵² A. Jacobs, *Labour Law in the Netherlands*, Alphen aan den Rijn: Kluwer Law International 2015, p. 65.

- 1) The employee has to perform work;
- 2) The employer has to provide remuneration;
- 3) The employee has to perform the work in service of the employer.

The phrase ‘during a given period’ has no substantial meaning. The provision does not require the contract of employment to have a minimum length, therefore very small jobs, covering only a few hours or days, may be classified as contracts of employment.⁵⁴

1) Work

The employee is obliged to perform work. The nature of the work is not important, it can have a physical or mental nature; even sleeping can be considered as working.⁵⁵ The work must be of value to the other party. If the work is primarily focused on extending the knowledge and experience of the one who performs the work, for example when we are dealing with an internship agreement, the contract cannot be considered being a contract of employment.⁵⁶ Apart from being obliged to perform work, the employee is also obliged to perform the work himself. He may not arrange to be replaced by a third party except with consent of the employer, following article 7:659 DCC.⁵⁷

2) Remuneration

The meaning of remuneration in the light of article 7:610 DCC has a wide scope and can be defined as: the compensation the employer is obliged to provide to the employee for the work he performs.⁵⁸ The remuneration will mostly be set in money, but it can also be set in kind. The decisive factor entails there being an obligation of the employer to provide compensation for the work that is done.⁵⁹

3) In service of

The third element of article 7:610 DCC consists of the circumstance that the employee performs the work in service of the employer. In other words, there has to be a relationship based on authority or subordination.

⁵³W.H.A.C.M. Bouwens, R.A.A. Duk & D.M.A. Bij de Vaate 2018, *Van der Grinten Arbeidsovereenkomstenrecht*, Deventer: Wolters Kluwer 2018, p.4.

⁵⁴ A. Jacobs, *Labour Law in the Netherlands*, Alphen aan den Rijn: Kluwer Law International 2015, p. 65 ; W.H.A.C.M. Bouwens, R.A.A. Duk & D.M.A. Bij de Vaate 2018, *Van der Grinten Arbeidsovereenkomstenrecht*, Deventer: Wolters Kluwer 2018, p.4 ; M.S. Houwerzijl, *Juridische vraagstukken rond arbeid in de klusseneconomie, Beleid en Maatschappij* 45(2), p. 211.

⁵⁵ Dutch Supreme Court 15 March 1991, ECLI:NL:HR:1991:ZC0174, *NJ* 1991/417 en 418. Vgl. CJEU 3 October 2000, ECLI:EU:C:2000:538 (C-303/98), *JAR* 2000/251 (*Simap*); CJEU 9 September 2003, ECLI:EU:C:2003:437 (C-151/02), *JAR* 2003/226 (*Jaeger*); CJEU 5 October 2004, ECLI:EU:C:2004:584 (C-397/01), *JAR* 2004/261 (*Pfeiffer* and others).

⁵⁶ W.H.A.C.M. Bouwens, M.S. Houwerzijl & W.L. Roozendaal, *Schets van het Nederlandse arbeidsrecht*, Deventer: Wolters Kluwer 2017, p. 60. See also: Dutch Supreme Court 29 October 1982, ECLI:NL:HR:1982:AC0442, *NJ* 1983/230 (*Hesseling/Stichting De Ombudsman*).

⁵⁷ A. Jacobs, *Labour Law in the Netherlands*, Alphen aan den Rijn: Kluwer Law International 2015, p. 66.

⁵⁸W.H.A.C.M. Bouwens, R.A.A. Duk & D.M.A. Bij de Vaate 2018, *Van der Grinten Arbeidsovereenkomstenrecht*, Deventer: Wolters Kluwer 2018, p. 6.

⁵⁹ J.M. Van Slooten, *Arbeid en loon (diss. Amsterdam UvA)*, Deventer: Kluwer 1999, p. 79, p. 93-94.

According to case law, the notion ‘in subordination to’ entails that the employer has the authority, on the grounds of the underlying contract, to unilaterally issue binding rules or instructions concerning how the work should be done or how to advance the organisation of the enterprise.⁶⁰ This control test is the main legal tool used to distinguish a contract of employment from other contracts which involve labour, such as the contract for services involving a self-employed person.⁶¹ Distinguishing between those two categories is crucial with regard to matters of protection. When working as a self-employed person, your entitlement to labour law protection is relatively low.⁶²

However, distinguishing the two abovementioned contracts from each other is not always simple. On the basis of article 7:402 DCC, a self-employed person is also obliged to follow up instructions the contracting party has given him. Thus, the control test cannot always be used to make the proper distinction between labour contracts. Therefore the courts execute a wider assessment which takes into account a balance of various factors which are relevant for the nature of the subordination. This is done case-by-case on the basis of indicators such as:

- whether the principal can give directives and the extent to which the worker is bound to them;
- the freedom of the worker to determine whether to work or not;
- the measure of liberty the worker has in the organisation of his work and the fixation of his working hours;
- who bears the entrepreneurial risks;
- who provides and finances the raw materials and tools;
- to what extent the worker is performing other activities besides the one concerned;
- whether during illness, holidays, etc. the remuneration is continued;
- whether the work was more or less incidental, etc.⁶³

The explanatory memorandum of article 7:610 DCC discusses the desirability of maintaining the element of ‘in service of’. Firstly, the memorandum refers to an older discussion on that topic, which entailed the suggestion of replacing ‘in service of’ by ‘performing work in a company or housekeeping of the other party’.⁶⁴ This suggestion was rejected by arguing that this element, from which the concept of ‘subordination’ of the employee and ‘authority’ of the employer is read, has formed a useful criterion for distinguishing the employment contract from other agreements, such as a contract for services.⁶⁵ It was not without uncertainty in borderline cases, but those borderline cases were inevitable in a situation in which a legal concept encompassed a large amount of socially varying relationships.⁶⁶ Secondly, the memorandum states that the aforementioned discussion is still present, but that has not let the legislator to modify the element of ‘in service of’.⁶⁷ While referring to the already given arguments, the case law also showed that the current description is not an obstacle to classify highly divergent relationships as contracts of employment.⁶⁸

⁶⁰ A. Jacobs, *Labour Law in the Netherlands*, Alphen aan den Rijn: Kluwer Law International 2015, p. 66.

⁶¹ Ibid.

⁶² D.J.B. de Wolff & E. Verhulp, *Flexibele arbeidsrelaties*, Deventer: Wolters Kluwer 2017, p. 153.

⁶³ A. Jacobs, *Labour Law in the Netherlands*, Alphen aan den Rijn: Kluwer Law International 2015, p. 67.

⁶⁴ *Kamerstukken II 1993/94*, 23 438, nr. 3, p. 13.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ *Kamerstukken II 1993/94*, 23 438, nr. 3, p. 13-14.

In other words, the legislator acknowledged that the formulation of this element did not need to undergo any changes and is capable of distinguishing the contract of employment from other contracts, even when confronted with atypical cases.

Intention of the parties and actual execution

The Supreme Court of the Netherlands (hereafter: the Supreme Court) provided guidelines in its case law with regard to distinguishing a contract of employment from other contracts which involve labour, by emphasising the importance of the intention of the parties and the actual execution of the concluded contract.

In the case *Groen/Schoevers*, the Supreme Court ruled that what applies between the parties has to be determined not only on the basis of the rights and obligations that the parties had in mind when entering into the legal relationship, but also the manner in which the parties have actually given execution to the legal relationship and thus have given substance to it.⁶⁹ On the basis of that substance it has to be determined if the contract is a contract of employment, a contract to render services by a self-employed person or another contract.⁷⁰ When classifying the contract not a single characteristic is decisive, but the different legal consequences which the parties have attached to their legal relationship must be viewed in their mutual context.⁷¹ The Court also ruled that the social position of the one performing the work has to be taken into account.⁷²

Furthermore, the classification given to the contract by the parties is of importance, but not decisive.⁷³ The real intention of the parties is decisive. They cannot withdraw themselves from applicable legislation by simply addressing their contract differently.⁷⁴ A contract which is explicitly addressed by the parties as a contract of employment, cannot be classified as such, if the actual execution regarding the contract determines the contract not be a contract of employment.⁷⁵ This approach regarding the classification of a contract could have one wondering if the classification is based on identifying the actual intention via the actual execution or on identifying how the intention and the actual execution relate to each other. I would argue for the second option and that when confronted with difficulties regarding the classification of a contract involving labour, the contract itself and its

⁶⁹ Dutch Supreme Court 14 November 1997, ECLI:NL:HR:1997:ZC2495, *NJ* 1998/149 (*Groen/Schoevers*). See also the recent application of these guidelines in: Hof Amsterdam 6 February 2018, ECLI:NL:GHAMS:2018:404, *JAR* 2018/84, para. 3.9-3.10 (*Logidex/Stichting Naleving cao voor uitzendkrachten*, Hof Amsterdam 10 July 2018, ECLI:GHAMS:2018:314, *JAR* 2018/198, paras. 3.9-3.13 (*X c.s./De Persgroep Distributie B.V.*) and Ktr. Amsterdam 15 January 2019, ECLI:NL:RBAMS:2019:198, paras. 26-53 (*FNV/Deliveroo*).

⁷⁰ W.H.A.C.M. Bouwens, R.A.A. Duk & D.M.A. Bij de Vaate 2018, *Van der Grinten Arbeidsovereenkomstenrecht*, Deventer: Wolters Kluwer 2018, p.10.

⁷¹ *Ibid.*

⁷² Dutch Supreme Court 14 November 1997, ECLI:NL:HR:1997:ZC2495, *NJ* 1998/149 (*Groen/Schoevers*).

⁷³ Dutch Supreme Court 16 September 1994, ECLI:NL:HR:1994:ZC1445, *NJ* 1996/329 (*Nationale Nederlanden/Woudsend*).

⁷⁴ For example stating the contract that it is not a contract of employment.

⁷⁵ Dutch Supreme Court 10 October 2003, ECLI:NL:HR:2003:AF9444, *JAR* 2003/263 (*Van der Male/Den Hoed*).

actual execution have to be examined, while taking into account all the relevant factors of the legal relationship. It is about the ‘total picture’.⁷⁶ An individual assessment is thus necessary.

To give a more practical view of how national courts deal with classification issues regarding a contract involving labour and the relationship between the intention of the parties and the actual execution of the contract, I will discuss a recent case below. It provides a clear and structured assessment of classifying a contract of labour, more interestingly because it also deals with uncertainty regarding the legal status of the ‘workers’ involved and the legal question if they are self-employed persons or employees.

§2.1.1. An illustration of a practical application of the legal framework

This case concerned a dispute between newspaper deliverers (hereafter: the claimants) and a distribution company (hereafter: the defendant).⁷⁷ The claimants claimed that the contracts they concluded with the defendant were wrongly classified as contracts to render services ex. 7:400 DCC instead of contracts of employment ex. 7:610 DCC and were therefore being deprived of labour law protection. The court firstly referred to the *Groen/Schoevers* case and the given guidelines by the Supreme Court, before approaching the classification issue by answering two main questions:

- 1) What did the parties have in mind when entering into the legal relationship?
- 2) In what manner have the parties given execution to the legal relationship?

The court emphasized to take into account all the circumstances of the case when answering the two legal questions. With regard to the first question, the court considered the following:

- In the contracts is explicitly stated that these are contracts to render services; several texts sufficiently clarify the contracts **not** being contracts of employment.
- The claimants did not attach much importance to the nature of the legal relationship, but were primarily focused on finding a paid job.
- In retrospective the court acknowledged that the claimants would have given preference to concluding a contract of employment, but they did not argue that they actually had concluding a contract of employment in mind.
- If the parties extensively discussed or did not discuss the nature of the contracts and its consequences for the claimants and if the claimants understood or did not understand that were going to deliver newspapers as a contractor and not as an employee, is **not** decisive when determining the intention of the parties.

The court continued with answering the second question:

- The work entailed the delivery of newspapers before a certain time of day at specified addresses and the claimants were free to perform the work in the way they deemed suitable.
- The court addressed the work being of such a simple nature that providing specific instructions by the defendant were not necessary. However, for the existence of a relationship of

⁷⁶W.H.A.C.M. Bouwens, R.A.A. Duk & D.M.A. Bij de Vaate 2018, *Van der Grinten Arbeidsovereenkomstenrecht*, Deventer: Wolters Kluwer 2018, p.10. See also: Hof Amsterdam 30 January 2018, ECLI:NL:GHAMS:2018:314, *JAR* 2018/64 (*X/Post NL*).

⁷⁷ Hof Amsterdam, 10 July 2018, *JAR* 2018/198, paras. 3.9-3.13 (*X c.s./De Persgroep Distributie B.V.*)

subordination it is not required that instructions are actually given, but that those instructions **can** be given.

- The claimants did not argue that the defendant could have given instructions that could have pointed at a relationship of subordination, nor have the claimants provided concrete examples to substantiate the matter.
- The claimants had been granted a wide degree of freedom to replace themselves with someone else. Therefore, there could not be a personal obligation to perform work on the basis of article 7:659 DCC.

Based on the answers of the aforementioned questions, the court ruled that the legal relationship between the claimants and the defendant could **not** be classified as a contract of employment. The intention of the parties when entering into the contract was not aimed at entering a contract of employment, nor was sufficiently proved that there was a relationship of subordination and a personal obligation to perform work. The nature of the work entails performing work up to a few hours a day for a fee that mainly depends on the number of newspapers and other printed material, whereas the contractor remains responsible for his replacement during illness or holiday. The argued economically unequal position and the economic dependence of the claimants does not lead to a different judgement according to the court.

The examination of the court shows a complementary relationship between the intention of the parties when entering into the legal relationship and the actual execution of the legal relationship. In this case the intention of the parties was not determined to be focused on a contract of employment and the actual execution could in the court's eyes not prove otherwise. The examination also shows the important nature of the casuistic and individual assessment, as the details of the case are fundamentally decisive for the actual classification. Interestingly enough, this case harbours quite a few parallels with the classification of a specific offline gig-worker and his legal relationship with the digital platform.

