

**UBER, TASKRABBIT, & CO: PLATFORMS AS EMPLOYERS?
RETHINKING THE LEGAL ANALYSIS OF CROWDWORK**

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One of the key assumptions underpinning the rise of ‘crowdsourced work’ – from transport apps including Uber to online platforms such as Amazon’s Mechanical Turk – is the assertion put forward by most platforms that crowdworkers are self-employed, independent contractors. As a result, individuals might find themselves without recourse to worker-protective norms, from minimum wage and working time law to health and safety regulations and unfair dismissal protection. But is this account accurate? In this paper, we hope to challenge prevailing assumptions, arguing that in certain scenarios crowdworkers can, and should, be classified as workers within the scope of domestic employment law. The approach proposed, however, is an initially counterintuitive one: we advocate the adoption of a functional concept of the employer as a regulatory solution to crowdwork employment, with platforms, crowdworkers, and service users each shouldering their appropriate share of employer responsibilities.

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INTRODUCTION

Crowdsourced work is on the rise – presenting opportunities and challenges for workers, businesses, and regulators alike, as the wide range contributions to this special issue demonstrate. From an employment law perspective, the phenomenon of work supplied through digital platforms opens a new chapter in the age-old problem of determining the scope of employee-protective norms: are crowdworkers employees or workers in a technical sense, and thus deserving of legal protection, ranging from minimum wage and working time regulation to unfair dismissal and collective rights, depending on their jurisdiction? Are they independent contractors, operating as small businesses on their own account, and thus rightly exposed to the

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rough and tumble of the market? Or do they represent a genuinely novel form of work, deserving of its own legal status and regulatory apparatus?¹

The answer suggested by the platforms themselves is straightforward: *Uber*, *Mechanical Turk*, *TaskRabbit* and others merely see themselves as digital agents, connecting customers and independent contractors. Individual platforms' terms and conditions vary from country to country according to local conditions, whilst always pursuing identical aims: the denial of worker status.

At the same time, however, the level of control exercised by a platform can be significant, from setting wage levels to specifying – and supervising – how work is to be done. It is unsurprising, therefore, that courts and administrative bodies have begun to find themselves tasked with determining crowdworkers' legal status: early litigation in the United States² was soon followed by similar lawsuits in Europe.³ The questions raised are both novel, given the constantly evolving technology and business models of various platforms, and eerily familiar after decades of judicial and academic argument over how the contractual models used to structure 'atypical' work in 'fissured' workplaces⁴ might fit into our received regulatory categories.⁵ As an exasperated District Judge noted in the course of on-going US litigation, the task of determining worker status is akin to being

'handed a square peg and asked to choose between two round holes. The test the ... courts have developed over the 20th Century for classifying workers isn't very helpful in addressing this 21st Century problem. Some factors point in one direction, some point in the other, and some are ambiguous.'⁶

In the present paper, we hope to propose a different way of approaching the legal problems arising from crowdwork. Instead of dwelling on the well-rehearsed debates as to employee or independent contractor status, we analyse the multilateral contractual relationships in the operation of online platforms from a different angle, *viz* that of questioning which party, if any, could be identified as a responsible employer: by adopting a functional concept of the employer, we suggest, the courts might be able to sidestep the current impasse, and allocate rights and responsibilities in a flexible, yet coherent manner.

In order to develop this argument, the paper is structured as follows. Section I briefly introduces crowdwork, highlighting salient aspects for subsequent debate: there is a broad spectrum of platforms, from physical service provision to exclusively digital work. Crowdworkers' experiences are similarly varied, ranging from successful entrepreneurs to those

¹ See e.g. the recent call by for the introduction of a new 'independent worker' status in the United States: S Harris and A Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First Century Work: The "Independent Worker"* (Hamilton Project, 2015).

² See further Miriam Cherry's contribution in the present volume.

³ H J Parkinson, *Uber faces legal action in UK over drivers' rights* (The Guardian, 29 July 2015).

⁴ D Weil, *The Fissured Workplace* (Harvard University Press 2014).

⁵ See further E Albin and J Prassl, 'Fragmenting Work, Fragmented Regulation: The Contract of Employment as a Driver of Social Exclusion' in M Freedland et al (eds), *The Contract of Employment* (OUP, forthcoming 2016).

⁶ *Cotter et al. v. Lyft Inc.*, United States District Court, Northern District of California, Order of March 11, 2015 Denying Cross-Motion for Summary Judgment (Case No. 13-cv-04065-VC) 19.

stuck with monotonous tasks and long hours, remunerated significantly below minimum wage rates. Section II reviews the regulatory challenges arising from crowdwork: one of the very purposes of employment and labour law is to draw a distinction between the genuinely self-employed and those requiring protection, bringing the latter within its protective scope. The multiplicity of contractual relationships and competing legal characterizations in the arrangements between platforms, workers, and customers, on the other hand, sits uneasily with the traditional binary divide. It is this mismatch which sits at the core of above-mentioned classification problems, and the resulting exclusion of workers from even the most basic labour standards.

In response to these problems, sections III and IV advocate a different conceptual focus, looking at the concept of the employer instead of received notions of the employee or worker. Having briefly justified this potentially counterintuitive approach, we set out Prassl's functional-typological concept of the employer, developed on the basis of a catalogue of five employer functions. We illustrate how this functional concept could operate in practice, identifying the relevant employer (or indeed employers) in a range of scenarios, whether the platform exercises all employer functions, or whether that exercise is parcelled out amongst several actors. A brief conclusion argues that the successful identification of the relevant employer for each function would restore coherence to the scope of employment law, resolving questions as to employee (and indeed customer) status in its wake.

Before turning to that discussion, three important caveats remain to be noted: first, as with all forms of 'atypical' work, it is important not to underestimate the sheer heterogeneity and complexity of underlying fact patterns: crowdwork should not be understood as a single, unified phenomenon, let alone a novel category of work relationships calling for *sui generis* regulatory responses.⁷ Any proposed solution must be able flexibly to respond to changing economic and organisational models, offering conceptual coherence in the face of factual complexity. Second, whilst the functional concept of the employer was originally developed by one of the present authors in the context of English and European law,⁸ the present piece is deliberately not focused on a single jurisdiction – we hope instead briefly to introduce that model, and then to illustrate its application in the context of two different online platforms. Finally, given present space limitations we will not be able to address the difficult jurisdictional and conflict of laws issues which may arise, particularly in the context of primarily digital crowdwork, when platforms, customers, and workers operate in different countries.⁹

⁷ As was once thought to be the case with agency work in the United Kingdom: *Construction Industry Training Board v Labour Force Ltd* [1970] 3 All ER 220.

⁸ J Prassl, *The Concept of the Employer* (OUP 2015).

⁹ See eg L Merrett, *Employment Contracts in International Law* (OUP 2011). Even purely digital platforms, however, are increasingly limiting their workers to single jurisdictions, such as the US in the case of Amazon's *MTurk*: <http://turkrequesters.blogspot.com/2013/01/the-reasons-why-amazon-mechanical-turk.html>.

I. Working in the Digital Crowd

As Antonio Aloisi¹⁰ and Valerio De Stefano¹¹ note in their contributions to this special issue, developments in information and communication technology ('ICT') have led not only to fundamental changes in traditional working relationships, but also to the emergence of new forms of employment located in the grey and often uncharted territory between employment contracts and freelance work;¹² a difficult fit for the existing binary legal categories of dependent labour and self-employment.

A particularly salient instantiation of this phenomenon is crowdwork, a relatively recent model also known as crowdsourcing of labour or crowd employment. These notions describe an ICT-based form of organizing the outsourcing of tasks to a large pool of workers. The work (ranging from transportation services and cleaning to digital transcription or programming tasks) is referred to in a variety of ways, including 'gigs', 'rides', or 'tasks', and is offered to a large number of people (the 'crowd') by means of an internet-based 'crowdsourcing platform'.¹³ This organisational model forms part of a larger set of processes known as 'crowdsourcing',¹⁴ with customers (or indeed employers) referred to as 'crowdsourcers'. As detailed in Figure 1, the resulting contractual relationships are manifold and complex: whilst the work is usually managed through an intermediary (the crowdsourcing platform), some will insist on direct contractual relationships between crowdsourcer clients and crowdworkers, whereas others will opt for tripartite contractual structures, akin to traditional models of agency work and labour outsourcing.¹⁵

¹⁰ 'Commoditized Workers - The Rise of On-Demand Work, a Case Study Research on a Set of Online Platforms and Apps' [2016] CLLPJ (forthcoming).

¹¹ 'The rise of the "just-in-time workforce": on-demand work, crowd work and labour protection in the "gig-economy"' [2016] CLLPJ (forthcoming).

¹² Cf. Eurofound, *New Forms of Employment* (2015) 107.

¹³ Such as notably Amazon's Mechanical Turk (www.mturk.com) see S Strube, 'Vom Outsourcing zum Crowdsourcing', in Ch Benner (ed), *Crowdwork – zurück in die Zukunft* (Bund Verlag 2014) 75 et seqq.

¹⁴ This term derives from a combination of the words "outsourcing" and "crowd", and was used by Jeff Howe for the first time, cf. J Howe, 'The Rise of Crowdsourcing' (*Wired Mag*, 14 June 2006) www.wired.com/2006/06/crowds/.

¹⁵ Cf. A Kittur et al., 'The Future of Crowd Work', paper presented at 16th ACM Conference on Computer Supported Cooperative Work, www.lri.fr/~mbl/ENS/CSCW/2012/papers/Kittur-CSCW13.pdf; J M Leimeister et al., 'Crowdwork – digitale Wertschöpfung in der Wolke', in W Brenner and T Hess (eds), *Wirtschaftsinformatik in Wissenschaft und Praxis* (Springer Verlag 2014) 51 - 64.