§2.2. Application of the legal framework in Dutch labour law to Uber and Deliveroo

When classifying the labour relationship between two parties, we saw that two main questions have to be answered: what did the parties have in mind when entering into the legal relationship and in what manner have the parties given execution to the legal relationship. This assessment is simultaneously focused on the legal relationships both Uber and Deliveroo have with the specific offline gig-workers, who are either drivers or riders respectively. To substantiate my assessment, I will refer to two recent Dutch cases dealing with classifying Deliveroo riders in Dutch labour law, while drawing parallels with Uber.⁷⁸

⁷⁸ Ktr. Amsterdam 15 January 2019, ECLI:NL:RBAMS:2019:198, *JAR* 2019/23 (*FNV/Deliveroo*) and Ktr. Amsterdam 23 July 2018, ECLI:NL:RBAMS:2018:5183, *JAR* 2018/189(*X/Deliveroo*). There have not yet been any cases dealing with classifying Uber drivers in Dutch law, although the classification of Uber drivers in English law led to an interesting and high-profile case. The Employment Tribunal classified the drivers as **not** being self-employed, but considered them to be 'workers', a category we do not use in Dutch labour law. Nevertheless, the arguments used by the presiding judge are worth referring to. See: Employment Tribunals, *Aslam, Farrar and others versus Uber B.V., Uber London Ltd, Uber Britannia Ltd*, 28 October, Case Nos: 2202550/2015 & Others, confirmed by the Employment Appeal Tribunal, 10 November 2017, Appeal No. UKEAT/0056/17/DA, confirmed by the Court of Appeal, 19 December 2018, Appeal No. EWCA Civ 2748.

Intention of the parties

In chapter one I referred to case *X/Deliveroo*, where the court ruled that the legal relationship between X and Deliveroo had to be classified as constituting a contract of services and **not** a contract of employment, while in the most recent case *FNV/Deliveroo*, the same court ruled the exact opposite. With regard to the first question, both rulings referred to the ‘**rights and obligations**’ the parties had in mind when entering into the legal relationship, which is more specific than the actual question as formulated in *Groen/Schoevers*, but can be used as well to determine the intention of the parties.⁷⁹ Interestingly, this question was approached differently in both cases.

In *X/Deliveroo*, the court mainly assessed if the parties had the intention of concluding a contract of employment, ultimately concluding this intention to be absent, based on the large amount of freedom and lack of obligations a rider has, but mostly on the explicit wording in the contract stating that both parties have no intention of concluding a contract of employment.⁸⁰ I stated before that the classification given to the contract by the parties is of importance, but can never be decisive.

A contract which is explicitly addressed by the parties as a contract of employment or services, cannot be classified as such, if the actual execution regarding the contract determines otherwise. Bennaars rightfully stated that the court failed to acknowledge this matter and wrongfully focused on what the parties had in mind with regard to the classification of the contract, instead of on the rights and obligations that can be derived from the contract. The court could have sufficed by concluding that the rights and obligations the parties had in mind were focused on freedom and few obligations, before continuing with assessing the actual execution of these rights and obligations.⁸¹

Another aspect the court missed in its assessment, was the unilateral imposition of the contract.⁸² In *FNV/Deliveroo*, the court did assess this important aspect and stated that documenting the rights and obligations in a contract, which constitute the intention of the parties, can be of value depending on the degree of negotiation. In this case of unilateral imposition and no negotiation whatsoever, it ruled that no decisive meaning can be attached to that written contract, definitely not regarding the intention of the rider. At most his willingness to comply with Deliveroo’s conditions to be able to work, can be recognized.⁸³

So, while the court in *X/Deliveroo* valued the intention of the parties, derived from the contract, highly and attached decisive meaning to it, the court in *FNV/Deliveroo* limited the significance of the intention of the parties by **not** attaching any decisive meaning to it, because of the use of an unilaterally imposed contract.⁸⁴ The use of such a contract cannot be dismissed or overlooked when

⁷⁹ Dutch Supreme Court 25 March 2011, ECLI:NL:HR:2011:BP3887, *NJ* 2011/594, para. 3.3.2 (*Gouden Kooi*).

⁸⁰ Ktr. Amsterdam 23 July 2018, ECLI:RBAMS:2018:5183, *JAR* 2018/189, paras. 11 & 12 (*X/Deliveroo*).

⁸¹ J.H. Bennaars, *Eén platform, één rechtbank, twee uitkomsten*, AR Updates annotaties, AR 2019/51, p. 2. In *X c.s./De Persgroep Distributie B.V.*, the court used a similar and equally wrong approach when determining what the parties had in mind when entering into the legal relationship. It was also too focused on what the parties had in mind with regard to the classification of the contract, instead of the rights and obligations that could be derived from the contract.

⁸² J.H. Bennaars, *Is platformwerk een bedreiging of een kans voor het arbeidsrecht? Het antwoord is ja*, *ArbeidsRecht* 2018/28 (6/7), p. 10. M. Houwerzijl, *Juridische vraagstukken rond arbeid in de klussenconomie*, *Beleid en Maatschappij* 2018 (45) 2, p. 212.

⁸³ Ktr. Amsterdam 15 January 2019, ECLI:NL:RBAMS:2019:198, *JAR* 2019/23, para. 21 (*FNV/Deliveroo*). Because of the unilateral imposition I would not value the acceptance of the rider highly.

⁸⁴ J.H. Bennaars, *Eén platform, één rechtbank, twee uitkomsten*, AR Updates annotaties, AR 2019/51, p. 2.

assessing the intention of the parties, therefore I would argue that the assessment of the court in *FNV/Deliveroo* is rightly done.

Applying the reasoning in *FNV/Deliveroo* on Uber when assessing the intention of the parties would lead to the same conclusion. Uber does not use contracts like Deliveroo, but unilaterally imposes terms and conditions which drivers have to accept, which also explicitly state that the parties do not intend to conclude a contract of employment.⁸⁵ A decisive meaning can neither be attached to the written terms and conditions for determining the intention of the parties.⁸⁶

It is abundantly clear that both platforms have no intention of concluding a contract of employment with the service providers. The intention of the service providers is thus more difficult to determine. A potential driver or rider cannot individually negotiate the content of the terms and conditions he has to accept or the contract he has to sign. With other words, a potential driver or rider is confronted with an all or nothing system: either accept and start working without negotiating or decline and continue searching for a job.⁸⁷ I would argue that it is not possible to say what a specific driver or rider has in mind when entering into a legal relationship with Uber or Deliveroo, besides his intention to earn an income by performing services.⁸⁸ But if he intends to do so as an employee or as a self-employed person has to be determined on a case-by-case basis.

Actual execution

Now, I will assess the actual execution of the legal relationship between Uber and drivers and Deliveroo and riders. It is clear that drivers and riders both perform **work** and receive **remuneration**, so the question which needs to be answered is: do they perform work **in service of** the platforms? In other words, are the drivers and riders **subordinate** to respectively Uber and Deliveroo? Therefore, I will especially focus on this element.

In service of or subordination

- Flexibility and autonomy

The core of specific offline gig-work and the new business model entails: deciding when and how much you want to work. A specific offline gig-worker is not obliged to work, he can even decline work and he has no fixed working hours. Also, he does not need permission for a leap of absence or holiday. These elements clearly point in the direction of a contract of services.⁸⁹ This is what is generally known about specific offline gig-work, while there is also another side to the presumed

⁸⁵ P. Kruit & M. Ouweland, *Platformarbeid: de ene platformwerk(nem)er is de andere niet*, TRA 2018/58 (7/8), p. 21. J.H. Bennaars, *Is platformwerk een bedreiging of een kans voor het arbeidsrecht? Het antwoord is ja*, *ArbeidsRecht* 2018/28 (6/7), p. 12.

⁸⁶ The fact that a signing a contract or accepting terms and conditions are different ways to reach an agreement between parties is in my opinion not relevant, because both ways are unilaterally imposed and thus lead to the same unequal position of the driver or rider.

⁸⁷ The low threshold and guaranteed flexibility to apply makes it attractive to accept the contract or user conditions of the platforms. Also, if someone is desperately looking for a job, he will most likely accept as well, negotiating about his position not being a priority.

⁸⁸ Being aware of the intention of Uber or Deliveroo before accepting the terms and conditions or signing the contract could be of relevance if in an individual case a potential driver or rider actually intends to enter into a contract of services.

⁸⁹ P. Kruit & M. Ouweland, *Platformarbeid: de ene platformwerk(nem)er is de andere niet*, TRA 2018/58 (7/8), p. 20.

flexibility and freedom. It is not as absolute as Uber and Deliveroo tend to display. In reality, the use of rating systems and algorithms limit the flexibility and autonomy of a specific offline gig-worker.⁹⁰

Uber

Uber influences the drivers to work at certain times or places by setting a higher price for particular rides. This feature is accompanied by ‘surge pricing’, an automatic increase of the price of a ride, if it is expected that many people are going to request a ride, on for example a holiday. By sending a text, Uber tries to encourage the drivers to work, while the question remains if a driver can resist that temptation. Furthermore, Uber uses a productivity system: if drivers are logged on in the application, then they have to accept at least 70% of the rides, otherwise the cooperation will be ended.

Deliveroo

Deliveroo uses a different approach to influence the riders. An order is in the first place assigned to a rider who has signed up for a ‘session’ in advance. If he does so, he has assurance of being able to log in on the application and perform services in a particular place and at a particular time.⁹¹ It is therefore beneficial for a rider to sign up for sessions in advance to have a bigger chance of obtaining orders, while there is also a maximum of riders that can sign up for a session.⁹² Moreover, ‘priority access’ can be given to riders who perform well, thus giving them priority when signing up for sessions, increasing their chance of obtaining orders.⁹³

Both platforms use rating systems to evaluate the service performance of the drivers and riders. If one’s rating sinks low, he will be given less favourable gigs or even risk getting cut off from the platform temporary or in the worst case, permanently. The evaluation process is delegated to customers who will rate the service providers, not the platforms themselves, but it are the platforms that act on that information and decide what consequences it will have.

Working as a driver or rider is genuinely more flexible, but it being totally up to them when and how much they want to work, is a misconception and deceiving in nature. Drivers and riders are being influenced to work more often, at certain times and are forced to perform well due to the rating systems. Furthermore, a certain level of freedom in the way the work is done, will not distort the dependency relationship, and even less so when this freedom is inherent to the work.⁹⁴

- Personal labour and substitution

Performing personal labour is an important element of a contract of employment on the basis of article 7:659 DCC. Both drivers and riders need to have a personal account to be able to work for either Uber or Deliveroo. Having a personal account gives the service performance a personal dimension and the

⁹⁰ Smink and others, *Een eerlijke kluseconomie*, Beleid en Maatschappij 2018 (45) 2, p. 205.

⁹¹ See also article 2.2. of the contract. Signing up for a session and logging in on the application is no guarantee for actually obtaining the order. It only increases your chances.

⁹² If you are too late and a session is already full, then you will not be able to work at that particular timeslot, what evidently limits your freedom and flexibility to work whenever you want.

⁹³ Ktr. Amsterdam 15 January 2019, ECLI:NL:RBAMS:2019:198, *JAR* 2019/23, paras. 31-33 (*FNV/Deliveroo*).

⁹⁴ R. Sprange, *Worker (Mis)Classification in the Sharing economy: Square Pegs Trying to fit in Round Holes*, A.B.A. Journal of Labor & Employment Law 31, Wyoming: University of Wyoming, p. 53-76.

account is normally only used by the driver or rider himself and not by a third party.⁹⁵ Also, ratings given by customers are personal and only regard a specific driver or rider. Kruit and Ouwehand argued that performing these types of specific offline gig-work thus entail personal labour and specific offline gig-workers such as drivers and riders are therefore not freely replaceable.⁹⁶

Deliveroo gives an interesting spin to this assessment, because it explicitly allows riders to arrange substitution, which is a strong indicator towards a contract of services. So, what element should prevail? I agree with Bennaars who stated that the possibility of substitution should be nuanced, because substitution is not of much practical use.⁹⁷ Riders do not have an actual obligation to work, so if they do want to work, they ought to do that themselves, which makes substitution unnecessary. Also, gigs are short and time sensitive jobs, what makes it unpractical to even consider or arrange substitution in such a limited amount of time. Furthermore, a gig is connected to the personal account of the rider, so how is the intended substitute going to successfully replace the rider, which makes it even more impractical.

- Possibility to work for several platforms

Another ‘privilege’ given to drivers and riders equally, is the opportunity to work for different platforms at the same time. With other words, they are not bound to only Uber or Deliveroo. The question is how often this happens. It is imaginable that both Uber and Deliveroo provide sufficient work opportunities, so working for several platforms would then be unnecessary. Besides, both platforms promote themselves with guaranteeing that you can work as much as you want, so why bother performing services for another platform? But, it could be possible that a driver or rider wants to work but is not able to do so, because of a rating setback or negative consequence of an algorithm. Also, how loyal is a driver or rider to Uber or Deliveroo? How quickly would he switch and how much does he depend on the particular platform? Such questions can only be answered in individual cases.

- No obligation to use specific material or clothing to perform the service

I stated before in chapter one that applying for the position of a gig-worker is relatively easy and you do not need much equipment to perform the service. Drivers and riders are not obliged to use specific materials or clothing. Uber provides the possibility of leasing a car, while Deliveroo sells the required equipment, but those are only services.⁹⁸ Todolí-Signes argued that this characteristic is a poor sign of subordination, because a car, a bike and a mobile phone etc. are tools anyone can possess.⁹⁹ Today, employees can be owners of the means of production, whereas they could not when the tools and materials needed for production were factories. The lack of ownership of means of production is therefore no longer a good indication of being an employee.

⁹⁵ A driver’s or rider’s reputation is also not transferable.