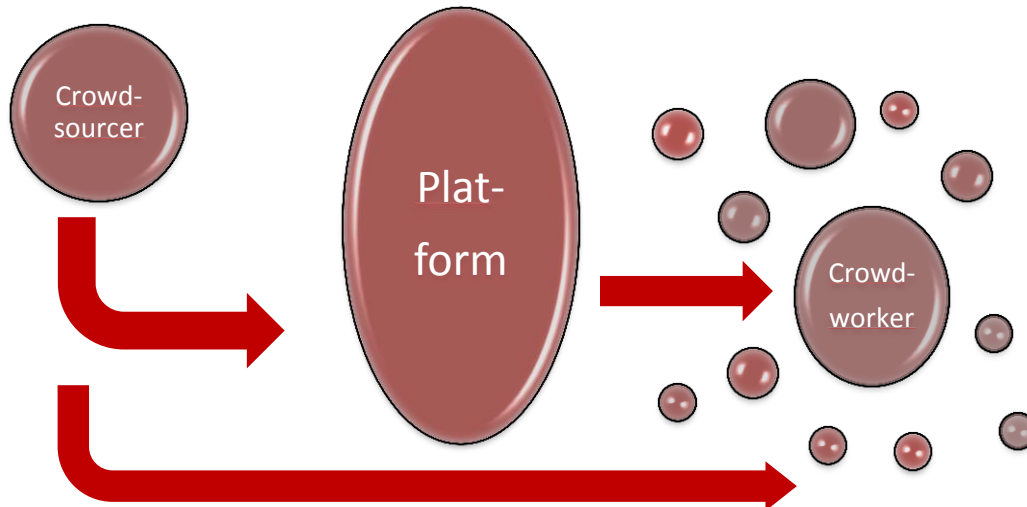


Figure 1: Parties involved in the crowdsourcing of labour

I.A Characterising Crowdwork Platforms

We have already alluded to the nearly unlimited factual variety that characterises the emergence of online platforms, both in terms of crowdsourcing in general (crowdfunding,¹⁶ allocation of non-labour resources such as accommodation¹⁷), and crowdsourcing of labour, or crowdwork, in particular. It is therefore not useful, or indeed feasible, to construct an overall taxonomy of crowdsourcing platforms. For present purposes, however, a few fundamental distinctions may be drawn.

Crowdsourcing, first, can take place internally or externally, depending on whether the crowd comprises a company's internal workforce or simply any number of individuals on a given platform. With external crowdsourcing, the crowdsourcer generally uses crowdsourcing platforms that already have an active, crowd of registered workers. In this contribution, we will look solely at external crowdsourcing, as internal crowdsourcing is generally arranged within the context of existing employment relationships, and therefore poses fewer fundamental legal problems,¹⁸ regardless of whether the platform is operated by an independent enterprise or by the company itself.¹⁹

Work crowdsourced to an external crowd, on the other hand, can be seen as clustered along a spectrum of services and arrangements. On the one end, we find physical services to be undertaken in the 'real' (offline) world, where the crowdworker comes into direct contact with the customer. Examples include transportation delivered via apps such as *Uber*, domestic

¹⁶ www.KickStarter.com.

¹⁷ www.AirBnB.com.

¹⁸ Cf. Th Klebe and J Neugebauer, 'Crowdsourcing: Für eine handvoll Dollar oder Workers of the crowd unite?' [2014] AuR 4.

¹⁹ Cf. *Eurofound*, New forms of employment 110.

services (cleaning, repair work, &c) delivered via platforms such as *Helping*²⁰ and clerical work (e.g. customer service or accounting) provided by platforms like *UpWork*.²¹ *Uber* customers, for example, use an app on their smartphones to request rides from a specific location, information that is instantly broadcast to drivers in the area.²² Once the request has been accepted by a driver, she is directed to the passenger and onwards to the required destination, through her version of the *Uber* app. Payment is taken automatically from the customer by the platform, and after the taking of a commission between 20 and 30%,²³ passed on to the driver. Customers and drivers rate each other anonymously following each journey; the resulting scores are displayed to passengers and operators respectively before the next trip commences. *Helping* operates in a similar way, even though the physical work takes place in the client's home or business premises – customers log in on a platform or app, type in their postcode and when cleaning is required. They are then offered profiles of workers available in their vicinity, with further information about each individual, and an online facility to complete bookings. Payment is processed via the platform, and after completion of their tasks, all cleaners are rated by their customers, with the resulting score displayed online in order to inform future customers.

On the other end of the spectrum, there is digital work delivered in the virtual world, usually via an interface provided by the platform. The tasks involved here are often very simple, repetitive activities involving low pay and highly standardized or automated processes. These 'microtasks' include digital labelling and the creation of image descriptions, categorizing data and products, and the translation or proofreading of short texts; with larger tasks often broken down into smaller subtasks to be worked on independently. These microtasks are then posted on platforms, where crowdworkers can find and complete them. The leading platforms for this kind of 'cognitive piece work'²⁴ or 'Neo-Taylorism',²⁵ include Amazon's *Mechanical Turk*²⁶ and *Clickworker*.²⁷ Survey research has shown that 25% of the tasks offered on Amazon *Mechanical Turk* are valued at \$ 0.01, 70% offer \$ 0.05 or less and 90% pay less than \$0.10 per completed task; thus equalling an average wage of about \$2 per hour.²⁸

I.B Working in the Crowd

Historically, the main advantage of hierarchical employment relationships over contracts with independent contractors was understood to be the entrepreneur's degree of control, and the resulting decrease in transaction cost, whether in the search, selection and training of workers, or the employer's tight control over the production process.²⁹ An increasing desire for labour

²⁰ www.helping.com – in the UK, this platform operates under a different brand, www.hassle.com.

²¹ www.upwork.com.

²² <https://www.uber.com/features>.

²³ Though the platform continues to experiment with varying the amount of commission payable, which is particularly harmful to part-time workers, as the percentage retained falls with the number of trips offered: <http://www.cnet.com/news/uber-tests-30-commission-for-new-drivers-in-san-francisco/>.

²⁴ F A Schmidt, 'The Good the Bad and the Ugly', in C Benner (ed), *Crowdwork – zurück in die Zukunft* (Bund Verlag 2014) 378.

²⁵ J Leimeister et al, 'Crowdwork – Digitale Wertschöpfung in der Wolke', in C Benner (ed), *Crowdwork – zurück in die Zukunft* (Bund Verlag 2014) 32.

²⁶ www.mturk.com/mturk/welcome.

²⁷ www.clickworker.com.

²⁸ *Eurofound*, New forms of employment 115.

²⁹ R Coase, 'The Nature of the Firm' (1937) 4 *Economica* 386.

flexibility, on the other hand, was the driver behind the more recent creation of different forms of atypical work, including agency work, part-time work, and fixed term employment.³⁰

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

Secondly, instead of the command-and-control systems inherent in ‘traditional’ employment relationships, crowdsourcers and platforms rely on ‘digital reputation’ mechanisms to guide the selection of crowdworkers and to ensure efficient performance control. Individual models vary, but the fundamental approach is consistent: crowdworkers are awarded points, stars or other symbols of status by the crowdsourcer or customer after completing a task.³¹ Quality control itself can thus be crowdsourced by the platform to its customers or other crowdsourcers, tapping the ‘wisdom of the crowd’³² in order to determine the performance levels of each single crowdworker.

The potential upsides of this emerging model for firms and workers alike should not be underestimated.³³ Through the use of platforms, businesses ranging from restaurants to IT service providers can draw on a large crowd of flexible workers to reduce or even eliminate the cost of unproductive time at work, and rely on reputation mechanisms to maintain full control over the production process or service delivery. The resulting competition between crowdworkers will ensure that quality remains high whilst wages are low. As Thomas Biewald, the CEO of the platform Crowdfunder, put it bluntly in 2010

‘Before the Internet, it would be really difficult to find someone, sit them down for ten minutes and get them to work for you, and then fire them after those ten minutes. But with technology, you can actually find them, pay them the tiny amount of money, and then get rid of them when you don’t need them anymore.’³⁴

Crowdwork similarly offers significant potential upside for (at least some of its) workers: first and foremost, in terms of flexibility: crowdworkers can decide when to work, where to work, and what kind of tasks to accept. Platform work might therefore be more compatible with other duties, such as childcare. The flexibility and potentially limited nature of individual engagements

³⁰ Eurofund, *Third European survey on working conditions* (eurofund 2000); European Parliament, *Atypical Work in the EU* (SOC1106EN, 1998).

³¹ On some platforms, including *Uber*, customers are rated by crowdworkers in turn: cf. S Langlois, ‘Don’t tip your Uber driver? It could cost you a 5-star rating’ (*Market Watch*, 12 August 2015) <www.marketwatch.com/story/dont-tip-your-uber-driver-it-could-cost-you-a-5-star-rating-2015-08-12>.

³² J Surowiecki, *The wisdom of the crowds* (Doubleday 2004).

³³ <http://www.telegraph.co.uk/technology/uber/12086500/In-praise-of-the-gig-economy.html>

³⁴ As quoted in M Marvit, ‘How Crowdworkers Became the Ghosts in the Digital Machine’ (*The Nation* 5 February 2014) <<http://www.thenation.com/article/how-crowdworkers-became-ghosts-digital-machine/>>.

can also help the underemployed, providing additional income to their regular earnings,³⁵ and (at least through virtual work crowdwork) allow those excluded from regular labour markets due to disabilities or other factors to find opportunities for gainful employment.³⁶ Finally, there is an increasing number of genuinely successful small entrepreneurs, focussed on particular niches or offering special skills, for whom crowdwork has become a very profitable source of new business.

At the same time, however, it is important to note that working conditions for the vast majority of crowdworkers appear to be poor, irrespective of the work being delivered.³⁷ The lack of unions or organising powers, the oligopoly of but a few platforms offering certain kinds of tasks, and constant economic and legal insecurity result in a massive imbalance of bargaining power, noticeable primarily in low wage-rates and heavily slanted terms and conditions in platform use agreements. In the case of virtual crowdwork global competition and dislocated physical workplaces further aggravate these problems, as a lack of regulation leads to ‘digital slaves’³⁸ working away in their ‘virtual sweatshops’.³⁹

Two problems in particular are repeatedly highlighted: low wages, and workers’ dependence of their ratings with a particular platform. As regards the former problem, for example, some reports suggest that the average wage on Amazon’s *Mechanical Turk* is less than \$2 per hour⁴⁰, considerably below the US minimum wage.⁴¹ A related aspect is insecurity as regards payment: in accordance with the general terms and conditions of microtasking-platforms, crowdsourcers have the right to reject the work without having to give a reason or providing payment, whilst still receiving the fruits of a worker’s labour.⁴²

Various systems of ‘digital reputation’, or rating mechanisms, which form one of the core elements of platform works, raise a second set of difficult questions:⁴³ a customer-input based

³⁵ <https://www.dailyworth.com/posts/3410-flexible-side-gigs-to-bring-in-extra-income/4>

³⁶ Cf. K Zyskowski et al., Accessible Crowdwork? Understanding the Value in and Challenge of Microtask Employment for People with Disabilities, http://research.microsoft.com/pubs/228714/crowdwork_and_disability.pdf.

³⁷ <http://www.thenation.com/article/how-crowdworkers-became-ghosts-digital-machine/>

³⁸ M Rosenblum, ‘The Digital Slave – That would be You’ (*Huffingtonpost* 5 June 2013) <http://www.huffingtonpost.com/michael-rosenblum/the-digital-slave-that-wo_b_3222785.html>.

³⁹ See for so “called gold farming” (professional online gaming to collect virtual money in games like World of Warcraft): J Dibbell, ‘The unreal estate boom’ (*Wired Magazine* 1/2003) < www.wired.com/2003/01/gaming-2>; J Dibbell, ‘The Life of the Chinese Gold Farmer’ (*NYT Magazine* 17.6.2016) <http://www.nytimes.com/2007/06/17/magazine/17lootfarmers-t.html?_r=2&oref=slogin>.

⁴⁰ Cf. J Ross et al., ‘Who are the crowdworkers? Shifting Demographics in Amazon Mechanical Turk’, Paper prepared for Chi 2010 <<http://dl.acm.org/citation.cfm?doid=1753846.1753873>>; A Felstiner, ‘Working the Crowd: Employment and Labour Law in the Crowdsourcing Industry’, 32 *Berkeley J. Emp. & Lab. L.* (2011) 143.

⁴¹ In the US there are different minimum wages, depending on the Federal State. Cf. <www.dol.gov/whd/minwage/america.htm> .

⁴² For an illustration in the context of *Mechanical Turk*, see S Strube, ‘Vom Outsourcing zum Crowdsourcing – Wie Amazons Mechanical Turk funktioniert’, in Ch Benner, *Crowdwork – Zurück in die Zukunft?* (2014) 78 (83); D Martin et al., ‘Being a turker’ in: CSCW’14. Proceedings of the 17th ACM conference on Computer supported cooperative work & social computing [2014] < <http://dl.acm.org/citation.cfm?id=2531602>>.

⁴³ There are also increasing reports of discrimination and bias hampering the operation of rating systems: see <https://www.bostonglobe.com/news/science/2013/08/08/the-pitfalls-crowdsourcing-online-ratings-vulnerable-bias/>

system of stars or points not only puts crowdworkers in a state of permanent probation, but also infringes their mobility as it ties them to particular platforms. As the more attractive and better paid tasks are only offered and assigned to those that have the best reputation, a change of platforms will be difficult as the digital reputation is not transferable between individual platforms – a fact which also further impairs the bargaining situation of crowdworkers.

II. The Regulatory Challenge

One of the very purposes of employment and labour law is to draw a distinction between the genuinely self-employed and those requiring protection against many of the problems just outlined, bringing the latter group within its protective scope. In this section, we briefly outline employment law's traditional approach to this crucial classificatory exercise and show that the multiplicity of contractual relationships and competing legal characterizations in the arrangements between platforms, workers, and customers, on the other hand, sits uneasily with the received binary divide. It is this mismatch which sits at the core of crowdworkers' difficulties, and their resulting exclusion from even the most basic labour standards.

II.A The Received Analytical Approach

Most jurisdictions have developed a more or less elaborate legal framework regulating the employment relationship based on the idea of the existence of an imbalance of bargaining power when negotiating pay and conditions of work.⁴⁴ This usually includes the right to organize, to bargain collectively and to take collective action. Self-employed persons usually do not enjoy any of these rights, including minimum wages, sick pay or protection against unfair dismissal. Indeed, they may even be forbidden from coming to mutual arrangements over basic terms such as minimum payments, as this might contravene competition or anti-trust laws.⁴⁵

It is therefore important to analyze where the line is drawn between the status of an employee and a self-employed person or independent contractor. The received analytical approach, however, was developed in the context of bilateral employment relationships and will therefore struggle with the crowdsourcing of labour given the involvement of an intermediary or platform in addition to the crowdworkers and crowdsourcers. In order to highlight the problems resulting from a binary contractual analysis of multi-partite contracts, two questions are at stake:

1. Who are the contractual partners? As already noted, above, crowdsourcing will involve at least three parties (the crowdsourcer, the platform and the crowd); yet it is often not clear into which contractual relationships (if any) they enter.
2. If a contractual relationship has been entered into, the question as to its classification arises: What is the nature of the contract between the respective parties? The answer to this question requires an overall assessment of the actual situation, and is of considerable

⁴⁴ M Freedland and P Davies, *Kahn-Freund's Labour and the Law* (Stevens 1983) 14, 69.

⁴⁵ Cf. European Court of Justice Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* [2014] ECLI:EU:C:2014:2411.

practical importance: employment law protection does not attach to genuine independent contractors.

Subsequent paragraphs look at the potential (bi-partite?) relationships underlying crowdsourcing arrangements, focussing on crowdworkers and crowdsourcers, crowdworkers and platforms, and platforms and crowdsourcers in turn in order briefly to demonstrate the prevailing classification problems.⁴⁶ In addition to protracted questions as to the workers' legal status, a second problem emerges: even if the putative employee has been classified as such, she may struggle to point at her employer, which could be the platform or indeed the crowdsourcer.

II.B. Identifying Parties, Characterising Contracts

(i) *Contractual relationship between the crowdworker and the crowdsourcer*

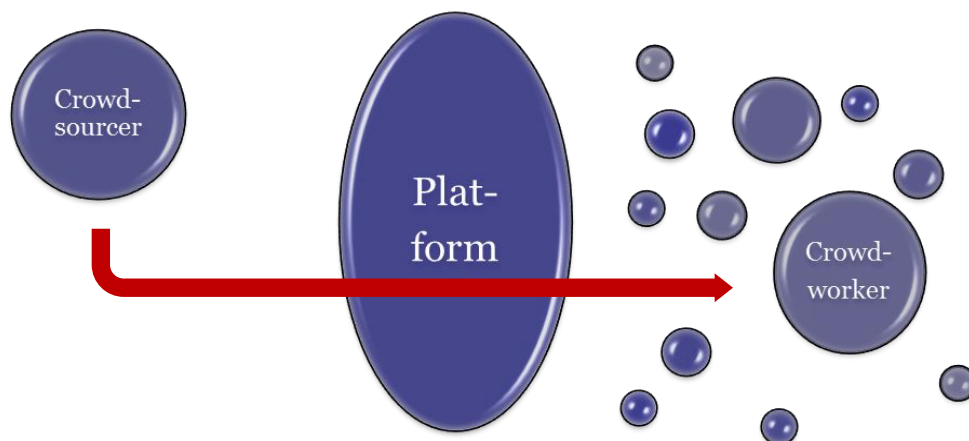


Figure 2: *Contractual relationship between the crowdworker and the crowdsourcer*

The first question to be addressed concerns the existence of a direct contractual relationship between the crowdsourcer and the crowdworker. In some models, no such contract is in place: a contractual relationship might only exist between the crowdworker and the platform, for example where results are delivered to the platform, which also conducts the quality check and pays the crowdworker directly. In this scenario, the platform may also determine the conditions under

⁴⁶ For present purposes, we focus primarily on the employee – independent contractor divide. Many jurisdictions have developed additional categories, such as the worker concept in the United Kingdom (see e.g. Employment Rights Act 1996, section 230) or the ‘employee-like status’ (*Arbeitnehmerähnlichkeit*) in Austria and Germany; cf. M Risak, *Austrian Labour Law* (Wolters Kluwer 2010) 36; M Weiss/M Schmidt, *Germany* (Wolters Kluwer 2010) 47. See further ILO/ELLN, *Regulating the employment relationship in Europe: A guide to Recommendation No. 198* (ILO 2013) 23.

which the task is to be performed (including time available, and work-related behaviour – from directing the route to be taken to screen-shot monitoring⁴⁷).