⁹⁶ P. Kruit & M. Ouwehand, *Platformarbeid: de ene platformwerk(nem)er is de andere niet*, TRA 2018/58 (7/8), p. 20.

⁹⁷ J.H. Bennaars, *Is platformwerk een bedreiging of een kans voor het arbeidsrecht? Het antwoord is ja*, *ArbeidsRecht* 2018/28 (6/7), p. 12. The court also regarded the possibility of substitution as an ‘empty letter’. See: Ktr. Amsterdam 15 January 2019, ECLI:NL:RBAMS:2019:198, *JAR* 2019/23, paras. 38-40 (*FNV/Deliveroo*).

⁹⁸ Deliveroo used to demand riders to purchase specific Deliveroo equipment, but later on withdrew this obligation.

⁹⁹ A. Todolí-Signes, *The ‘gig-economy: employee, self-employed or the need for a special employment regulation?*, *European Review of Labour and Research* 2017/23(2), p. 193-205.

- Method of payment

Drivers and riders do not get paid an hourly rate, but get paid per service performed. Their remuneration is therefore dependent on the number of services they perform, which can vary day by day. Uber and Deliveroo manage and arrange the payment of drivers and riders. Moreover, they are not paid in case of sickness or when enjoying a holiday. They also do not build up a pension and the platform does not pay payroll tax and social insurance premiums. This method of payment is generally associated with someone who is self-employed, but it is on the other hand easy for the platforms to deliberately use this method of payment to point in the direction of being self-employed, while that does not have to be the case in reality.

- Determination of remuneration

Both Uber and Deliveroo unilaterally decide what the remuneration per performed service will be.¹⁰⁰ A driver or rider has no bargaining possibility whatsoever, thus not allowing him to decide for how much he sells his service.¹⁰¹ For a self-employed person this is an essential feature of his freedom of enterprise, which is taken away by both platforms. In my opinion this entirely nullifies any argument based on the method of payment pointing in the direction of a contract of services, because a driver or rider misses any say in such an important matter of business.

- Intrinsic interference and control by using rating systems and algorithms

The aforementioned aspects have shown that both platforms are not just an intermediary bringing together supply and demand. No, the platforms exert influence on the service performance of the drivers and riders. The actual customer and the driver or rider have no negotiating space and are not allowed to make their own agreements, they cannot deviate from the content of the service delivery as organised by the platforms, including the actual performance of the service and the remuneration provided for a performed service.¹⁰² A self-employed person would be able to decide for himself how to perform the service.

Uber

Uber interferes with the service performance a driver has to deliver by influencing the route that has to be taken, which is easy to do because of GPS-tracking. Uber discourages contact between the driver and the customer. Furthermore, Uber gives instructions on how to execute the ride by determining how the driver has to be dressed and how he should behave in front of a customer. Uber even has a manual entailing rules of behaviour. As I already discussed, Uber uses rating systems. These ratings given by customers constitute a personal score for each driver, which is also influenced by the

¹⁰⁰ The court emphasized that the term ‘remuneration’ has to be given a wide meaning. It is therefore no obstacle that the remuneration a rider is paid, fluctuates on the basis of the particular delivery. Ktr. Amsterdam 15 January 2019, ECLI:NL:RBAMS:2019:198, JAR 2019/23, para. 44 (*FNV/Deliveroo*).

¹⁰¹ J.H. Bennaars, *Is platformwerk een bedreiging of een kans voor het arbeidsrecht? Het antwoord is ja*, ArbeidsRecht 2018/28 (6/7), p. 12. M. Houwerzijl, *Juridische vraagstukken rond arbeid in de klusseneconomie*, Beleid en Maatschappij 2018 (45) 2, p. 212. P. Kruit & M. Ouwehand, *Platformarbeid: de ene platformwerk(nem)er is de andere niet*, TRA 2018/58 (7/8), p. 17. Negotiating a lower price with customers is theoretically possible, but Uber will consequently calculate a commission based on the higher price set by Uber, so drivers will not be eager to use that possibility.

¹⁰² P. Kruit & M. Ouwehand, *Platformarbeid: de ene platformwerk(nem)er is de andere niet*, TRA 2018/58 (7/8), p. 17.

availability of a driver and his percentage of declining a ride while he had already accepted it. Drivers with poor ratings risk being (temporary or permanently) cut off from the platform, while good ratings are rewarded by Uber, thus giving drivers incentive to deliver the desired quality.

Deliveroo

The core business of Deliveroo is being an adequate delivery service, what makes Deliveroo dependent on the quality of deliveries.¹⁰³ The platform therefore has no choice but to influence, control and monitor the service performance of riders, by doing so interfering with the service performance of a rider and putting him in a subordinate position. The choice of a rider to work when he wants, to let himself be replaced and to decline orders, are all limited by Deliveroo to maintain the quality. The ‘SBB-system’, which manages the scheduling, has the possibility to influence the availability of riders on Deliveroo’s behalf, by giving priority to certain riders when logging in for sessions. The platform also uses the ratings given by customers to determine if a rider will be given access to log in. Together with the possibility to collect bonuses for performing well, riders are given incentive to deliver quality. While replacing oneself as a rider will not frequently happen, it could be possible that a rider will need a replacement, because he will otherwise risk dropping in the ranking system or risk losing bonus opportunities. Also declining orders will not be beneficial for a rider’s position, again risking detrimental action or even losing the possibility to obtain orders.

§2.2.1. Legal classification in Dutch labour law

I weighed all the foregoing arguments against each other and ultimately, I would argue that there can only be one proper conclusion: both legal relationships Uber and Deliveroo have with the drivers and riders respectively have to be classified as constituting a contract of employment.¹⁰⁴ Even though both platforms have each given an own execution to facilitating specific offline gig-work, my assessment has shown that their characteristics are sufficiently similar to classify their legal relationships with the drivers and riders likewise. While the intention of the parties when entering into the legal relationship may point in the direction of a contract of services, because the contract or terms and conditions explicitly state it that way, it cannot be given decisive meaning. The fact that the contract or terms and conditions are unilaterally imposed by both platforms clarify that both platforms aim at concluding a contract of services, not that the driver or rider intends to do so. As I stated before, the intention of a driver or rider has to be specifically assessed, while it is likely that an aspiring driver or rider is aware of the intention of Uber and Deliveroo not to conclude a contract of employment.

The actual execution of the legal relationships show us a two-sided picture. On paper, the legal relationships harbour distinctive elements that would normally convincingly lead to a classification of

¹⁰³ Ktr. Amsterdam 15 January 2019, ECLI:NL:RBAMS:2019:198, *JAR* 2019/23, para. 30 (*FNV/Deliveroo*).

¹⁰⁴ Several authors tend to agree with this classification. See: W.H.A.C.M. Bouwens, *Position Paper: Werk in de platformeconomie*, p. 4. M. Houwerzijl, *Juridische vraagstukken rond arbeid in de klusseneconomie*, *Beleid en Maatschappij* 2018 (45) 2, p. 212. P. Kruit & M. Ouweland, *Platformarbeid: de ene platformwerk(nem)er is de andere niet*, *TRA* 2018/58 (7/8), p. 21. A. Todolí-Signes, *The ‘gig-economy: employee, self-employed or the need for a special employment regulation?*, *European Review of Labour and Research* 2017/23(2), p. 193-205. A. Todolí-Signes II, p. 268. I also agree with Bennaars who argued that the classification of the court in *FNV/Deliveroo* is more convincing than the one in *X/Deliveroo*, because of the courts rightful assessment of the intention of the parties and the excessive assessment of the actual execution of the rights and obligations. See: J.H. Bennaars, *Eén platform, één rechtbank, twee uitkomsten*, *AR Updates annotaties*, *AR* 2019/51, p. 4. Furthermore, I have to emphasize that this classification does not have to apply to every Uber driver or Deliveroo rider. Contraindications and individual circumstances can lead to a different classification.

a contract of services. In short, the extremely flexible working hours, the possibility to work for several platforms, no obligation to use specific materials or tools and the method of payment, are all indicators of being self-employed. In practise, those indicators can all be refuted as I argued above.¹⁰⁵ I would say that the platforms have used these indicators to create a smokescreen, a façade, to cover up the fact that a relationship of subordination and a personal obligation to perform labour do exist, while being aided by the ambiguity regarding specific offline gig-work.

Especially the use of rating systems and algorithms to track, monitor and encourage drivers and riders, substantiate my conclusion. Smink and others call it management by algorithms: the data generated by the drivers or riders feed the algorithms, offer insight in the performances and make suggestions to sway or tempt the driver or rider to work and perform well.¹⁰⁶ The digital character of the online platforms facilitate the use of rating systems and algorithms. Hiding behind the statement ‘we are just a technological company and thus an intermediary’ is in my opinion utterly pretentious, because the technological abilities of a digital platform are what make it possible to exercise control over drivers or riders and their service performance in the first place, without the driver or rider even knowing how exactly he is being controlled.

Both Uber and Deliveroo do not share the insights of their rating system and algorithms with the drivers or riders, while both are crucial for the proper functioning and organisation of the platform and the service performance derived from it. Both platforms totally lack transparency in this matter.

Todolí-Signes refers to usage of rating systems and algorithms as a ‘new form of control’, pointing out that traditional ways of monitoring and controlling of workers do not exist in these new organisations.¹⁰⁷ Furthermore, he emphasizes the fact that the important thing will not be how much control a platform exercises, but how much control a platform retains the right to exercise. The fact that Uber and Deliveroo allow drivers or riders to choose their working hours and schedules (because technology makes it unnecessary to issue such instructions) does not make them self-employed. Uber and Deliveroo could issue new instructions and the drivers or riders should obey. For this reason, the fact that both platforms could decide not to exercise power as employers does not mean that they do not have it.¹⁰⁸

Uber and Deliveroo clearly use their power to control drivers or riders, but that is actually not even strange. On the contrary, both platforms benefit from a high quality service performance. Monitoring, controlling and influencing the service performance is therefore necessary and unavoidable to maintain the desired quality and keep the brand of Uber or Deliveroo highly valued. If not, then the business model would not be as profitable. These specific offline platforms have taken advantage from the new and unprecedented business model long enough and should finally take responsibility for treating their employees well.¹⁰⁹ Moreover, I also agree with Marvit, who stipulates that these types of specific offline gig-work lack entrepreneurial opportunities for specific offline gig-workers such as drivers and riders, as they have no chance of obtaining the profits of the labour they deliver, while that

¹⁰⁵ The possibility of a Deliveroo rider to arrange substitution can also be refuted.

¹⁰⁶ Smink and others, *Een eerlijke kluseconomie*, Beleid en Maatschappij 2018 (45) 2, p. 205 & 206.

¹⁰⁷ A. Todolí-Signes, *The ‘gig-economy: employee, self-employed or the need for a special employment regulation?’*, European Review of Labour and Research 2017/23(2), p. 193-205.

¹⁰⁸ Ibid.

¹⁰⁹ I have not even argued the economically unequal position and the economic dependence of drivers and riders, because I believe the given arguments for classifying them as employees are sufficient to back up that conclusion. Besides, the non-existent bargaining position of the service providers regarding the contract or terms and conditions already caused the intention of the parties that could be derived from those to be non-decisive.

is inherent to being a self-employed entrepreneur.¹¹⁰ I would like to add that neither a driver or a rider actually profiles himself as being in charge of his own business, thus actually running a transport company or delivery company, because they are evidently not in charge.

§2.3. Flexible labour relationships

The outcome of this classification is also the direct consequence of the binary system the Dutch labour law system currently has. Someone either works on the basis of a contract of employment or a contract of services, while a contract of employment of an indefinite duration is generally or traditionally considered to be the norm.¹¹¹ However, in the Netherlands we see a growing number of atypical employment contracts which are based on a more flexible approach towards employment.¹¹² We can think of zero-hour contracts, on-call labour, temporary agency work and homework/telework. These relationships deviate from the traditional or standard employment relationship.

The protective provisions which can be derived from labour law are aimed at individuals who work on the basis of a traditional contract of employment and not at the individuals who work on the basis of these different kinds of flexible labour relationships.¹¹³ In comparison to UK law, on which I will elaborate more in the following chapter, the Dutch legal system does not distinguish between different categories of employment statuses and thus different labour law entitlements.

What the Netherlands does, is extending the applicability of protective provisions to other contracts than exclusively the traditional contract of employment if there is a need to level the position of individuals with traditional employees because of their economic dependence on another party.¹¹⁴ If a contract on which the flexible labour relationship is based, can be classified as a contract of employment, then an individual will be classified as an employee as well and will be entitled to labour law protection. So, not only traditional forms of employment can be protected and have been protected, also flexible forms of employment have been granted protection.

Differentiating between several types of employment contracts is thus possible, once the gateway of contract of employment is passed. Recognizing specific offline gig-work as a new, flexible employment relationship could be a way to regulate platforms such as Uber and Deliveroo, on which I will elaborate more in the following chapters.

¹¹⁰ M. Marvit, *How crowdworkers became the ghosts in the digital machine*, The Nation, 5 February 2014. Available at: <https://www.thenation.com/article/how-crowdworkers-became-ghosts-digital-machine/> (last accessed: 18 February 2019).

¹¹¹ G. Thüsing, *European Labour Law*, München: Verlag C.H. Beck oHG 2013, p.140. E. Verhulp, *The Notion of 'Employee' in EU-Law and National Laws*, A Thematic Working Paper for The Annual Conference of the European Centre of Expertise (ECE) in the field of labour law, employment and labour market policies: The Personal Scope of Labour Law in Times of Atypical Employment and Digitalisation. April 2017, p. 1.

¹¹² W.H.A.C.M. Bouwens, M.S. Houwerzijl & W.L. Roozendaal, *Schets van het Nederlandse arbeidsrecht*, Deventer: Wolters Kluwer 2017, p. 66; A. Jacobs, *Labour Law in the Netherlands*, Alphen aan den Rijn: Kluwer Law International 2015, p. 71.