In other constellations, a direct contractual relationship exists between the crowdworker and the crowdsourcer – despite a lack of direct communication between the crowdworker and the crowdsourcer. Work is offered and delivered via the platform (at least in the case of virtual work or intermediary forms), which also processes payments and may set key terms and conditions. In spite of its strong presence in this scenario, many a platform will claim only to act as a broker or agent when contracting with the crowdworker in these scenarios.⁴⁸

As to classifying the relationship between the crowdworker and the crowdsourcer legally we have to take into account that the relationship usually will only last for very limited time (e.g. for a ride or the fulfilment of a micro-task) and that contractual partners often change frequently. The contract will therefore – depending on the applicable tests in each jurisdiction – very likely not be an employment contract but a contract for services as the crowdworker is not integrated into the crowdsourcers business, the influence of the crowdsourcer on the work performed is limited and there is no economic dependency on that contractual relationship alone.⁴⁹ The general working situation of the crowdworker is therefore atomized in a large number of small and very limited contracts with different partners, each of which might refuse to provide the crowdworker with employment law protection although here overall situation might suggest the contrary.

⁴⁷ A Kittur et al., ‘The Future of Crowdwork’ paper presented at 16th ACM Conference on Computer Supported Cooperative Work <<https://www.lri.fr/~mbl/ENS/CSCW/2012/papers/Kittur-CSCW13.pdf>>.

⁴⁸ See e.g. the terms and conditions of *Uber*, as set out in the introductory section.

⁴⁹ For an overview, see e.g. G Casale, *The Employment Relationship: A Comparative Overview* (ILO 2011).

(ii) Contractual relationship between the crowdworker and the crowdsourcing platform

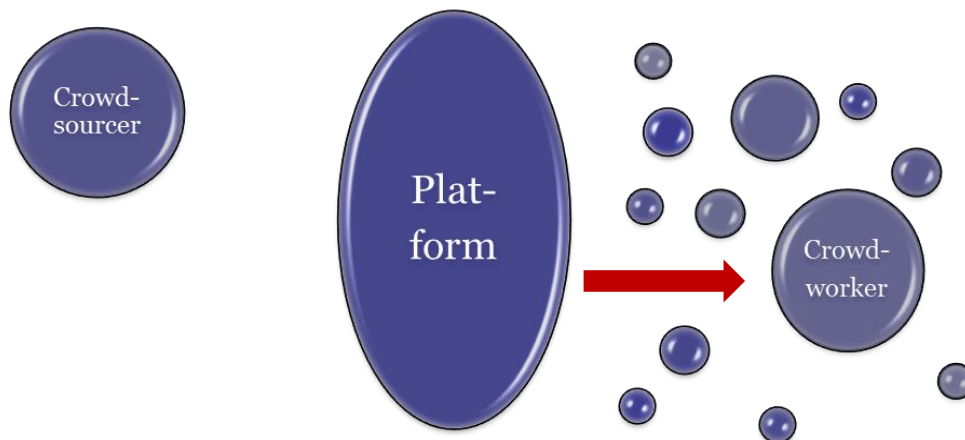


Figure 3: Contractual relationship between the crowdworker and the crowdsourcing platform

In nearly all scenarios, there will be some form of contractual relationship between the crowdworker and the platform, in addition to any direct contractual relationship between the crowdsourcer and the crowdworker. At the very least, crowdworkers need to register and undertake an obligation to provide the platform with correct and updated information.⁵⁰ If they agree to work a task or job posted on the platform, the terms and conditions of the platform apply; crowdworkers might also be asked to provide the platform with feedback on the crowdsourcer/customer.⁵¹

Any additional rights and obligations will strengthen the case for employee classification. Having registered with a platform, crowdworkers communicate that they are in principle available for work offered through that channel. Whilst there is no general obligation to accept any tasks, reputation systems built on the number of positive ratings will nonetheless put the crowdworker under pressure to work as much as possible to gain and maintain a positive rating. As pointed out above platforms depend on a large and active crowd to be able to deliver crowdwork to crowdsourcers/customers. Platforms may therefore introduce into their rating systems elements that take into account times of limited activity or inactivity and to make this

⁵⁰ E.g. Amazon Mechanical Turk Participation Agreement <<https://www.mturk.com/mturk/conditionsofuse>> s 1.a.: 'You agree to provide us with true and accurate information, and to update that information to the extent it changes in any way. When registering or updating your information, you will not impersonate any person or use a name that you are not legally authorized to use.'

⁵¹ This is notably the case with *Uber* passengers: <https://help.uber.com/h/e9302f73-8625-427f-abf7-dbe7ab25af7d>

part of the reputation of the crowdworker.⁵² This puts crowdworkers' supposed freedom to accept tasks into a very different light.

Placement of the task on the platform might represent an offer to the crowd, which is subsequently accepted by accepting the task (e.g. accepting a ride) or simply through performance. Under the common Ts&Cs of many platforms, the task may still be rejected by the crowdsourcer without either having to give a reason nor to pay remuneration.⁵³ Alternatively, placement of the task may also be considered a mere invitation to treat (i.e. an offer to the crowd to make an offer).⁵⁴ The crowdworker then only offers to enter into a contract by delivering the completed task to the platform. Not until the completed task is accepted by the platform (either as an agent for the crowdsourcer or on its own behalf) the contract is concluded.

The underlying contract might be classified a contract of employment or a contract for services, depending on the applicable tests in each jurisdiction - from the intensity of the influence the contractual partner has on the work performed to economic dependency and permanence of the contractual arrangement. The flexible nature of the arrangement will often provide a serious hurdle to employee classification: the fact that both crowdsourcers and platforms are usually granted significant leeway in the T&Cs, for example, suggests that the crowdworker might provide a service for which the recipient does not pay.⁵⁵

If the crowdsourcing platform merely serves as the intermediary, providing but the infrastructure to allow a legal relationship in the above sense to be formed between the crowdworker and the crowdsourcer, it might be classified as no more than a placement service or temporary agency work; however, the lack of integration into the crowdsourcer's business as well as (supposed) the lack of managerial prerogative and control by the crowdsourcer will often negate the latter. If, on the other hand, the work is provided for the crowdsourcing platform rather than for the crowdsourcer,⁵⁶ that legal relationship could in principle be deemed to be an employment relationship. For this to be the case, it is essential for the work to be rendered in a relationship characterised by personal dependency or mutuality of obligation, again dependent on the relevant jurisdiction. When working, the party performing the work might also have to be integrated into an external operational body and be subject to the right to instructions on the part of the recipient of the service.⁵⁷

⁵² *TaskRabbit*, for example, will deactivate accounts that have not completed tasks for more than 90 days:

<https://support.taskrabbit.com/hc/en-us/articles/204409440-TaskRabbit-Community-Guidelines>

⁵³ E.g. Amazon Mechanical Turk Participation Agreement <<https://www.mturk.com/mturk/conditionsofuse>> 3.a. 'If a Requester is not reasonably satisfied with the Services, the Requester may reject the Services.' 3.b. 'However, if the Services do not meet the Requester's reasonable satisfaction, the Requester may reject the Services and repost the specific request.'

⁵⁴ Cf. e.g. *Partridge v Crittenden* [1968] 1 WLR 1204. Or even an offer for reward, see e.g. Cf. German Civil Code s 657, Austrian Civil Code s 860.

⁵⁵ Cf. crowdworkers experiences reported in M Marvit 'How Crowdworkers Became the Ghosts in the Digital Machine' (The Nation 5 February 2014) <<http://www.thenation.com/article/how-crowdworkers-became-ghosts-digital-machine/>>.

⁵⁶ It is also possible to arrive at this estimation if it is concluded that, despite a bogus direct legal relationship between the crowdworker and crowdsourcer, the relationship actually exists between the crowdworker and the platform, due to the real economic content and the fact that the platform manages the relationship on its own behalf.

⁵⁷ Cf. ILO/ELLN, *Regulating the employment relationship in Europe: A guide to Recommendation No. 198* (ILO 2013) 28 et seq.

The challenges quickly mount: in crowdwork arrangements, the tasks are often very short in duration – with the resulting relationships potentially characterised as a series of temporary employment relationships, which shift the risk of business downturns from crowdsourcers and platforms to individual workers, not unlike on-call work or zero-hours arrangements.⁵⁸ Furthermore, at least in the case of virtual work, tasks may be commissioned and completed at separate physical locations. These factors do not match stereotypical assumptions about employment relationships – even though a high level of platform control may still result in an employment relationship.

(iii) Contractual relationship between the crowdsourcer and the crowdsourcing platform

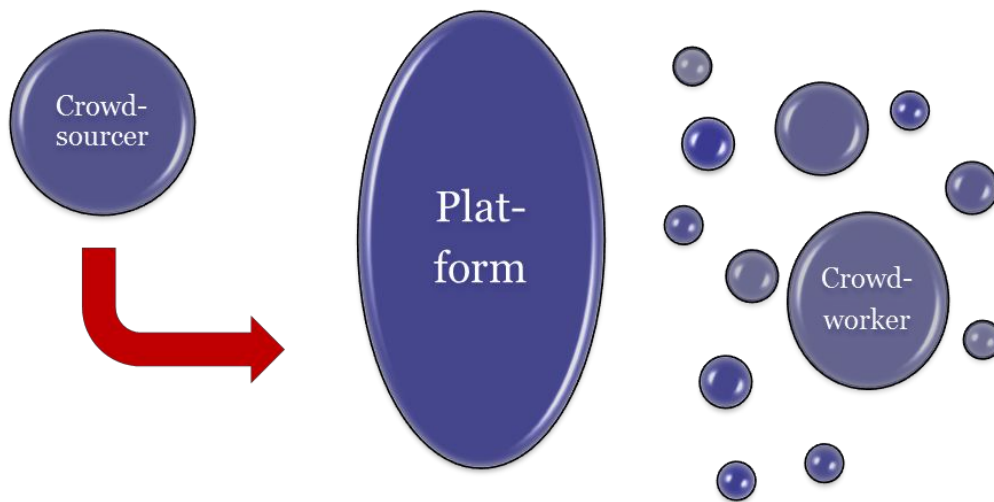


Figure 4: Contractual relationship between the crowdsourcer and the Crowdsourcing platform

The final contractual relationship involved will be that between the crowdsourcer and the platform. If there are direct contractual relationships between the crowdsourcer and the crowdworkers the platform will at least provide brokerage services. Additionally this may include other tasks such as pre-selection of the crowd, division of tasks into smaller assignments, payment processing, provision of a framework contract or quality control. On the other hand the crowdsourcing platform itself may be responsible for service provision using the crowdworkers for fulfilment. This is likely always to be a contract for services, regardless of whether a direct relationship exists between the crowdworkers and the crowdsourcer.