¹¹³ D.J.B. de Wolff & E. Verhulp, *Flexibele arbeidsrelaties*, Deventer: Wolters Kluwer 2017, p. 153.

¹¹⁴ *Ibid.*

Chapter three: Classification of a specific offline gig-worker in European labour law

The previous chapter showed that Uber drivers and Deliveroo riders can be classified as employees in Dutch labour law. This chapter will answer the question if they can also be classified as workers in European labour law. In the following paragraphs I will look into the conditions under which an employment relationship exists according to EU labour law and case law. An application of that legal framework will determine the legal classification of drivers and riders in European labour law. Furthermore, before the arrival of online platforms such as Uber and Deliveroo, the European Commission already foreshadowed a rise of different forms of employment or work opportunities, eventually leading to different types of employment statuses and a different scope of labour law protection. This paragraph I will shortly examine the possibility of regulating specific offline gig-work by introducing a new category of worker.

§3.1. Legal framework of worker in European labour law

While Member States are responsible for deciding who can be considered an employee in their national legal order, at EU level, the Court of Justice (hereafter: CJEU) has defined the concept of ‘worker’¹¹⁵ for the purpose of applying EU law.¹¹⁶ Emphasis has to be put on the term ‘concept’ as there is no unified European definition of employee or worker.¹¹⁷ This concept is used to determine who can be considered a worker when applying certain EU Directives in the social field.¹¹⁸ Therefore the legal uncertainty regarding the legal status of a specific offline gig-worker does not only play a role on a national level, but also on a European level. If a gig-specific offline gig-worker cannot be classified as a worker within the meaning of the European concept, then he could possibly be deprived of access to certain employment rights.¹¹⁹ For example, Directives on working time (*Isère*), collective redundancies (*Balkaya*) and employment equality (*O’*) refer to the European concept of worker for their applicability.¹²⁰ Other labour law Directives expressly refer to the Member States understanding of who is a worker, as long as they respect the effectiveness of EU law, with reference to the *O’Brien* case.¹²¹

For the purpose of this paragraph and setting out the framework for classifying a specific offline gig-worker in European labour law, I will focus on the ‘general’ European concept of worker as established in the case law of the CJEU. Further on in this thesis I will elaborate more on the specific scope of the directives I will be examining.

¹¹⁵ Worker is the more common term in European legislation. See also: Article 45 TFEU and Regulation 492/2011.

¹¹⁶ COM (2016) 356 final, *A European agenda for the collaborative economy*, p. 12.

¹¹⁷ F.J.L. Pennings & S.S.M. Peters, *Europees Arbeidsrecht*, Deventer: Wolters Kluwer 2016, p. 86., E. Verhulp, *The Notion of ‘Employee’ in EU-Law and National Laws*, A Thematic Working Paper for The Annual Conference of the European Centre of Expertise (ECE) in the field of labour law, employment and labour market policies: The Personal Scope of Labour Law in Times of Atypical Employment and Digitalisation. April 2017, p. 2.

¹¹⁸ COM (2016) 356 final, *A European agenda for the collaborative economy*, p. 12.

¹¹⁹ Member states could choose to voluntarily grant rights derived from labour law Directives to gig-workers, but then gig-workers would be handed over to the arbitrariness of Member States.

¹²⁰ CJEU 14 October 2010, ECLI:EU:C:2010:612 (C-428/09), paras. 27-29 (*Isère*), CJEU 9 July 2015, ECLI:EU:C:2015:455 (C-229/14), para. 33 (*Balkaya*) and CJEU 1 October 2015, ECLI:EU:C:2015:643, para. 22 (*O’*).

¹²¹ CJEU 1 March 2012, ECLI:EU:C:2012:110 (C-393/10), paras. 28-31 (*O’Brien*).

The European concept of ‘worker’

The concept of ‘worker’ is derived from the Lawrie Blum case, where the CJEU stated: ¹²²

“The essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.”

Today, the CJEU still refers to this settled piece of case law when dealing with questions regarding the concept of worker and classifying labour contracts.¹²³ Whether an employment relationship exists or not has to be established on the basis of a case-by-case assessment, considering all the facts and circumstances characterising the arrangements between the contracting parties.¹²⁴ In particular, we have to look cumulatively at the following three essential criteria¹²⁵:

1) The nature of work

The ‘worker’ must be engaged in a ‘genuine and effective’ economic activity, excluding activities on such a small scale as to be regarded as purely marginal and accessory.¹²⁶

National courts have adopted divergent approaches in identifying what is marginal and accessory even within the context of less traditional employment relationships.¹²⁷

2) The presence of a remuneration

The Commission has emphasized that this criterion is of importance to distinguish a worker from a volunteer. If the service provider ‘does not receive any remuneration or receives merely a compensation of costs incurred for his activities’, the remuneration criterion would not be met.¹²⁸ This has to be determined while taking into account the actual facts of the case in question.¹²⁹

3) The existence of a subordination link

The existence of such a link distinguishes a worker from a self-employed person, who is defined as an independent worker and therefore works independently of an employer, in contrast with an employee who is subordinate to and dependent on an employer.¹³⁰

¹²² CJEU 3 July 1986, ECLI:EU:C:1986:284 (C-66/85), paras. 16-17 (*Lawrie Blum*).

¹²³ CJEU 3 May 2012, ECLI:EU:C:2012:263 (C-337/10), para. 23 (*Neidel*), CJEU 19 July 2017, ECLI:EU:C:2017:566 (C-143/16), para. 19 (*Abercrombie & Fitch Italia*), CJEU 25 October 2018, ECLI:EU:C:2018:(C-260/17), para. 28 (*Anodiki Services EPE*).

¹²⁴ CJEU 14 December 1989, ECLI:EU:C:1989:650 (C-3/87), paras. 35 & 36 (*Agegate*).

¹²⁵ These essential criteria resemble the three prominent elements of the legal definition of a contract of employment in Dutch labour law.

¹²⁶ C. Barnard, *EU Employment Law*, Oxford: Oxford University Press 2012, p. 149. See also: CJEU 26 February 1992, ECLI:EU:C:1992:87 (C-357/89), paras. 30 (*Raulin v. Minister van Onderwijs en Wetenschappen*).

¹²⁷ COM (2016) 356 final, *A European agenda for the collaborative economy*, p. 12.

¹²⁸ *Ibid.*

¹²⁹ P. Craig & G. De Burca, *EU Law: Text, Cases & Materials*, Oxford: Oxford University Press 2015, p. 751-752, p. 754-775. See CJEU 3 June 1986, ECLI:EU:C:1986:223 (C-139/85), para. 14 (*Kempf*) and ECJ 7 September 2004, ECLI:EU:C:2004:488 (C-456/02), para. 16 (*Trojani*).

¹³⁰ C. Barnard, *EU Employment Law*, Oxford: Oxford University Press 2012, p. 145.

According to the CJEU, any activity which a person performs outside a relationship of subordination must be classified as an activity pursued in a self-employed capacity.¹³¹ Barnard illustrates this by referring to UK case law and the indicators courts in the UK have used to determine the existence of a subordination link, such as:¹³²

- does the employer have the power to select and dismiss;
- is the worker paid a wage or a lump sum.¹³³
- does the worker have to render exclusive service or to work on the employer's premise;
- does the employer own the tools and materials;
- does the employer bear the primary chance of profit or risk of loss;
- is the work an integral part of the business.

The use of these indicators show the extent to which the courts will not just look at one single factor but instead take a multiple or 'pragmatic' approach, weighing up all the factors for or against a contract of employment and determining on which side the scales will settle.¹³⁴

This approach is similar to the Dutch legal framework, as we saw in the previous chapter. However, the assessment in Dutch labour law is two-folded. The intention of the parties plays an important part in the assessment of the labour relationship in question. It can provide a significant indication towards a contract of services or a contract of employment. If the intention of the parties indicates the contract being a contract of services, general instructions point in the direction of a contract of services rather than a contract of employment.¹³⁵ Contrarily, the CJEU does not pay any attention to the intention of the parties when assessing if someone has to be regarded as a 'worker' in European law.¹³⁶ It instead only assesses the actual execution of the labour relationship to determine if the criteria are met.¹³⁷ Therefore, the European legal framework provides a broader scope of application than the Dutch legal framework.¹³⁸

¹³¹ CJEU 20 November 2001, ECLI:EU:C:2001:616 (C-268/99) para. 70 (*Jany and others*).

¹³² C. Barnard, *EU Employment Law*, Oxford: Oxford University Press 2012, p. 145-146.

¹³³ I would argue that the requirement of remuneration only deals with the question if a service provider receives remuneration or not, the nature of the remuneration not being relevant for this requirement. Therefore, its nature is assessed when determining if a link of subordination is present or not. The CJEU ruled in *Trojani* that the origin of the funds from which the remuneration is paid or the limited amount of the remuneration cannot have any consequence in regard to whether or not the person is a worker for the purposes of Community law. Based on the ruling of the CJEU, I would state that if a service provider receives a wage or lump sum can never be a decisive factor with regard to assessing if a link of subordination is present or not.

¹³⁴ I. Smith, *Industrial Law*, London: Butterworths 2003; C. Barnard, *EU Employment Law*, Oxford: Oxford University Press 2012, p. 146.

¹³⁵ F.G. Laagland & J. Kloostra, *De Engelse tussencategorie als oplossing voor platformwerk: mythe of werkelijkheid?*, *Ondernemingsrecht* 2019/7, p. 46.

¹³⁶ *Ibid.*

¹³⁷ This is for example illustrated by the CJEU in CJEU 11 November 2010, ECLI:EU:C:2010:674 (C-232/09), paras. 51 & 56 (*Danosa*) and CJEU 10 September 2014, ECLI:EU:C:2014:2185 (C-270/13), paras. 30-34 (*Haralambidis*).

¹³⁸ F.G. Laagland & J. Kloostra, *De Engelse tussencategorie als oplossing voor platformwerk: mythe of werkelijkheid?*, *Ondernemingsrecht* 2019/7, p. 46-47.

On the basis of this assessment, general instructions qualify more quickly as constituting a subordination link, if the person in question is embedded in the organisation, accounts for the work and/or has little or no room to manoeuvre in the work that has to be performed.¹³⁹ This significant different approach in assessing the legal relationship between two parties may lead to different classifications in Dutch law and European law, because the intention of the parties does not have to be taken into consideration when applying the legal framework in European law.

§3.1.1. Directions of the Court of Justice of the EU

In a Dutch case brought before the CJEU in a preliminary ruling procedure, a question was referred by a national court regarding a matter of European competition law and the cartel prohibition laid down in Article 101 (1) TFEU.¹⁴⁰ From a labour law perspective this was an interesting case, because the CJEU discussed the distinction between an employee and a self-employed person and how the relationship between the two classifications should be approached. The CJEU started its consideration by stating that the term ‘employee’ for the purpose of EU law must itself be defined according to objective criteria that characterise the employment relationship, taking into consideration the rights and responsibilities of the person concerned, while, not surprisingly, referring to its judgement and given criteria in *Lawrie Blum*.

Furthermore, the CJEU referred to the *Allonby* case, where it previously held that the classification of a ‘self-employed’ under national law does not prevent that person being classified as an employee within the meaning of EU law if his independence is merely notional, thereby disguising an employment relationship.¹⁴¹ Lastly, the CJEU stated 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 direction of his employer as regards, in particular, his freedom to choose the time, place and content of his work¹⁴², does not share in the employer’s commercial risks¹⁴³ and, for the duration of that relationship, forms an integral part of that employer’s undertaking, so forming an economic unit with that undertaking.¹⁴⁴

Moreover, whilst the CJEU has continued to emphasize subordination, it has applied the term in a flexible way that suggests that it will not prove much of an obstacle in practice.¹⁴⁵ In *Danosa*, which was about a company director who was dismissed from her employment on grounds of her pregnancy, the CJEU held the following with regard to determining the existence of subordination: it is necessary to consider the circumstances in which the person was recruited; the nature of the duties entrusted to that person; the context in which those duties were performed; the scope of the person’s powers and the extent to which he or she was supervised within the company; and the circumstances under which the person could be removed.¹⁴⁶ The Court suggested that it was significant for the purposes of

¹³⁹ F.G. Laagland, *Voorbij de grenzen van het werknemersbegrip. Een Europese analyse van de zzp-plannen van het Nederlandse kabinet*, Rede uitgesproken bij de aanvaarding van het ambt van hoogleraar (Europees) arbeidsrecht aan de Faculteit der Rechtsgeleerdheid van de Radboud Universiteit op donderdag 27 september 2018, Nijmegen: Radboud Universiteit Nijmegen, p. 7.

¹⁴⁰ CJEU 4 December 2014, ECLI:EU:C:2014:2411 (C-413/13) (*FNV/Kiem*).

¹⁴¹ CJEU 13 January 2004, ECLI:EU:C:2004:18 (C-256/01), para. 71 (*Allonby*).

¹⁴² CJEU 13 January 2004, ECLI:EU:C:2004:18 (C-256/01), para. 72 (*Allonby*).

¹⁴³ CJEU 14 December 1989, ECLI:EU:C:1989:650 (C-3/87), para. 36 (*Agegate*).

¹⁴⁴ CJEU 16 September 1999, ECLI:EU:C:1999:419 (C-22/98), para. 26 (*Becu and others*).

¹⁴⁵ A.C.L. Davies, *EU Labour Law*, Edward Elgar Publishing Limited 2012, p. 175.

¹⁴⁶ CJEU 11 November 2010, ECLI:EU:C:2010:674 (C-232/09), paras. 47 (*Danosa*).

subordination that the company director had to report to the supervisory board from time to time, which constituted an activity under the direction or supervision of another body.¹⁴⁷

These considerations of the CJEU show that also on a European level, it is often not easy to determine whether a person is an employee or a self-employed person. On the contrary, the CJEU even stated that a person can be wrongly classified as self-employed and thus be ‘falsely self-employed’.¹⁴⁸ A-G Wahl described this kind of category as employees who are disguised as self-employed in order to avoid some specific legislation (for example, labour or fiscal regulations) which is considered unfavourable by the employer.¹⁴⁹ Another example is the case of self-employed persons who are economically dependent on a sole (or) main customer.¹⁵⁰

§3.2. Application of the legal framework in European labour law to Uber and Deliveroo

The Dutch legal framework and the European legal framework showed to be similar to some extent. I would therefore deem it unnecessary to repeat myself while applying the legal framework in European labour law, thus only discussing the relevant differences and referring to my previous assessment if needed.