⁵⁸ A Adams, M Freedland, and J Prassl, 'The "Zero-Hours Contract": Regulating Casual Work, or Legitimizing Precarity?' (2015) 147 *Giornale di Diritto del Lavoro e di Relazioni Industriali* 529.

II. C. Shortcomings of this Approach

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

This fragmented analysis makes employment law coverage fragile, given the wide variety of multi-entity employment scenarios: it becomes unclear, incoherent, and open to easy manipulation. Crowdwork thus serves as a clear illustration of the ‘profound difficulties’ posed by complex triangular or multilateral employment relationships:⁵⁹ it challenges the very existence of a contract of employment, thus leaving individual workers without recourse to the majority of domestic employment protective legislation. The complete breakdown of employment law coverage e.g. in case of agency work in the UK is a consequence of ‘contractual arrangements that split, on the one hand, day-to-day control of work processes and, on the other hand, day-to-day securing and paying of people to work, [thus] prima facie prevent[ing] those working from being legally classified as anyone’s “employees”’:⁶⁰ neither the relationship with the crowdsourcer nor with the crowdwork platform is characterized as one of employment.

III. A Single Platform as the Employer

How, then, could we find ways to side-step this ‘constant and increasing counter-factuality’⁶¹ of the received approach? In suggesting that a focus on rethinking the concept of the employer could provide a starting point for a more fruitful analysis of crowdwork, this paper takes up the suggestion, first raised by Paul Davies and Mark Freedland (albeit in a different context), that the problems at stake might

⁵⁹ M Freedland, *The Personal Employment Contract* (OUP 2003) 36ff.

⁶⁰ L Barmes, ‘Learning from Case Law Accounts of Marginalised Working’ in J Fudge, S McCrystal and K Sankaran (eds), *Challenging the Legal Boundaries of Work Regulation* (Oñati International Series in Law and Society, Hart 2012) 308.

⁶¹ P Davies and M Freedland, ‘The Complexities of the Employing Enterprise’ in G Davidov and B Langile (eds), *Boundaries and Frontiers of Labour Law* (Hart Publishing 2006) 274.

best be understood from an unfamiliar perspective, indeed initially a counterintuitive one, [where the] problem lies not in the binary analysis of the worker, but in the unitary analysis of the employer.⁶²

In developing this line of thought, we suggest that the problems resulting from a unitary analysis of the employer, where the employing entity is defined as a single counterparty to the contract of employment or service,⁶³ can best be overcome through a more openly functional concept of the employer.

Subsequent discussion draws on recent work by one of us to set out the idea of functional concept of the employer, in order to pave the way for an illustration of its operation in the crowdwork context. As *The Concept of the Employer* suggests, in order to restore congruence to the application of employment law norms, the very definition of the employer must carefully be reconceptualised as a more openly functional one. Present space limitations prohibit an extensive rehearsal of the development of that notion; two crucial steps can nonetheless be highlighted. First, the argument that the traditional unitary analysis of the employer has long been accompanied by functional elements: employment law identifies, at least indirectly, a series of five employer functions – from hiring workers to setting their rates of pay – and regulates them in one or several areas – from anti-discrimination law to minimum wage provisions. The present section demonstrates how a focus on the exercise of these five functions can overcome the various contractual problems set out, above: it first sets out the functions in detail, before explaining how some crowdwork platforms, such as *Uber*, exercise their full range – and should therefore be identified as the responsible employer. Section IV then turns to the more difficult question of multiple entities’ joint exercise of employer functions.

III. A. The Functions of the Employer

For purposes of this analysis, a ‘function’ of being an employer is one of the various actions employers are entitled or obliged to take as part of the bundle of rights and duties falling within the scope of the open-ended contract of service. These functions are rarely set out explicitly: indeed, in most jurisdictions, the definition of the employer is seen as an afterthought in determining the scope of worker-protective norms. Upon closer inspection, however, it quickly appears that the concept implicitly mirrors the definition of the employee or worker, allowing for a ‘reverse-engineering’ of employer functions out of factors defining the employee.⁶⁴

In trawling the established tests of employment status such as control, economic dependence, or mutuality of obligation for these employer functions, there are endless possible mutations of different fact scenarios, rendering categorisation purely on the basis of past decisions of limited assistance.⁶⁵ The result of this analysis of concepts underlying different fact

⁶² *ibid* 273.

⁶³ J Prassl, ‘The Notion of the Employer’ (2013) *Law Quarterly Review* 380.

⁶⁴ *The Concept of the Employer* (n 8) 24-25.

⁶⁵ Whilst subsequent examples are drawn primarily from Common Law jurisdictions, we suggest that the approach is capable of being similarly developed in Civilian jurisdictions.

patterns, rather than the actual results on a case-by-case basis, is the following set of functions, with the presence or absence of individual factors becoming less relevant than the specific role they play in any given context. Individual elements can vary from situation to situation, as long as they fulfil the same function when looked at as a whole.⁶⁶

The *five main functions* and their functional underpinning of the employer are:⁶⁷

[1] Inception and Termination of the Employment Relationship

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

[2] Receiving Labour and its Fruits

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

[3] Providing Work and Pay

The employer’s obligations towards its employees, such as for example the payment of wages.

[4] Managing the Enterprise-Internal Market

Coordination through control over all factors of production, up to and including the power to require both how and what is to be done.

[5] Managing the Enterprise-External Market

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

Key to this concept of the employer being a *multi-functional* one is the fact that no one function mentioned above is relevant in and of itself. Rather, it is the *ensemble* of the five functions that matters: each of them covers one of the facets necessary to create, maintain, and commercially exploit employment relationships, thus coming together to make up the received legal concept of employing workers or acting as an employer – and being subjected to the appropriate range of employee-protective norms.

A functional conceptualisation of the employer, then, is one where the contractual identification of the employer is replaced by an emphasis on the exercise of each function –

⁶⁶ The ‘equipollency principle’ (*Äquivalenzprinzip*): L Nogler, ‘Die Typologisch-Funktionale Methode am Beispiel des Arbeitnehmerbegriffs’ (2009) 10 ZESAR 459, 463.

⁶⁷ For earlier attempts at such lists see eg M Freedland, *The Personal Employment Contract* (OUP 2003) 40.

whether by a single entity, as demonstrated immediately below, or in situations where different functions may be exercised from more than one *locus* of control,⁶⁸ a discussion to which we turn in section IV.

III. B. *Uber*: the platform as a sole employer

The operation of transportation platforms causes significant problems when analysed through the traditional (contractual) lens of employment law – not least because the platforms will often go to great lengths to (mis-) characterise its relationships with workers and consumers alike. In the UK, for example, *Uber* stipulates that it ‘accepts Bookings acting as disclosed agent for the Transportation Provider (as principal).’⁶⁹ Its U.S. version of the terms and conditions a customer must accept in order to download the required software (‘app’) is even more explicit, informing customers in capital letters that they ‘ACKNOWLEDGE THAT UBER DOES NOT PROVIDE TRANSPORTATION OR LOGISTICS SERVICES OR FUNCTION AS A TRANSPORTATION CARRIER.’⁷⁰

The moment we shift our analytical focus to *Uber*’s exercise of employer functions, on the other hand, it becomes clear that the platform does in fact exercise all relevant employer functions usually involved in the provision of transportation or logistics services. The following paragraphs look at each function in turn, drawing on a range of qualitative accounts of drivers’ experiences to demonstrate how *Uber* exercises full employer control, reaping the benefits of its drivers’ work – and suggesting that it should therefore equally be responsible for related risks and costs.

At first glance, *Uber*’s business model is very simple: customers download a small programme (the app) to their mobile phone, enabled with internet access and a GPS locator. In order to create an account, a potential client must provide their credit card details; once these have been verified, the customer can begin to request rides.⁷¹ They are then connected to the closest driver (similarly equipped with a smartphone running an *Uber* app); billing, rating, and nearly all other interaction to be discussed take place exclusively through that online channel – indeed, the *Uber* app is designed specifically to hide passengers’ and drivers’ mobile numbers even when they speak to one another.⁷²

[I] Inception and Termination of the Employment Relationship

⁶⁸ The term *locus* of control is designed to avoid additional complexities arising out of the fact, noted *inter alia* by M Freedland (n 68) 45-47, that even in traditional companies without external influence management control is often exercised by more than one person amongst a group of relatively senior executives.

⁶⁹ <https://www.uber.com/legal/gbr/terms>.

⁷⁰ <https://www.uber.com/legal/usa/terms>, clause 2. cf the German version: ‘Die Dienstleistung von Uber besteht lediglich in der Vermittlung der Beförderungsdienstleistung und in der Abrechnung der Beförderungsdienstleistung im Namen des Beförderungsdienstleisters. Uber selbst bietet keine Beförderungsdienstleistungen an und führt auch keine Beförderungen durch.’ <https://www.uber.com/legal/deu/terms>.

⁷¹ For details, see: <https://help.uber.com/h/15b0d4d8-2763-40d4-80c0-ff83a9a37cc4>.

⁷² <https://www.twilio.com/use-cases/masked-phone-numbers>.

This employer function includes control over the very existence of an employment relationship, from the power of selection to the choice of dismissing a worker. At first glance, it might appear that the platform has little control over individual ‘rides’, their inception and termination: *Uber* customers use the app on their smartphones to request rides from a specific location, information that is instantly broadcast to drivers in the area.⁷³ Drivers may accept a ride request, and are then directed to the relevant customer. The relationship ends at the customer’s destination, or – occasionally – if either party cancels the ride within a short timeframe after offer and acceptance.

In reality, on the other hand, the relationship between platform and workers is a much more long-term and durable one, irrespective of short individual engagements: the platform is fully in control of the existence of the relationship. Drivers have to sign up with *Uber* to use its app,⁷⁴ but the process is significantly more intensive than mere registration: the company will vet drivers’ cars, check their licences and demand proof of relevant insurance for the jurisdiction in question.⁷⁵ *Uber* is similarly in charge of terminating its driver’s access to the platform. As a leading industry blog notes,

It’s every Uber driver’s worst nightmare: To receive an email from Uber letting you know that you’ve been deactivated as an Uber partner, or a message in the app that says you can’t drive. It’s a huge disappointment to be fired from your ride sharing job, and to make things worse, you’re given little to no warning or explanation about your deactivation. Instead, when you try to log on to drive, you’re greeted with an error message.⁷⁶

Reasons (where given) range from passenger complaints to average ratings dropping below 4.6 out of a possible 5. Reactivation is usually subject to an *Uber*-sanctioned re-training course, the low practical value of which has become a common cause for complaint.⁷⁷ The platform thus exercises full control over the existence of driver’s work relationship.

Indeed, even at the short-term level of individual rides, it cannot be suggested that clients or drivers exercise the relevant functions: clients, for example, do not know who individual drivers are, or indeed which one of the cars shown on a schematic map will accept their transportation request. Drivers have slightly more leeway, insofar as they can – on some versions of the app – see different passengers’ average ratings, thus for example avoiding low-rated passengers who might be more problematic customers.⁷⁸

On the other hand, drivers’ actual choice is severely limited, by at least two factors: first, the need to maintain an average acceptance rate of around 80% of offers received while the driver’s app is activated, and strict limitations on how many rides can be cancelled.⁷⁹ Second, drivers will

⁷³ <https://www.uber.com/features>.

⁷⁴ <https://get.uber.com/drive/> .

⁷⁵ <https://newsroom.uber.com/australia/ubersafeau/> .

⁷⁶ <http://www.ridesharingdriver.com/fired-uber-drivers-get-deactivated-and-reactivated/> .

⁷⁷ <http://observer.com/2015/02/uber-drivers-the-punishment-for-bad-ratings-is-costly-training-courses/>.

⁷⁸ <http://www.npr.org/sections/alltechconsidered/2015/07/18/423549092/what-does-your-uber-driver-think-of-you>

⁷⁹ <http://www.ridesharingdriver.com/fired-uber-drivers-get-deactivated-and-reactivated/> .

usually not know what an individual passenger's destination is, unless they have contacted the customer immediately upon acceptance to determine where they are headed.

[2] Receiving Labour and its Fruits

Uber similarly exercises the second employer function, as it is the direct recipient of the fruits of a driver's labour: payment is taken automatically from the customer by the platform. *Uber* also handles all aspects of invoicing, claim reconciliation, and complaints;⁸⁰ the entire system is designed to avoid any direct financial interaction between passengers and drivers – up to and including a prohibition on tipping.⁸¹

[3] Providing Work and Pay

As regards the provision of work, first, the key tool here is an *Uber*-provided smartphone which allows drivers access to its network of customers. Drivers are never paid directly: out of the sums charged to customers, *Uber* takes a commission between 20 and 30%,⁸² before depositing the money in drivers' accounts – usually with at least a week's delay. The platform continues to experiment with varying the amount of commission payable, which is particularly harmful to part-time workers, as the percentage retained falls with the number of trips offered.⁸³ Another common tactic is for *Uber* to offer reasonably generous rates when it first enters a new city or territory; a rate which is subsequently lowered both through a reduction in fares, and an increase in *Uber*'s commission. As a Dallas driver notes, 'They started to tighten the rope. Gradually, we can't breathe any more.'⁸⁴

[4] Managing the Enterprise-Internal Market

Under the fourth function, the employer enjoys coordination through control over all factors of production, up to and including the power to require both how and what is to be done. Through a combination of technology and human factors, *Uber* enjoys extremely tight control over all aspects of how a ride is provided: once the request has been accepted by a driver, for example, she will be directed to the passenger and onwards to the required destination, through her version of the *Uber* app; customers can complain if a different route was chosen and they feel disadvantaged in consequence.⁸⁵

⁸⁰ <https://help.uber.com/h/3eb4e4a1-94ed-42d2-9cb6-d13d03166234>.

⁸¹ <https://help.uber.com/h/1be144ab-609a-43c5-82b5-b9c7de5ec073> .

⁸² <http://www.cnet.com/news/uber-tests-30-commission-for-new-drivers-in-san-francisco/>.

⁸³ <https://help.uber.com/h/8ba64dc9-a85b-4923-8277-c0e813395d79> .

⁸⁴ <http://www.nytimes.com/2016/02/03/business/uber-drivers-and-others-in-the-gig-economy-take-a-stand.html> .

⁸⁵ <https://help.uber.com/h/0487f360-dc56-4904-b5c9-9d3f04810fa9> .

As has already been discussed, *Uber* also has tight control over the car types drivers may use,⁸⁶ occasionally inspecting them for everything from cleanliness to scratches. Control over the enterprise-internal market extends as far as the music to be played during the ride: through corporate partnerships, drivers must enable passengers to use music apps to set their own background music.⁸⁷

In addition to technology-based control, notably GPS locators, *Uber* relies on star-based ratings to exert close control over its workforce. Customers and drivers rate each other anonymously following each journey; the resulting scores are displayed to passengers and operators respectively before the next trip commences. As Ben Sachs has noted,

the firms are (1) soliciting customer feedback, (2) setting relevant performance levels, and then (3) making termination decisions when the customer feedback reveals that drivers are not meeting the performance levels set by the firms. This is what *employers* do.⁸⁸

[5] Managing the Enterprise-External Market

Uber is equally exercising the final employer function: it is the entity undertaking economic activity in return for potential profit, whilst also being exposed to any losses that may result from the enterprise. At first glance, that assertion is once more counterintuitive, as the risks and income levels appear to depend on each individual driver's actions: if she drives more, her income will be higher. As recent Department of Labor guidance recalls, however, in

considering whether a worker has an opportunity for profit or loss, the focus is whether the worker's managerial skill can affect his or her profit and loss ... the worker's ability to work more hours and the amount of work available from the employer have nothing to do with the worker's managerial skill and do little to separate employees from independent contractors—both of whom are likely to earn more if they work more and if there is more work available.⁸⁹

The most important indicator of driver's earning ability, on the other hand, is *Uber*'s dynamic pricing algorithm, which determines remuneration for distance and time on the basis of factors such as individual city pricing levels, or even demand specific to a particular location and time though so-called surge pricing.⁹⁰ The platform is, finally, also in full control of branding, thus providing a global service under a unified mantle.⁹¹

⁸⁶ <https://www.uber.com/driver-jobs> .

⁸⁷ <https://newsroom.uber.com/uber-spotify-music-for-your-ride/> .

⁸⁸ <http://onlabor.org/2015/05/20/uber-and-lyft-customer-reviews-and-the-right-to-control/> .

⁸⁹ http://www.dol.gov/whd/workers/misclassification/AI-2015_1.htm, section II.B.

⁹⁰ <http://abovethecrowd.com/2014/03/11/a-deeper-look-at-ubers-dynamic-pricing-model/> .

⁹¹ <http://www.wired.com/2016/02/the-inside-story-behind-ubers-colorful-redesign/> .

As even a brief overview of *Uber*'s business model has thus shown, the platform very clearly exercises the full range of employer functions: analysed thus, despite its heavy reliance on modern technology, it is little different from a traditional, unitary employer – with its drivers to be classified as employees. Given the range of functions exercised, the platform should therefore be responsible for the full suite of employment rights in each jurisdiction it operates: from minimum wage and working time laws to collective bargaining.

IV. A Multiplicity of Employers

As the previous section has demonstrated, *Uber*'s business model is surprisingly close to the traditional assumption that all employer functions will be exercised by a single entity (the platform), which should therefore be characterized as the employer counterparty to a worker's contract of service.⁹² Our brief overview of the operation of crowdwork platforms in section I has highlighted, however, that a multiplicity of parties might often be involved in the organisation and execution of crowdwork. It is thus not possible to focus on a single entity exercising all employer functions as the only case regulatory models need to be capable of addressing.

Instead, functions may sometimes be jointly exercised by platforms, customers, and potentially even the crowdworker herself. The shared exercise between two or more entities, or one where functions are parcelled out between different parties arise where platform work arrangements lead to a fragmented exercise of employer functions – it is in those scenarios that the functional model of the employer will now be put to the test: there may be elements of genuine self-employment, platforms performing employer roles, and even customers could potentially become subject to regulatory obligations.