Preliminary remarks

My assessment in Dutch labour law showed that the intention of the parties in the cases of Uber and Deliveroo could not be regarded as being decisive for the classification of the specific offline gig-workers.¹⁵¹ It came down to the actual execution of the rights and obligations to determine their legal status. The lack of significance of the intention of the parties reduces the chances of the outcome of the classification to turn out differently when applying the European framework, considering the fact that the intention of the parties does not play a part in the assessment. Only the actual execution of the legal relationship has to be assessed, which does not differ from the legal relationship I already assessed. However, the fact remains that the criteria in European labour law are similar, not equal. Therefore, an thorough assessment is still needed.

The CJEU has not yet ruled in a case concerning the classification of Uber drivers or Deliveroo riders and whether they should be regarded as workers within the scope of the general European concept.¹⁵²

¹⁴⁷ CJEU 11 November 2010, ECLI:EU:C:2010:674 (C-232/09), paras. 56 (*Danosa*).

¹⁴⁸ I would not regard the category of false self-employed as a third possible classification next to worker or self-employed. I would rather regard the category as a sub-category of worker, consisting of workers who are intentionally misclassified as self-employed persons. Those persons are still workers after all.

¹⁴⁹ Opinion AG Wahl 11 September 2014, ECLI:EU:C:2014:2215 (C-413/13), para. 52 (*FNV/Kiem*).

¹⁵⁰ CJEU 11 November 2010, ECLI:EU:C:2010:674 (C-232/09), paras. 56 (*Danosa*).

¹⁵¹ This can of course be different in an individual and specific case, but the fact remains that a potential driver or rider is put in an unequal position regarding the unilateral imposition of the contract or terms and conditions by Uber or Deliveroo.

¹⁵² The CJEU did rule that Uber is a transport company and not a merely a technological company as it claimed to be. See: CJEU 20 December 2017, ECLI:EU:C:2017:981 (C-434/15) (*Asociación Profesional Elite Taxi vs. Uber Systems Spain SL*).

The nature of work

The economic activity a driver or rider pursues has to be genuine and effective, it can therefore not be purely marginal and accessory. It is inherent to the nature of the service performance of drivers and riders, as organised by Uber and Deliveroo, to consist of short, paid tasks, while also having highly flexible working hours. National courts have used different thresholds (hour or wage-based) to assess this element, but according to case law of the CJEU short duration, limited working hours, discontinuous work or low productivity cannot in themselves exclude an employment relation.¹⁵³ More explicitly, the CJEU ruled in ‘*O*’ that although a person works for only a very limited number of hours in the context of an employment relationship may be an indication that the activities performed are marginal and ancillary, the fact remains that, independently of the limited amount of the remuneration for and the number of hours of activity, the possibility cannot be ruled out that, following an overall assessment of the employment relationship in question, that activity may be considered by the national authorities to be real and genuine, thereby allowing its holder to be granted the status of ‘worker’ within the meaning of EU law.¹⁵⁴

This flexible approach of the CJEU towards this element makes it possible for specific offline gig-work such as providing transport or delivery services to be regarded as a genuine and effective economic activity, if drivers or riders do not perform their services on a merely incidental or occasional basis. I would argue that most drivers and riders do explicitly not perform their services on such a basis, so this criterion will for this assessment not be decisive in the matter of classification.¹⁵⁵

The presence of a remuneration

As we saw in the previous assessment, drivers and riders are getting paid by performed service, while both platforms determine the remuneration.¹⁵⁶ If Uber or Deliveroo would merely process the payment deposited by a customer and pass it on to the driver or rider, then that would be an indication of a platform acting only as an intermediary.¹⁵⁷ This is evidently not the case, nor is there any indication of the service performance by drivers and riders being voluntary.

¹⁵³ M. S. Houwerzijl, *Arbeid en arbeidsrecht in de digitale platformsamenleving: een verkenning*; TRA 2017/14, p. 7. COM (2016) 356 final, *A European agenda for the collaborative economy*, p. 14, with reference to cases CJEU 6 November 2003, ECLI:EU:C:2003:600 (C-413/01), para. 32 (*Ninni-Orasche*), CJEU 3 June 1986, ECLI:EU:C:1986:223 (C-139/85), para. 14 (*Kempf*), CJEU 26 February 1992, ECLI:EU:C:1992:87 (C-357/89), para. 10-15 (*Raulin v. Minster van Onderwijs en Wetenschappen*), CJEU 31 May 1989, ECLI:EU:C:226 (C-344/87), para. 15 (*Bettray*).

¹⁵⁴ CJEU 1 October 2015, ECLI:EU:C:2015:643, para. 24 (‘*O*’).

¹⁵⁵ I have to emphasize again that this could be different in a specific individual case, a driver or rider could theoretically perform services on an incidental basis, but I would consider that scenario to be unlikely.

¹⁵⁶ If a platform merely processes the payment deposited by a customer and passes it on to the specific offline gig-worker, then that would be an indication of a platform acting only as an intermediary.

¹⁵⁷ COM (2016) 356 final, *A European agenda for the collaborative economy*, p. 14.

The existence of a subordination link

In the previous paragraph, I referred to *Jany and others* where the CJEU stated that any activity which a person performs outside a relationship of subordination must be classified as an activity in a self-employed capacity. An activity classifies as such if the person in question determines the choice of that activity, the working conditions and conditions of remuneration.¹⁵⁸

With regard to the service performance of both drivers and riders, it is clear that neither driver or rider determine any of those elements. The choice of activity, either performing taxi or delivery services, is determined by Uber or Deliveroo. A driver or rider cannot choose to perform another service, while they can neither determine how they provide the service.¹⁵⁹ The working conditions are determined by the platforms as well, although the drivers and riders are given a large amount of flexibility with regard to setting their working hours. My previous assessment showed that while the way of working is very flexible, their flexibility and autonomy is limited. Lastly, the conditions of remuneration are also determined by the platforms as I already mentioned. The activity drivers and riders perform can thus not be classified as an activity in a self-employed capacity, which points in the direction of the existence of a subordination link. Furthermore, both drivers and riders from a part of either Uber's or Deliveroo's organisation, do not share in the commercial risks of either platform and more importantly, their service performance belongs to the core of Uber's and Deliveroo's activities. The core business of both platforms revolves around providing taxi or delivery services, so without the drivers and riders both platforms would not be able to actually maintain their business.

This finding is further substantiated if we look more closely at the provided guidelines by the CJEU in *Danosa* and applying them on the organization and management of Uber and Deliveroo.¹⁶⁰ Both drivers and riders have to comply with unilaterally drafted contracts or terms and conditions when entering the recruitment process. The nature of the duties entrusted to them and the context in which those duties are performed, entail performing one specific service which belongs to the core of both platforms' business. The content and execution of the service performance is unilaterally organized and determined by Uber and Deliveroo as we saw in my previous assessment. Their scope of power is therefore extremely narrow, although they can influence their working hours, but that is all they can. Moreover, the extent to which they are supervised can of course not be measured by the typical and regular idea of supervision, because the lack of physical management or supervision is what makes specific offline gig-work difficult to fit in our current presentation or idea of employment. I already extensively discussed the 'new' way of supervising by using rating systems and algorithms, what in my opinion undoubtedly constitutes a considerable amount of supervision by Uber and Deliveroo.¹⁶¹ Poor ratings and declining opportunities to work could ultimately lead to a permanent removal from the platforms.

¹⁵⁸ CJEU 20 November 2001, ECLI:EU:C:2001:616 (C-268/99) para. 70 (*Jany and others*).

¹⁵⁹ COM (2016) 356 final, *A European agenda for the collaborative economy*, p. 14.

¹⁶⁰ 11 November 2010, ECLI:EU:C:2010:674 (C-232/09), para. 47 (*Danosa*).

¹⁶¹ The European Commission referred to this particular element by stating that the existence of subordination is not necessarily dependent on the actual exercise of management or supervision on a continuous basis. See: COM (2016) 356 final, *A European agenda for the collaborative economy*, p. 14.

§3.2.1. Legal classification in European labour law

This assessment may seem to be less extensive than my previous one, which is due to the fact that both frameworks share some similarities and I have deemed it unnecessary to repeat already given arguments. I would nonetheless argue that both drivers and riders should be classified as ‘workers’ within the meaning of EU law and not as self-employed persons. This is not a surprising outcome given the fact that the legal framework of worker in European law has a broader scope of application than the Dutch legal framework of employee. I determined the drivers and riders to be employees in Dutch law, thus it makes sense that they also fall within the scope of the broader term of worker.

Their pursued economic activities are not marginal and accessory, but real and genuine. They receive remuneration for their service performance and do so while being in a relationship of subordination with either Uber or Deliveroo. It is furthermore interesting to mention the notion of false self-employed derived from *Allonby*, which does not exist as such in Dutch law. Verhulp refers to this notion as entailing an abusive situation in which position the person is self-employed based on formal grounds, but in fact performs his or her services in a subordinated relationship.¹⁶² Both drivers and riders are explicitly classified as self-employed persons by Uber and Deliveroo, while a relationship of subordination is undeniably present. I would argue that both drivers and riders are thus ‘workers’ who are simultaneously false self-employed. This is another confirmation of drivers and riders being wrongly regarded as self-employed persons, while I need to repeat yet again the importance of individual assessments of labour relationships, which could entail a different outcome.

§3.3. A new category of worker

In the previous chapter I briefly explored the possibility of regulating specific offline gig-work as a new, flexible labour relationship based on an atypical employment contract, following my conclusion that drivers and riders are employees. This form of regulation would stay within the aforementioned binary system the Netherlands currently has.

Some have suggested to regulate specific offline gig-work by creating a new, intermediate category of ‘worker’, that could be placed between the employee and the self-employed.¹⁶³ Specific offline gig-work would be too special, too atypical to fit in our current binary system.¹⁶⁴ It would deviate too much from traditional employment, to be regulated the same way.

The European Commission (hereafter: the Commission) has shown to question the desirability of an essentially binary system as well. Already in 2006, the Commission acknowledged in its Modernising Labour Law Green paper that while the employee and the self-employed can be considered as traditional employment concepts, these are no longer an adequate depiction of the economic and social

¹⁶² E. Verhulp, *The Notion of ‘Employee’ in EU-Law and National Laws*, A Thematic Working Paper for The Annual Conference of the European Centre of Expertise (ECE) in the field of labour law, employment and labour market policies: The Personal Scope of Labour Law in Times of Atypical Employment and Digitalisation, April 2017, p. 7.

¹⁶³ P. Kruit & M. Ouweland, *Platformarbeid: de ene platformwerk(nem)er is de andere niet*, TRA 2018/58 (7/8), p. 21. F.G. Laagland & J. Kloostera, *De Engelse tussencategorie als oplossing voor platformwerk: mythe of werkelijkheid?*, *Ondernemingsrecht* 2019/7, p. 41. J.M. Van Slooten, *Ter Visie – Platformarbeids: nog een reden tot rethinking van het arbeidsrecht*, *TAO* juni 2017, p. 52.

¹⁶⁴ J.H. Bennaars, *Is platformwerk een bedreiging of een kans voor het arbeidsrecht? Het antwoord is ja*, *ArbeidsRecht* 2018/28 (6/7), p. 13.

reality of work.¹⁶⁵ According to the Commission, this is reflected in variations to work organisation, working hours, wages, and workforce size at different stages of the production cycle.¹⁶⁶ Specific offline gig-work can be seen as a current example of a business model which applies such variations.

The Commission noted that in the British legal system, differentiating between categories of employment statuses is a common practice. Each category enjoys different rights. Employees enjoy the full protection of employment legislation. ‘Workers’, a more broadly defined group, enjoy a reduced range of employment rights (e.g. national minimum wage, working time), whereas the genuinely self-employed does not benefit from any employment rights.¹⁶⁷ The Commission considered that this targeted approach of the UK, which established differing rights and responsibilities in employment law for employees and workers, is an example of how categories of vulnerable workers involved in complex employment relationships have been given minimum rights without an extension of the full range of labour law entitlements associated with standard employment contracts.¹⁶⁸

If this line of thinking would be followed, what would that entail? And would it be desirable to regulate specific offline gig-work this way?

For one thing, adding a new category of worker would complicate matters, rather than simplifying the issues surrounding classification.¹⁶⁹ Determining the legal status of a service provider in general has proven to be difficult as it is with only two categories to choose from. Adding a third one would be even more confusing.¹⁷⁰ Also how should that category be defined? Creating an intermediate category such as dependent contractors or dependent self-employed persons requires a suitable definition that clearly captures the workers that you want to grant protection.¹⁷¹

Both Rogers and De Stefano argue that applying a test requiring a worker to earn a certain percentage of his income from the same platform to qualify as a dependent contractor would be a problematic threshold for gig-workers, because it is possible to work for multiple platforms.¹⁷² And how much protection should that intermediate category be entitled to? The idea behind creating a third category is not expanding the scope of labour law as a whole, but only a number of labour law rules.¹⁷³

¹⁶⁵ COM (2006) 708 final, *Green Paper – Modernising labour law to meet the challenges of the 21st century*, p. 10.

¹⁶⁶ COM (2006) 708 final, *Green Paper – Modernising labour law to meet the challenges of the 21st century*, p. 5.

¹⁶⁷ Uber drivers were classified as workers in English law. See: Employment Tribunals, Aslam, Farrar and others versus Uber B.V., Uber London Ltd, Uber Britannia Ltd, 28 October, Case Nos: 2202550/2015 & Others.