IV.A. Shared Exercise of Functions

The platform under scrutiny for this purpose is *TaskRabbit*, 'a web and mobile marketplace that safely and reliably connects people and businesses with fully vetted people in their community to get everyday and skilled Tasks done.'⁹³ As the service's Terms & Conditions explain,

Clients are individuals and/or businesses seeking to obtain task services ("Tasks") from Taskers and are therefore clients of Taskers, and Taskers are individuals and/or businesses seeking to perform Tasks ("Taskers") for Clients. Clients and Taskers together are hereinafter referred to as "Users." The Service is a platform for enabling connections between Users for the fulfillment of Tasks.⁹⁴

⁹² *The Concept of the Employer* (n 8), 16-23.

⁹³ *TaskRabbit, The TaskRabbit Handbook* ('Handbook', electronic copy on file with the editors) 12.

⁹⁴ <https://www.taskrabbit.com/terms> (excerpts from clauses 1 and 2).

TaskRabbit consequently denies any employer role, whilst at the same time leaving the question as to employer status between clients and taskers an open question: ‘[e]ach User assumes all liability for proper classification of such User’s workers as independent contractors or employees based on applicable legal guidelines.’⁹⁵ Returning once more to the list of established employer functions, however, it becomes clear that *TaskRabbit*’s self-classification as a ‘platform for enabling connections’ might not be the full extent of the story.

[1] Inception and Termination of the Contract of Employment

The existence of an overarching relationship is primarily in the hands of the platform: *TaskRabbit* vets individual workers’ credentials before activating their accounts,⁹⁶ and will terminate taskers for violations of its usage terms – including on occasion complaints about specific clients.⁹⁷ In contrast to other crowdwork providers, however, Taskers’ accounts are not terminated when their rating falls below a pre-set level. Instead, they find themselves subject to a series of ‘performance standard probations’,⁹⁸ and may be confined to low-value tasks,⁹⁹ with well-paid or otherwise attractive requests reserved for Taskers with higher ratings.¹⁰⁰

[2] Receiving Labour and its Fruits

Similarly to the analysis of *Uber* in the previous section, it appears that in most scenarios the platform will be the primary recipient of the fruits of taskers’ labour: it organises the invoicing, and no money (save for tips) may change hands directly between clients and taskers. The crucial role taskers play for the platform is explicitly acknowledged by *TaskRabbit*. As a blog-post on the company’s website notes, the taskers ‘are the face of TaskRabbit and frankly, do all the work. (We [the headquarters staff] just sit in our fancy office and watch while they do all the heavy lifting... literally.)’¹⁰¹

Under certain circumstances, finally, Taskers may also ‘apply for the longer-term business tasks under the “Jobs” filter’ – a scenario which appears to be strongly reminiscent of traditional agency work,¹⁰² where the receipt of labour and its fruits is split between the platform and the long-term client.

[3] Provision of Work and Pay

The division of this third employer function is amongst the more difficult to analyse, as it varies drastically across different tasks. Looking first at the provision of day-to-day work, Clients will post their tasks – from cleaning and shopping to repair services – on *TaskRabbit*. The platform

⁹⁵ *ibid*, clause 12.

⁹⁶ <http://loneplacebo.com/adventures-of-a-first-time-taskrabbit/> .

⁹⁷ <http://www.businessinsider.com/confessions-of-a-task-rabbit-2011-12?IR=T&page=1> .

⁹⁸ <https://support.taskrabbit.com/hc/en-us/articles/204409440-TaskRabbit-Community-Guidelines> .

⁹⁹ <http://www.theverge.com/2015/10/28/9625968/rating-system-on-demand-economy-uber-olive-garden> .

¹⁰⁰ On *TaskRabbit* ‘points and levels’, see Handbook (n 94) 9.

¹⁰¹ <https://blog.taskrabbit.com/2011/04/29/aprils-runner-of-the-month-is/> .

¹⁰² <https://blog.taskrabbit.com/2013/05/22/takin-care-of-business-tips-for-business-tasks/> .

then plays an important role in matching clients and taskers: on occasion this process is automated through its algorithms; other tasks are offered and accepted through direct client-tasker interaction.

The provision of pay is organised similarly: taskers are paid by the platform on a weekly basis, either by cheque or via paypal. If the former method is chosen, *TaskRabbit* will also comply with certain tax-related formalities.¹⁰³ The levels of remuneration vary dramatically, as the platform continues to experiment with different remuneration models: a notable shift in 2014 saw a move away from the original auction-style mechanisms, where Taskers could specify their offers for any given task, to an algorithm matching clients with a selection of workers for a job, displaying their relevant hourly rates.¹⁰⁴ The platform is thus not directly involved in the setting of wage levels: indeed, there is evidence that at least some Taskers are becoming increasingly savvy at developing appropriate pricing mechanisms.¹⁰⁵

[4] Managing the Enterprise-Internal Market

TaskRabbit carefully couches work in terms of ‘micro-entrepreneurship’, ‘neighbo[u]rhood heroes’, and ‘entrepreneurs like you who can help [busy people] get things done’.¹⁰⁶ In reality, the fourth employer function will usually be exercised by a combination of the platform, the tasker, and the client.¹⁰⁷ As regards actual control over individual tasks, the already-cited terms and conditions note that the

Company is not responsible for the performance of Users, nor does it have control over ... any ... aspect whatsoever of Tasks Clients, nor of the integrity, responsibility or any of the actions or omissions whatsoever of any Users.¹⁰⁸

This does not mean that the platform does not exercise the fourth employer function at all: tasks deemed inappropriate (such as dangerous tasks, or those of an illegal / sexual nature), for example, will be deleted by the platform, and can also be reported by individual taskers.¹⁰⁹ *TaskRabbit* also operates a comprehensive insurance scheme for clients and taskers alike, covering property damage, theft, and bodily injury (of clients, taskers, or third parties) during the performance of a task.¹¹⁰

Even more important is the fact that *TaskRabbit* operates a strict obligation on taskers personally to provide services – the Tasker manual explicitly notes that ‘TaskPosters want to see

¹⁰³ Handbook (n 94) 8.

¹⁰⁴ <http://www.theverge.com/2014/6/17/5816254/taskrabbit-blows-up-its-auction-house-to-offer-services-on-demand>.

¹⁰⁵ <http://www.priceintelligently.com/blog/bid/192053/Lessons-Learned-from-Creating-My-TaskRabbit-Pricing-Strategy>.

¹⁰⁶ Handbook (n 94) 2.

¹⁰⁷ <http://www.businessinsider.com/confessions-of-a-task-rabbit-2011-12?IR=T&page=1>.

¹⁰⁸ <https://www.taskrabbit.com/terms> (excerpts from clauses 1 and 2).

¹⁰⁹ <https://blog.taskrabbit.com/2011/12/08/taskrabbits-guiding-principles/>.

¹¹⁰ <https://support.taskrabbit.com/hc/en-us/articles/204411640-Does-my-Tasker-have-insurance->.

your smiling face, not anyone else's ... so please don't send someone that hasn't gone through our vetting process.'¹¹¹

[5] Managing the Enterprise-External Market

Undertaking economic activity in return for potential profit, whilst also being exposed to any losses that may result from the enterprise is the final function to be surveyed. Traditionally, one of the key elements of this function was the provision of relevant tools and investment for the economic activity to take place. As with other function, work *TaskRabbit* is highly heterogeneous: Some clients provide tools and closely supervise the work, whereas others will expect taskers to bring their own cleaning products or use their vehicles for transport-related tasks.¹¹² The same is true for remuneration levels. Over the course of the platform's development, numerous models appear to have been tested:¹¹³ from customers setting their 'optimum price', to taskers offering their rates (with the platform then charging an additional service fee), or even pre-set 'Quick Assign' tasks, where *TaskRabbit*'s algorithm determines the wages received. As a result, some Taskers may find themselves earning in excess of US \$ 1,000 per week – whereas others barely manage to earn a minimum wage.¹¹⁴

Another important element in exercising this function is the acquisition and retention of clients. On the one hand, the platform strongly encourages – and financially incentivises – taskers to advertise its services, both through physical coupons and online.¹¹⁵ It also provides detailed social guidelines, encouraging workers to 'Tweet or post about your great @TaskRabbit experiences' – whilst at the same time prohibiting from including an affiliation with the platform in their Twitter user name.¹¹⁶ On the other, it has more recently introduced features to 'encourage loyalty' between individual clients and Taskers: if 'a TaskPoster shows you some love, let them know they can use the Direct Hire feature to request bids and accept your bids easily in the future. They can also opt to hire you for Recurring Tasks like weekly grocery shopping.'¹¹⁷

TaskRabbit's operation is thus a prime example of how different employer functions are exercised by more than one entity – whether platforms, clients, or even individual workers themselves. In order to accommodate these different work arrangements, the second sub-section suggests, employment law needs to build on the identification of different employer functions, and embrace an openly functional concept of the employer, where the exercise of one or more employer functions triggers the concomitant regulatory responsibilities – regardless of the underlying contractual arrangement(s).

¹¹¹ Handbook (n 94)15.

¹¹² <http://www.bloomberg.com/bw/articles/2012-09-13/my-life-as-a-taskrabbit#p1> .

¹¹³ <http://venturebeat.com/2014/07/10/taskrabbit-users-revolt-as-the-company-shuts-down-its-bidding-system/> .

¹¹⁴ Compare, e.g. the reports at <http://time.com/money/3714829/working-for-taskrabbit/> with those at <http://www.bloomberg.com/bw/articles/2012-09-13/my-life-as-a-taskrabbit> .