¹⁶⁸ COM 2006 (708) final, *Green Paper – Modernising labour law to meet the challenges of the 21st century*, p. 12.

¹⁶⁹ V. De Stefano, *The Rise of the ‘Just-in-Time’ Workforce: On-Demand Work, Crowd Work and Labour Protection in the Gig-Economy*, ILO Conditions of Work and Employment Series no. 71, Geneva: International Labour Office 2015, p. 19.

¹⁷⁰ B. Rogers, *Employment as a Legal Concept*, Legal Studies Research Papers Series: Philadelphia: Temple University 2015, p. 515-516.

¹⁷¹ Ibid.

¹⁷² Ibid.

¹⁷³ A. Jacobs, *Labour and the Law in Europe. A Satellite View on Labour Law and Social Security Law in Europe*, Wolf Legal Publishers 2011, p. 28.

Furthermore, this approach would certainly seem to open further possibilities for regulatory avoidance by providing employers with another opportunity to misclassify employees as dependent contractors, in order to avoid employment responsibilities.¹⁷⁴

In other words, establishing another category of worker would encourage levelling down instead of levelling up.¹⁷⁵ In light of all the above, I would argue that the strategy of creating a new category of worker would not solve anything, but would only create new problems and uncertainty regarding the regulatory framework governing work.

¹⁷⁴ B. Rogers, *Employment as a Legal Concept*, Legal Studies Research Papers Series: Philadelphia: Temple University 2015, p. 516; A. Steward & J. Stanford, *Regulating work in the gig economy: What are the options?*, *The Economic and Labour Relations Review* 2015/28(3), p. 420-437.

¹⁷⁵ B. Rogers, *Employment as a Legal Concept*, Legal Studies Research Papers Series: Philadelphia: Temple University 2015 p. 516.

Chapter four: Regulating specific offline gig-work with regard to working conditions

The outcome of my assessments in the previous chapters led to two clear classifications: Firstly, both legal relationships Uber and Deliveroo have with the drivers and riders respectively constitute a contract of employment in Dutch labour law. Secondly, both drivers and riders should be classified as workers within the general concept of European labour law. Based on these conclusions, it would presumably seem just and fair to grant those two types of specific offline gig-workers the labour law protection they are entitled to with regard to working conditions.

In the following paragraphs, I will analyse the scope and content of three directives on working conditions: the Framework Directive on Health and Safety (Directive 89/391/EEC), the Working Time Directive (Directive 2003/88/EC) and the Directive on the organization of working time of persons performing mobile road transport activities (Directive 2002/15/EC). Also, I will analyse the scope and content of implemented Dutch legislation based on those directives. This comparative analysis will determine what protection drivers and riders can derive from those directives and the implementation thereof and if that protection is sufficient or not. Furthermore, I briefly explored two forms of flexible regulation in chapter two and three. On the one hand recognizing specific offline gig-work as a new, flexible labour relationship and on the other hand adding a new category of worker to the current binary system. Analysing the directives and national legislation will also illustrate which form of flexible regulation is recommendable to deal with specific offline gig-work in general.

§4.1. Framework Directive on Health and Safety (Directive 89/391/EEC)

The aim of the Framework Directive as defined in article 1(1) is to introduce measures to encourage improvements in the health and safety of workers at work. The CJEU extended this objective by stating that the aim of the Framework Directive is not only to improve the protection of workers against accidents at work and prevention of occupational risks, but also to introduce specific measures to organize that protection and prevention.¹⁷⁶ Article 1(2) states that the Framework Directive contains general principles concerning the prevention of occupational risks, the protection of safety and health, the elimination of risk and accident factors, the informing, consultation and balanced participation of workers and their representatives. In short, those principles translate to the obligation of the employer to ensure the health and safety of workers in every aspect related to the work (article 5) and to pursue an adequate policy based on a number of prevention principles (article 6). Employees and their representatives are expected to be consulted and participate in the process (article 7 & 11), while employees are also obliged to take care of their own health and safety (article 13).

The material scope of the Framework Directive is broadly defined in article 2. It states that the Framework Directive applies to all sectors of activity, both public and private, while excluding certain specific public sector activities such as the armed forces or police and certain specific activities in the civil protection services. The activities pursued by drivers and riders are not excluded and fall within the material scope. Moreover, the Framework Directive refers to the health and safety of ‘workers’, defining the term ‘worker’ in article 3 sub a as ‘any person employed by an employer, including trainees and apprentices but excluding domestic servants’. This way of describing a ‘worker’ does not refer specifically to the national law of Member States or the general European concept of a worker as I set out in chapter two and three. Those who work on the basis of a contract of employment fall within the personal scope of the Directive.¹⁷⁷ By classifying both specific offline gig-workers as employees in Dutch law and workers in line with the general European concept clearly confirms that they fall within the personal scope of the Framework Directive.

¹⁷⁶ CJEU 22 May 2003, ECLI:EU:C:2003:308 (C-441/01), para. 38 (*Commission v. Netherlands*).

¹⁷⁷ F.J.L. Pennings & S.S.M. Peters, *Europees Arbeidsrecht*, Deventer: Wolters Kluwer 2016, p. 390.

§4.1.1. Transposition in Dutch national law

In the Netherlands, the legal framework for implementing the Framework Directive is provided by the Working Conditions Act (Arbowet), on which more legislation is based in forms of the Working Conditions Decree (Arbobesluit) and the Working Conditions Regulation (Arboregeling). Similarly to the Framework Directive, the Working Conditions Act applies to both the private and the public sector, thus including the taxi services of drivers and delivery services of riders. With regard to the personal scope of the Working Conditions Act, it uses a confusing way of defining who can be deemed an employee in article 1. Essentially, it distinguishes two definitions: 1) the person who is required to perform work in accordance with a contract of employment or appointment under public law and 2) the person who is **not** required to perform work in accordance with a contract of employment under public law, but nevertheless has to perform work under another parties authority, with the exception of volunteers. The first definition of employee applies to drivers and riders, because they work in accordance with a contract of employment as confirmed in chapter two. Therefore, if one would follow my argumentation regarding the legal classification of drivers and riders, then they can derive protection from the Dutch legislation on health and safety in line with the principles set out in the Framework Directive, similarly to regular employees.¹⁷⁸

§4.2.1. Flexible regulation

If, hypothetically speaking, adding a new, intermediate category would be desired, how would such a change relate to the protection that can be derived from the Framework Directive? The definition of ‘worker’ in article 3 sub a of the Framework Directive does by implication exclude the self-employed from the benefit of the Framework Directive.¹⁷⁹ But its broad description has led to a broad interpretation of the term and therefore to a broad scope of protection, even extending to the self-employed, although it depends on the national law of the Member States how far that protection is extended.¹⁸⁰ Article 16 paragraph 7 of the Working Conditions Act provides the possibility to apply particular working conditions requirements to self-employed persons, insofar as those requirements relate to work that is associated with particular risks to health and safety. A substantial part of those requirements have been declared applicable to self-employed persons in article 9.5 of the Working Conditions Decree.¹⁸¹

I would argue that adding a category that sits between the employee and self-employed should benefit from at least the same protection as a self-employed person can. The personal scope of the Framework Directive does not seem to pose a problem here regarding the fact that it has opened the possibility of extending protection to the self-employed in the first place. Neither does the personal scope of the Working Conditions Act, which is equally broadly interpreted and provides room for extending protection to other persons than employees only. It would require an amendment of both the Working Conditions Act and the Degree to incorporate the new category and determine what working conditions requirements apply to them. But even though both the Framework Directive and the Working Conditions Act are flexible enough to deal with a third category, would it actually be of value? It seems more than logical that the protection with regard to health and safety at work is given a

¹⁷⁸ The Framework Directive does not provide the possibility for Member States to derogate from its content.

¹⁷⁹ C. Barnard, *EU Employment Law*, Oxford University Press: 2012, p. 502.

¹⁸⁰ (Cf. Council Rec. 2003/134/EC (OJ [2003] L53/45) which recognizes the precarious position of the self-employed and encourages MS to promote health and safety for self-employed workers. The European Committee on Social Rights argued that employed and non-employed workers are normally exposed to the same risks and should therefore be protected as well. (European Committee on Social Rights, *Conclusions XVIII-2 2007, (Germany)*, Vol. 1).

¹⁸¹ W.H.A.C.M. Bouwens, M.S. Houwerzijl & W.L. Roozendaal, *Schets van het Nederlandse arbeidsrecht*, Deventer: Wolters Kluwer 2017, p. 45.

broad scope of application. It does not matter what kind of worker a driver or rider is, he is equally exposed to the same risks when he is working. Their legal status is irrelevant in that regard. If drivers and riders would not be classified as employees then they would be self-employed and in principle be subject to protection as well.¹⁸² A third category would then not add anything, it would only shake up the system entirely.

§4.2. Working Time Directive (Directive 2003/88/EC)

Similarly to the Framework Directive on health and safety, this Working Time Directive is also adopted on the legal basis of article 153 TFEU, which is aimed at protecting the health and safety of workers. According to article 1 of the Working Time Directive, it is specifically aimed at laying down minimum safety and health requirements for the organisation of working time. The CJEU elaborated on this aim in *Wippel*, by stating that such harmonisation at Union level in relation to the organisation of working time is intended to guarantee better protection of the safety and health of workers by ensuring that they are entitled to minimum rest periods and adequate breaks and by providing a ceiling on the duration of the working week.¹⁸³ To that end, the Working Time Directive contains several provisions with regard to minimum rest periods (article 3-5), maximum weekly working time (article 6), paid annual leave (article 7) and certain aspects of night work, shift work and patterns of work (article 8-13).

For its material scope, the Working Time Directive refers to the Framework Directive in article 1(3), which as we saw above, was broadly defined and applies to activities in both public and private sectors. Normally, the activities of both drivers and riders would fall within the material scope. However, by virtue of article 14, the Working Time Directive does not apply where other Union instruments contain more specific requirements concerning certain occupations or occupational activities.¹⁸⁴ Such provisions exist for persons performing mobile road transport activities by means of Directive 2002/15/EC, which might cover taxi driving and thus drivers who perform taxi services for Uber. The existence of a more specific directive does not mean that the Working Time Directive will not apply. The exclusion applies only where special rules exist, otherwise the Working Time Directive will still apply.¹⁸⁵ I will elaborate more on Directive 2002/15/EC in the following paragraph.

The Working Time Directive makes a reference to the term ‘worker’ in article 3 sub a of the Framework Directive to define its personal scope of application, but it does not share its interpretation. The CJEU gave a Union meaning to the term ‘worker’ in *Isère*, which corresponds with the general European concept I set out in chapter three.¹⁸⁶ The personal scope of the Working Time Directive is thus limited to the Union meaning it is given, which means that it excludes the self-employed. I concluded that neither drivers or riders are self-employed, but are workers within the general European concept and thus within the Union meaning given to the term worker in the Working Time Directive. So, they fall within its personal scope. Furthermore, the definition of ‘working time’ is crucial for the scope of the directive.¹⁸⁷ Article 2(1) defines ‘working time’ as any period during which the worker is working, is at the employer’s disposal and carrying out his activity or duties, in accordance with national laws and/or practice. With regard to the service performance of drivers and riders, I would argue that not only driving or riding must be considered as working time, but also the time spent while waiting for another gig to present itself. It could be regarded as a particular execution of on-call

¹⁸² Unless Member States would choose not to grant protection to the self-employed.

¹⁸³ CJEU 12 October 2004, ECLI:EU:C:2004:607 C-313/02, para. 47 (*Wippel*).

¹⁸⁴ G. Thüsing, *European Labour Law*, München: Verlag C.H. Beck oHG 2013, p.140.

¹⁸⁵ *Ibid.*

¹⁸⁶ CJEU 14 October 2010, ECLI:EU:C:2010:612 (C-428/09), paras. 27-29 (*Isère*).

¹⁸⁷ F.J.L. Pennings & S.S.M. Peters, *Europees Arbeidsrecht*, Deventer: Wolters Kluwer 2016, p. 430.

service, which is working time according to the CJEU.¹⁸⁸ It entails that the employee must be present at a particular place determined by the employer either on or outside the premises and must keep himself available to provide services on demand of the employer.¹⁸⁹ It is inherent to specific offline gig-work to not have one particular place of work, but a driver or rider nevertheless has to keep himself available to provide taxi or delivery services and is thus not capable of managing his own time.¹⁹⁰ And even though both drivers and riders are able to decline gigs while being logged on, thus making it theoretically possible to manage their own time, this is not likely to happen in practice because declining gigs has detrimental consequences.

§4.2.1. Derogations and exceptions

It is necessary to point out that the Working Time Directive besides material standards also contains several derogations and exceptions which Member States can use to regulate certain specific areas of labour (article 17-22). This has launched a debate in literature about whether the Working Time Directive is too rigid or too flexible in the standards it lays down.¹⁹¹ On the one hand it seeks to regulate working time of virtually all workers in the EU, regardless of the job they do or the sector in which they work (with the exception of some). This has led to criticism of its ‘one size fits all approach’.¹⁹² On the other hand, it provides possibilities to derogate from certain provisions, even by means of collective agreements, while there are also exceptions to rights of particular types of workers or situations. These elements of flexibility have led to some authors arguing that the Working Time Directive does not afford workers enough protection because their rights are too easily altered or bargained away.¹⁹³

With regard to specific offline gig-work it is interesting to look at article 17(1), which allows Member States to derogate from various provisions, including all three types of minimum rest periods and maximum weekly working time, in the case of workers whose working time is ‘not measured’ or can be determined by the workers themselves. Specific offline gig-work is known for workers whose hours are not fixed, while also having discretion of their own working time. If the Netherlands would use this derogation to regulate specific offline gig-work, then those workers could end up with very few rights under the Working Time Directive.¹⁹⁴ On one hand, this might be justified because they are able to protect their own health and safety through the way in which they organise their working lives.¹⁹⁵ On the other hand, and this is what worries me, it might mean that they end up working unhealthily long hours, because specific offline gig-work does not pay well. Derogating from the maximum weekly working time can also be achieved by invoking the opt-out laid down in article 22 of the Working Time Directive, although this requires consent of the worker. Consent or not, a specific offline gig-worker will probably be eager to work long hours anyway, because he needs to work a lot to generate a sufficient income.¹⁹⁶ The health and safety of such workers can therefore be

¹⁸⁸ CJEU 3 October 2000, ECLI:EU:C:2000:538 (C-303/98), *JAR* 2000/251, para. 48 (*Simap*).

¹⁸⁹ *Ibid.*

¹⁹⁰ F.J.L. Pennings & S.S.M. Peters, *Europees Arbeidsrecht*, Deventer: Wolters Kluwer 2016, p. 430.

¹⁹¹ A.C.L. Davies, *EU Labour Law*, Edward Elgar Publishing Limited 2012, p. 203.

¹⁹² A.C.L. Davies, *EU Labour Law*, Edward Elgar Publishing Limited 2012, p. 204.

¹⁹³ *Ibid.*

¹⁹⁴ A.C.L. Davies, *EU Labour Law*, Edward Elgar Publishing Limited 2012, p. 208.

¹⁹⁵ *Ibid.*

¹⁹⁶ This illustrates again how working as a specific offline gig-worker should not be regarded as working as a self-employed person. He has the possibility of demanding a pay which allows him to perform his work properly, without the need to work longer hours, which could affect his own health and safety.

put in jeopardy. Even more so, now they are entitled to the minimum wage in the Netherlands, which is an aspect of labour law left to the competence of the Member States themselves.¹⁹⁷

This entitlement would in my opinion not result in better protection of their health and safety. If a specific offline gig-worker can earn more, then it is not likely that he will decide to work less. No, higher wages would provide an even stronger incentive to work more, especially because he, himself decides when and how much he wants to work, not the employer. Specific offline gig-work relies on the responsibility of the worker to protect their own health and safety, but the employer should be the one to make sure the worker actually takes that responsibility. Is that not exactly what the entire system is based on? Protecting employees if they cannot do so themselves. They should be protected against working too much.

§4.2.2. Paid annual leave

While it is clear that the Working Time Directive provides the Member States with many possibilities to derogate from its content, especially with regard to working hours, it does however not provide the possibility to derogate from article 7 (annual leave). In other words, drivers and riders could be confronted with deviating working hours, but their right to paid annual leave has to remain untouched. In that regard it is interesting to take a closer look at the *King* case. It concerned a self-employed salesman, who claimed to have been a worker within the meaning of the Working Time Directive, while working for one particular company. He was never offered paid leave but he argued that he was nevertheless entitled to payment of his annual leave (taken and not paid as well as not taken), for the entire period of his engagement to the company (thirteen years in total). He was held to indeed be a worker by the national employment tribunal. The court of appeal finally referred a number of questions to the CJEU.

When dealing with the submitted questions, the CJEU referred to its settled case law, which stipulates that the entitlement of every worker to paid annual leave must be regarded as a particularly important principle of European Union social law from which there can be no derogations and whose implementation by the competent national authorities must be confined within the limits expressly laid down by the Working Time Directive.¹⁹⁸ Furthermore, the CJEU stated that the right to paid annual leave is also expressly laid down in article 31(2) of the Charter of Fundamental Rights of the European Union, which article 6(1) TEU recognizes as having the same legal value as the Treaties.¹⁹⁹ In light of the above, the CJEU finally ruled that, unlike in a situation of accumulation of entitlement to paid annual leave who was unfit for work due to sickness, an employer that does not allow a worker to exercise his right to paid annual leave must bear the consequences.²⁰⁰ Thus, the worker was entitled to payment of accrued annual leave for thirteen years.

If one would apply this line of reasoning of the CJEU to the position of specific offline gig-workers, such as drivers and riders, then one could come to the intriguing conclusion that Uber and Deliveroo have not allowed them to exercise their right to paid annual leave, because they were unrightfully given the status of a self-employed person. Therefore, this decision could potentially lead to an immensely high number of claims demanding payment of accrued annual leave, which could add up to several years. The impact of such claims would be catastrophic for the platforms in question.

¹⁹⁷ C. Barnard, *EU Employment Law*, Oxford: Oxford University Press: 2012, p. 569.

¹⁹⁸ CJEU 29 November 2017, ECLI:EU:2017:941 (C-214/16), para. 32 (*King*).

¹⁹⁹ CJEU 29 November 2017, ECLI:EU:2017:941 (C-214/16), para. 33 (*King*).

²⁰⁰ CJEU 29 November 2017, ECLI:EU:2017:941 (C-214/16), para. 63 (*King*).

§4.2.3. Transposition in Dutch national law

The Working Time Directive is primarily transposed in the Dutch legislation by the Working Hours Act (*Arbeidstijdenwet*), while the Working Hours Decree (*Arbeidstijdenbesluit*) contains exceptions and additions to the Working Hours Act. Additional regulations can also be found in collective agreements.²⁰¹ The Working Hours Act defines the personal scope of application in article 1:1, which uses the same confusing terminology as the Working Conditions Act to describe who can be regarded as an employee. Following my argumentation on the legal status of drivers and riders, they fall within the scope of the Working Hours Act, initially granting them protection with regard to working hours and rest periods. It does not refer to a specific material scope of application, but it does in article 2:1 provide the possibility to exclude certain areas of labour entirely or partially from the scope of application of the Working Conditions Act and provisions based on it. These exceptions mostly regard the maximum working hours, minimum rest periods and certain aspects of employee participation.²⁰² The Working Hours Act provides the Netherlands with the possibility of creating special or divergent rules for specific types of labour, similarly to the Working Time Directive. The working time flexibility that is needed to facilitate specific offline gig-work could be achieved by using this possibility, while I want to emphasize again that derogating from the general provisions on working hours should not jeopardize the health and safety of the workers.

The right to paid annual leave is not incorporated in the Working Hours Act, but can be found in articles 7:634 - 643 of the Dutch Civil Code (DCC). One needs to work on the basis of a contract of employment (article 7:610 DCC) to be able to exercise the right to paid annual leave. Again with reference to my argumentation, drivers and riders are entitled to paid annual leave, whereas not classifying them as employees would deprive them of this right.

§4.2.4. Flexible regulation

If we go back at looking at the possibility of adding a new category of worker to our current binary system, we saw that the Framework Directive and the Working Conditions Act would be flexible enough to deal with such a change. Their personal scopes are broadly defined and capable of expansion. The Working Time Directive uses the term worker to define its personal scope same as the Framework Directive, but the CJEU has given it an Union meaning, by doing so limiting the application to workers only and excluding other persons who perform labour.²⁰³ The personal scope of the Working Hours Act is not limited to persons who work on the basis of a contract of employment, but the existence of a subordination link is nevertheless required.²⁰⁴

An extension of certain requirements to self-employed persons is only possible if that is necessary to prevent serious danger for the safety and health of other persons (article 2:7). So, even though the Working Time Directive and the Working Hours Act have a more flexible nature which can be used to adjust to particular sectors of labour, their personal scopes are less pliant when it comes to granting

²⁰¹ It is beyond the scope of this thesis to discuss collective agreements, but it is noteworthy to mention that the court declared the collective agreement on professional goods transport applicable to the delivery service of Deliveroo riders in *FNV/Deliveroo* (Ktr. Amsterdam 15 January 2019, ECLI:NL:RBAMS:2019/210, JAR 2019/24 (*FNV/Deliveroo*)). In that regard it is interesting to point at the existence of a collective agreement on taxi transport. The taxi service of Uber drivers is likely to fall within its scope. Both collective agreements contain more specific provisions with regard to working hours.

²⁰² W.H.A.C.M. Bouwens, M.S. Houwerzijl & W.L. Roozendaal, *Schets van het Nederlandse arbeidsrecht*, Deventer: Wolters Kluwer 2017, p. 34.

²⁰³ This is in principle true, but Member States could if they want, extend protection to other persons.

²⁰⁴ W.H.A.C.M. Bouwens, M.S. Houwerzijl & W.L. Roozendaal, *Schets van het Nederlandse arbeidsrecht*, Deventer: Wolters Kluwer 2017, p. 33.

protection to a new category of worker. It would of course be different if not a new category would be added to our binary system, but if another subcategory of employee would be introduced. By this I mean recognizing specific offline gig-work as a new precarious or flexible labour relationship, which fits in line with other atypical employment relationships such as on-call and zero hours contracts. These relationships deviate from traditional employment relationships, but they are based on a contract of employment, so they fall within the personal scope of the aforementioned legislation.

§4.3. Directive on the organization of working time of persons performing mobile road transport activities (Directive 2002/15/EC)

This sectoral Directive is adopted to provide for specific provisions concerning the hours of work in road transport in order to ensure both the safety of transport and the health and safety of the persons involved.²⁰⁵ It sets out minimum rules for the organisation of working time for drivers, thereby supplementing the provisions of Regulation 561/2006, which lays down common rules on driver's driving times and rest periods (article 2(4)).²⁰⁶ The Directive applies to mobile workers employed by enterprises carrying out road transport activities covered by Regulation 561/2006, while self-employed drivers are also included from 2009 on.²⁰⁷ Regulation 561/2006 refers to carriage of goods by vehicles above 3.5 tons and those engaged in carriage of passengers by vehicles for more than 9 persons, including a driver.²⁰⁸ A taxi company such as Uber, which facilitates the transport of passengers by generally using regular cars or vans, would therefore not fall within the scope of Regulation 561/2006 and the Directive, so neither do the drivers.²⁰⁹ It is nevertheless worthwhile to discuss this Directive in more depth, because its personal scope has been the subject of amendment regarding the inclusion or exclusion of self-employed drivers, thus providing insight in a possible expansion of application of a directive to other persons than workers only.

§4.3.1. Discussion on the personal scope of Directive 2002/15/EC

In its original proposal and throughout the debate on the current Directive, the Commission advocated for inclusion of the self-employed, for several reasons: to be consistent with the scope of Regulation 3820/85 (replaced by Regulation 561/2006), which makes no distinction between drivers; to avoid the potential fragmentation of a highly competitive industry through the re-designation of employees as self-employed drivers (so-called 'false self-employed') and to ensure the aims of fair competition, improved road safety and better working conditions are applied through the Directive to the whole road transport sector.²¹⁰ Before the self-employed drivers were included as of 2009, the Commission had to analyse the consequences of the excluding them from the scope of the Directive.²¹¹ Mainly, the issue of false self-employed drivers raised concerns. The Commission therefore proposed to not

²⁰⁵ Recital 4 of Directive 2002/15/EC. It seeks to protect mobile workers from the adverse effects caused by excessively long working hours, inadequate rest or disruptive working patterns.

²⁰⁶ This Directive is without prejudice to this Regulation 561/2006, which remains applicable in its entirety as does the European agreement on international road transport (AETR). On whether to apply the Regulation 561/2006 or the Agreement, see ECJ 16 January 2003, ECLI:EU:2003 (C-439/01) (*Cipra v. Bezirkshauptmannschaft Mistelbach*) See also: C. Barnard, *EU Employment Law*, Oxford University Press: 2012, p. 536.

²⁰⁷ See article 2(1) of Directive 2002/15/EC.

²⁰⁸ See article 2(1) of Regulation 561/2006/EC.

²⁰⁹ This means that they do not fall within the scope of a sectoral directive on Working Time, but fall under the scope of the general directive on Working Time.

²¹⁰ COM(2007)266 final, Report from the Commission to the Council and the European Parliament on the consequences of the exclusion of self-employed drivers from the scope of Directive 2002/15/EC of the European Parliament and of the Council of 11 March 2002 on the organization of the working time of persons performing mobile road transport activities, p. 3.

²¹¹ See article 2(1) of Directive 2002/15/EC.

include self-employed drivers under the Directive, but to amend the notion of mobile worker to also include the false self-employed drivers, i.e. those drivers who are not tied to an employer by an employment contract but who do not have the freedom to have relations with several customers.²¹²

This proposal, which also contained other amendments, was eventually rejected by the European Parliament.²¹³ The European Economic and Social Committee (EESC) advised against the proposal²¹⁴, because it would fail to fulfil one of the key objectives of the Directive. The EESC illustrated this by referring to the fact that a mobile worker cannot work more than 48 hours per week (on average) whilst complying with Regulation 561/2006, whereas a self-employed driver can work up to 86 hours per week and still comply with Regulation 561/2006. It also had its doubts with regard to the inclusion of the false self-employed.

According to the proposal, a false self-employed driver is a mobile worker, which means that he is required to comply with the Working Time Directive. If that driver is a mobile worker, then he must have a contract of employment, but who is supposed to be the employer in that situation? Also, what are Member States that have already included self-employed drivers supposed to do? Furthermore, the EESC emphasized that the aim of the Directive can only be achieved by applying minimum social protection standards in the road transport sector to everyone carrying out mobile transport activities, regardless of their status.

This discussion on the personal scope of Directive 2002/15/EC illustrates the difficulties of adding a third category to a binary system. Recognizing the false self-employed as a separate category is of no use if a false self-employed person has to be regarded as a mobile worker anyway. Besides, road transport is a sector in which protecting the health and safety of drivers is easily compromised by the work they perform. The legal status of drivers is irrelevant in that regard, so it makes sense to apply this sectoral directive to both workers and self-employed persons.²¹⁵

²¹²COM(2008)650 final, Proposal for a Directive of the European Parliament and of the Council amending Directive 2002/15/EC on the organization of the working time of persons performing mobile road transport activities, p. 2.

²¹³ European Parliament legislative resolution of 16 June 2010 on the proposal for a directive of the European Parliament and of the Council amending Directive 2002/15/EC on the organization of the working time of persons performing mobile road transport activities (COM(2008)9650-C60354 – 2008/0195(COD)) (2011/C 236 E/46).

²¹⁴ Opinion of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council amending Directive 2002/15/EC on the organisation of the working time of persons performing mobile road transport activities (COM(2008) 650 final – 2008/0195 (COD)) (2009/C 228/14).

²¹⁵ The Working Time Directive does not include self-employed persons, while this sectoral directive explicitly does. I would argue that it depends on the sector in question if expansion of protection with regard to working time is desired or not.

Chapter five: Conclusions and recommendations

The previous chapters have showed that dealing with platforms such as Uber and Deliveroo and the new way of working they embody, poses significant legal questions and challenges for our current system of labour law. By analysing their business model, determining the legal classification of the service providers that work through either Uber or Deliveroo in Dutch and European labour law and researching specific European and Dutch legislation on health and safety and working hours, I have laid down the framework of recommending how those platforms could be regulated in the Netherlands with regard to working conditions.

In this final chapter, I will firstly provide an overview of the conclusions that can be derived from my research in the first three chapters. Secondly, I will discuss my research from chapter four, on the basis of which I will provide recommendations on how and by whom those platforms could be regulated in the Netherlands with regard to working conditions, while also providing some general recommendations on how to deal with specific offline gig-work.

§5.1. Conclusions

This thesis began with analysing a new type of business model, commonly known as ‘gig-work’, which consists of individuals who perform ‘gigs’(short tasks or services) on a flexible and irregular basis through a digital platform which facilitates the whole process. I indicated beforehand that the digital platforms of Uber and Deliveroo would be the main test cases to substantiate the analysis. By examining the differences in terminology with regard to gig-work, it became clear that the new business model does not know only one particular execution, but several. I determined that the execution displayed by Uber and Deliveroo can be addressed as ‘specific offline gig-work’, which consists of a specific service offered by a digital platform that is performed physically by a service provider on an flexible and irregular basis. The nature of the service performance is characterized by providing the specific offline gig-worker (Uber driver or Deliveroo rider) with a seemingly unlimited flexibility regarding when and how much he wants to work, while subtle elements of subordination or supervision by the specific online platforms (Uber or Deliveroo) can be spotted as well. This fuelled a worldwide discussion on the employment status or legal classification of specific offline gig-workers: are they employees, self-employed or something else?

This led me to research the legal framework of employee in Dutch labour law and the legal framework of worker in European labour law, because the unclarity and uncertainty with regard to the legal classification of specific offline gig-workers would have deprived me of proposing anything substantive on how to deal with platforms such as Uber and Deliveroo in the Netherlands in terms of employment law. The Dutch legal framework showed to use the contract of employment to be the primary gateway to claiming the status of employee and employment protection. Determining the existence of such a contract has to be done by assessing the intention of the parties when entering into the legal relationship in question and by examining the actual execution of the relationship. The crucial element in that regard is subordination, otherwise one will be classified as self-employed. In European labour law the general concept of ‘worker’ is used to grant one labour protection, which consists of similar criteria as the contract of employment in Dutch labour law. Assessing its applicability is only based on the actual execution of the relationship, providing a broader scope of application than the Dutch legal framework.

Applying these two frameworks to determine the legal classification of Uber drivers and Deliveroo riders in Dutch and European labour law resulted in two assessments. Both primarily focused on assessing if the legal relationship between the platforms and the specific offline gig-workers meets the requirement of subordination.

The assessment in Dutch labour law dealt firstly with the intention of the parties. The platforms clearly intend to conclude a contract of services by explicitly stating in that way in the contracts or terms and conditions they unilaterally impose, while the intention of the driver or rider remains unknown until it is individually assessed. In other words, no decisive meaning can be given to the intention of the parties. Secondly, assessing the actual execution of the legal relationship showed that while it on the surface may seem like both drivers and riders are not subordinate to Uber and Deliveroo because of several indicators such as their extremely flexible working hours and the presumed lack of management or control, this is definitely not the case. On the contrary, Uber and Deliveroo use data driven technology in the form of algorithms and rating systems to track drivers and riders when they are working, monitor their performances and encourage or influence their working hours. Uber and Deliveroo have introduced a new way of working accompanied with a new way of control, but control is still control. Also, controlling the drivers and riders is simply necessary for Uber and Deliveroo to maintain a high quality image. Furthermore, the fact that drivers and riders do not determine their remuneration even more strongly substantiates the conclusion that they do not conduct their own business, but are working for the platforms in a subordinate position. The legal relationship of drivers and riders with Uber and Deliveroo should be classified as constituting a contract of employment, thus classifying them as employees in Dutch labour law.

The assessment in European labour law did not provide any real surprises. It showed that the activity drivers and riders perform cannot be classified as an activity in a self-employed capacity, because they do not determine the choice of activity, the working conditions and the conditions of remuneration. Also, their service performance belongs to the core business of both platforms, while the content and execution of the service is unilaterally organized and determined by Uber and Deliveroo. In other words, drivers and riders have almost nothing to say with regard to their service performance, apart from influencing their working hours, leading to my conclusion that the existence of a subordination link is present. They should be classified as workers in European labour law.

Moreover, both frameworks are imbedded in a binary system: one is either an employee or self-employed, an intermediate or third category does not exist. The European Commission indicated that using more categories could be desirable with regard to regulating atypical employment, while I argued that doing so would only create new problems and uncertainty. The Dutch legal system has shown to expand the scope of labour protection to flexible labour relationships which deviate from traditional employment, rather than using more than two categories of worker.

§5.2. Recommendations

Determining the legal classification of Uber drivers and Deliveroo was the first step in reaching the goal of this thesis: recommending how to regulate platforms such as Uber and Deliveroo in the Netherlands. I chose to focus this part on one specific theme: working conditions. By researching three European directives on working conditions, more specifically the Framework Directive on health and safety, the Working Time Directive and the Directive on the organization of working time of persons performing mobile road transport activities (hereafter: the Working Time Directive on Road Transport), and the transposed Dutch legislation based on those directives, I researched what

protection is granted to drivers and riders. Generally speaking, classifying both drivers and riders as employees in Dutch labour law and workers in line with the general European concept makes them fall within the personal scope and thus protective boundaries of labour law. In other words, their legal status allows them to derive rights and entitlements from the directives and the national laws of the Netherlands as if they are regular employees and workers, apart from the Working Time Directive on Road Transport because drivers and riders do not fall within its material scope. It is true that drivers and riders are not regular employees but atypical ones, therefore it was also necessary to research if the provided protection by the directives and Dutch legislation was sufficient or not.

The atypical nature of a specific offline gig-worker such as a driver or rider and the work he performs, does not pose any problems with regard to the Framework Directive or the Working Conditions Act and Decree in Dutch labour law. Work should be performed in a healthy and safe environment, without exposing the individuals who perform the work to risks which could compromise their health and safety, regardless of their legal status or atypical employment relationship, drivers and riders no different. Therefore, Uber and Deliveroo are obliged to comply with the Working Conditions Act and Decree as to ensure the health and safety of drivers and riders. In practical terms, Uber and Deliveroo must ensure the road safety of drivers and riders as far as can be expected from them, taking into account the own responsibility of drivers and riders to comply with traffic rules.

The Working Time Directive proved to be a more difficult piece of legislation in relation to specific offline gig-work. This directive contributes to the health and safety of workers by ensuring them entitlements to primarily minimum rest periods, maximum weekly working hours and paid annual leave. Drivers and riders, whose service performance constitutes working time, are in principle entitled to those rights, but the Working Time Directive provides the possibility for the Member States to derogate from the first two. To execute specific offline gig-work, the essential requirement of providing extremely flexible working hours has to be met, otherwise the business model would not function. Theoretically, it is possible for a driver or rider to work as much as he wants, thereby surpassing the limit for maximum weekly working hours, something the Working Time Directive and the Working Hours Act allow. Drivers and riders are keen to work long hours, because their work does not pay well. This is what worries me, this is where the flexibility of specific offline gig-work may jeopardize the health and safety of the workers in question.

Here, I detect a void where the protection could be insufficient, drivers and riders should not be able to work endless long days. Their entitlement to the minimum wage will be an even stronger incentive to work more, something they cannot resist. I would impose on their employers an additional duty of care, by doing so giving platforms as Uber and Deliveroo the responsibility to ensure that their employees do not work too much. I would furthermore argue that this is a logical consequence of using a business model which allows your employees to be so free. A line has to be drawn to protect their health and safety properly without disrupting the business model. This means that the platforms have to keep track of the working hours of every employee who all work irregularly, but they track and monitor each employee anyway, so keeping an overview will most likely not be a problem.

Both directives and the Dutch legislation based on those have shown that both the European legal system and the Dutch legal system are capable of dealing with specific offline gig-work and the classification of specific offline gig-workers as employees and workers. Nonetheless, I explored the idea of adding a new category of worker to the current binary system of both legal systems. My preliminary advise was negative, because creating a new category of worker would disrupt both systems, give rise to new problems and uncertainty regarding the regulatory framework of governing

work. I went on trying to substantiate that advise by researching if using such a third category is worthwhile when trying to regulate specific offline gig-work with regard to working conditions.

Both the Framework and Working Time Directive and Dutch legislation are primarily aimed at providing protection for employees, not other persons who perform work. But it depends on the personal scope to determine if protection that can be derived from a directive and therefore Dutch legislation can be expanded or not. The Framework Directive has a wider personal scope than the Working Time Directive, because it has been giving a broad meaning to the term ‘worker’, while the Working Time Directive has not. This has consequences for the national legislation that is adopted on the basis of the directives and the personal scope it has given to those implemented laws. It is therefore no coincidence that the Working Conditions Act has a broader personal scope than the Working Hours Act.

Of course, laws can be amended and personal scopes could be broadened. However, one must realize what kind of impact such a turnover would have on the existing system of labour law protection. The Working Time Directive on Road Transport I researched, illustrated how impractical it is to work with a third category. Here, the notion of false self-employed was proposed to be added to the personal scope of the directive, serving as a category between the mobile worker who worked and the self-employed. This conflicted with the general Working Time Directive, because it only applies to workers. No, disrupting the entire system by adding a third category for the sake of regulating one way of working is disproportionate and cannot be a viable solution.²¹⁶ More importantly, it is not necessary to do so.

Hence, I believe that dealing with platforms which operate like Uber and Deliveroo in general must be sought in our current system. I stated before that within that system the contract of employment is the primary gateway to the protection of Dutch labour law. This is where regulating specific offline gig-work should be focused on: recognizing that it actually is an employment relationship. The previous paragraphs of this chapter showed that drivers and riders fall within the scope of EU Directives and the implemented Dutch legislation based on it, because they work on the basis of a contract of employment and are thus granted protection. One could argue to simply leave it at that: they are employees, so they are protected. But that would be too easy and unsatisfying, considering the fact that specific offline gig-work clearly entails a new way of working.

When given the classification of employee, our system allows us to differentiate between several ways of performing work, by doing so creating different types of employees within the category of employee itself and thus creating different employment relationships. These relationships deviate from the traditional or standard employment relationship (consistent, full-time unlimited employment at one place of work) by being ‘precarious’ and atypical. The list is so far not exhaustive: No.7 of the Community Charter of Fundamental and Social Rights mentions ‘fixed-term contracts, part-time work, temporary work and seasonal work’. But this can most certainly be extended to include further groups.²¹⁷ De Stefano argued that it is essential to consider how many important dimensions of work

²¹⁶ V. De Stefano, *The Rise of the ‘Just-in-Time’ Workforce: On-Demand Work, Crowd Work and Labour Protection in the Gig-Economy*, ILO Conditions of Work and Employment Series no. 71, Geneva: International Labour Office 2015, p. 20.

²¹⁷ G. Thüsing, *European Labour Law*, München: Verlag C.H. Beck oHG 2013, p.80.

in the gig-economy share similar attributes with other non-standard forms of employment.²¹⁸ Illustratively, the employment relationship based on a zero-hours contract is not so different from specific offline gig-work.²¹⁹ Employees who work on the basis of a zero-hours contract are normally obliged to accept work offered to them, while specific offline gig-workers are not. That is exactly the new found flexibility attribute of specific offline gig-work: they are hired on the basis that they are not obliged to accept work offered to them by their employers (Uber/Deliveroo for example), who have displaced the risk of unavailability of these individuals by establishing a pool of workers they can call on.²²⁰ Therefore, I would suggest to recognize specific offline gig-work as a new atypical employment or flexible labour relationship and regulate it in general accordance with existing flexible labour relationships such as zero-hours contracts, while of course creating a specific regulatory framework.

This way of regulating specific offline gig-work would not need any legislative action on the European level, as no existing European legislation would have to be amended and no legislation would have to be adopted. Until now, there have not been any directives concerning on-call contracts and zero-hours contracts either. The European legislator could of course choose to harmonize the legislation of Member States on these particular topics and thus also with regard to specific offline gig-work, but it is not necessary for now. The Dutch legislator does have to step up to incorporate specific offline gig-work in our current regulatory framework of labour protection.

Lastly, I need to emphasize that recognizing specific offline gig-work as a flexible labour relationship is not a solution for the entire concept of gig-work. It depends on the organization and execution of the platform in question if it is suitable for regulating it like I suggested with regard to working conditions and in general. Platforms which operate similarly to Uber and Deliveroo engage in an employer-employee relationship what makes regulating them in terms of employment law not only possible, but also necessary. Again, not all platforms are organized this way, some are definitely just operating as intermediaries. Thus, it is important to acknowledge that regulating work in the gig-economy cannot be done in general, but needs a systematic and platform-orientated approach.

²¹⁸ V. De Stefano, *The Rise of the ‘Just-in-Time’ Workforce: On-Demand Work, Crowd Work and Labour Protection in the Gig-Economy*, ILO Conditions of Work and Employment Series no. 71, Geneva: International Labour Office 2015, p. 21.

²¹⁹ W.H.A.C.M. Bouwens, *Position Paper: Werk in de platformeconomie*, p. 4.

²²⁰ D. McCann, *Regulating Flexible Work*, Oxford University Press: 2008, p. 53.

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