¹¹⁵ Handbook (n 94) 11.

¹¹⁶ *ibid* 12.

¹¹⁷ *ibid* 11.

IV.B. A Functional Concept of the Employer

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

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

Calling for a functional definition of the employer is not a completely novel approach to the problems arising from multilateral employment arrangements. Judy Fudge, for example, has long noted the ‘need to go beyond contract and the corporate form, and adopt a relational and functional approach to ascribing employment-related responsibilities in situations involving multilateral work arrangements in employing enterprises.’¹¹⁸

In order to embrace a functional approach, however, the law’s underlying methods of reasoning need to evolve in part. The present sub-section thus sets out to consider the meaning of ‘functional’ in the proposed functional concept on a more abstract level, in the hope that this will allow for a clearer account of that approach. It further aims to develop functional typology as a richer concept than simply a contrast to the perceived formalism of the current bilateral-contractual approach,¹¹⁹ thus avoiding at least some of the dangers of the ‘transcendental nonsense’ which can result from the indiscriminate use of the ‘functional approach’ as a panacea to various analytical problems, ‘often [...] with as little meaning as any of the magical legal concepts against which it is directed.’¹²⁰

The account of functionalism proposed for purposes of identifying and defining the employer builds on the sociological concept of functional typologies, relying on the exercise of particular functions to determine the status of potential counterparties. A full exploration of the relevant sociological literature is beyond the scope of our contribution; the focus will instead be on Luca Nogler’s writing in a very closely related area, applying different typological models to the determination of employee status.¹²¹

The key idea of this *functional approach* is to focus on the specific role different elements play in the relevant context, instead of looking at the mere absence or presence of

¹¹⁸ J Fudge, ‘Fragmenting Work and Fragmenting Organizations: the Contract of Employment and the Scope of Labour Regulation’ (2006) 44 Osgoode Hall Law Journal 609, 636. See also S Deakin, ‘The Changing Concept of the “Employer” in Labour Law’ (2001) 30 ILJ 72, 79.

¹¹⁹ J Fudge, ‘The Legal Boundaries of the Employer, Precarious Workers, and Labour Protection’ in G Davidov and B Langile (eds), *Boundaries and Frontiers of Labour Law* (Hart 2006) 310-13.

¹²⁰ F Cohen, ‘Transcendental Nonsense and the Functional Approach’ (1935) 35 Columbia Law Review 809, 822.

¹²¹ Nogler (n 67). The following paragraphs draw extensively on this article and related work.

predetermined factors.¹²² The presence of a contract of employment (or other contract) can thus be an important indicator in particular fields (for example the obligation to pay wages), but it is by no means the only one. To adopt Nogler's language to the present proposal, a functional concept of the employer is one where the employing entity or entities are defined not via the absence or presence of a particular factor, but via the exercise of specific functions.¹²³ This exercise of specific functions extends to include a decisive role in their exercise, in order to take account of the judicial recognition in existing cases that as regards employer functions the right to play a decisive role in a particular function is as relevant as the actual exercise thereof.

Our working definition suggests that the concept of the employer should be understood as the entity, or combination of entities, playing a decisive role in the exercise of relational employing functions, and regulated or controlled as such in each particular domain of employment law. There are several steps in putting this abstract conceptualisation into practice. First is the recognition that for each employee, a functional approach to different models of inter-entity relationships will lead to an *array* of potential employing entities, from which one or several may emerge as employers. Being within this array of potential counterparties does not automatically bring any specific set of employment law obligations with it, even less so responsibility for the full domain of labour regulation. It is only as a consequence of the exercise of a particular regulated function that employer responsibilities are triggered; limited, however, to the relevant domain or domains. Employment law obligations may therefore be spread across multiple legal entities. This is the core of the reconceptualisation's challenge to received concepts of the employer as a single entity – and therefore, we suggest, key to a more flexible (yet coherent) allocation of responsibility in the crowdwork context.

Second, as the functions of the employer can be subdivided into distinct groups, the employer is no longer exclusively defined as an entity exercising a single and simple function comprising all elements identified: exercising a particular subset of employer functions may suffice to trigger responsibility in that regard. A functional approach will, in practical terms, lead to a multiplicity of employers in many employment situations. Historically, when faced with an array of potential counterparties in multi-employer scenarios, privity of contract guided decisions as to where employment law obligations would be placed. An important part of the reconceptualised definition of the employer is the fact that different entities, or even a combination of distinct legal entities, could now be faced with employment law obligations, depending on the particular function and context in question. This distribution of employment law obligations is driven by the multi-functional mode of defining the employer: responsibility attaches to each subset of functions, regardless of whether they are exercised in combination with all other functions by a single legal entity, parcelled out between different parties, or shared across multiple entities.

The third important consequence to note results directly from these observations. Under a functional approach, the composition of the employer acquires a degree of context- or domain-

¹²² *ibid* pt 3.

¹²³ *ibid* 463.

specificity: depending on the regulatory context, different subsets of the five employing functions will be of particular significance in identifying the responsible counterparty or counterparties. Whilst differences (potential or actual) in the concept of the employer across areas such as tax, tort, vicarious liability and ‘employment law proper’ have long been the subject of academic and judicial discussion,¹²⁴ the proposed definition goes further: adopting a functional method allows for even more detailed differentiation within what may all too easily have become perceived as a single regulatory domain.¹²⁵

In concluding this section, the implications of a functional concept of the employer in the crowdwork context can briefly be illustrated by reference to two (hypothetical) workers. A first possible scenario in the context of platform work arrangements such as *TaskRabbit*, is a cleaner, who is new to the platform and relies on its price matching mechanism to find work as quickly as possible. This means that the platform effectively sets his hourly rate, billing it (in addition to a commission) directly to the client. The first flat to which the cleaner is dispatched to, however, is rather large, and it is physically impossible to complete the task in the planned time. As a result, his earnings fall considerably below minimum wage levels. In this scenario, the platform has clearly exercised the relevant employer function by determining the cleaner’s remuneration, and should be held responsible for minimum wage law compliance accordingly. This, however, does not mean that it should be the employer for all purposes: if a customer specifies dangerous working conditions, such as the use of particularly harsh cleaning chemicals, Health and Safety liability will be imposed on her, as she was in charge of exercising control over how the work should be done.

A second illustration is the case of an IT specialist, offering help with the development of online shops for fashion start-ups. She has a long track record of successful freelance work and is a sought-after designer and programmer, who has recently begun to channel her work through a platform as a single online market place. Her work commands a significant premium, which she reflects by setting her own wage rates at a higher rate per task. In this scenario, even if a task were to overrun and thus result in a too-low hourly wage, neither platform nor customers would be responsible for minimum wage levels under a functional concept of the employer, as the relevant employer function was exercised by the worker who genuinely set her own rate of remuneration. Over time, however, she finds that her ratings never rise to the top, and that there are fewer and fewer good offers available to her in consequence. This is due to the rating mechanism used by the platform systematically discounting female programmers’ work, as users’ biases become aggregated without correction.¹²⁶ Even though control over the inception and termination of employment relationships is shared between the worker and the platform, responsibility under anti-discrimination norms here would fall on the platform, as the operation of the ratings mechanism is solely under its control.

¹²⁴ See e.g. E McKendrick, ‘Vicarious Liability and Independent Contractors: A Re-Examination’ (1990) 53 MLR 770.

¹²⁵ Though cf. a notable countermove: M Freedland and N Kountouris, *The Legal Construction of Personal Work Relations* (OUP 2011) 17, 25ff.

¹²⁶ This example is sadly less hypothetical than one might expect: <https://www.bostonglobe.com/news/science/2013/08/08/the-pitfalls-crowdsourcing-online-ratings-vulnerable-bias/>.

V. Conclusion

The need for coherent underlying norms in employment law cannot be understated. ‘It is no exaggeration to think of the classification of work relationships as the central, defining operation of any labour law system.’¹²⁷ In this paper, as indeed in the current special issue more generally, we have shown that crowdwork is the most recent threat to emerge to this need for underlying coherence from dramatic changes in the labour market: online platforms or ‘apps’ acts as intermediaries in a spot-market for labour, providing clients with workers for a wide range of jobs referred to as ‘gigs’, ‘rides’, or ‘tasks’.

At a first glance, the advantages for business, customers, and workers are immense: crowdwork does away with many of the regulatory costs traditionally associated with employing individuals; customers can receive a nearly infinite number of services at cut-price rates; and workers can find flexible work to suit their schedules and income needs. Upon closer inspection in section I, however, a series of problems arising from this fragmentation of traditional work arrangements quickly emerged – in particular for workers, who often find themselves outside the scope of employment protective norms as a result of crowdwork platforms’ business models and the conceptual straitjackets imposed by traditional tests for employee status. Section II focused on this problem, analyzing the multiplicity of contractual relationships involved in order to demonstrate the difficulty of identifying any one bilateral employment relationship in the operational setup of most crowdwork platforms.

In response to these problems, section III advocated a shift in focus from notions of the employee to our concept of the employer. Employment law has come to recognize and regulate a series of five employer functions, from power over the inception and termination of the relationship, to control over enterprise-internal and –external markets, with a wide range of regulatory responsibilities triggered by their exercise. As an in-depth examination of *Uber*’s business model demonstrated, where a platform exercises all employer functions, it can easily be identified as an employer, with drivers consequently to be seen as workers, rather than independent contractors. Most platforms, on the other hand, lead to a fragmentation of employer functions. Section IV turned to *TaskRabbit* as an illustration of one such business model, before setting out the second step in the development of a functional concept of the employer: we should come to recognize that just as different functions may be exercised by various parties, concomitant responsibility should be ascribed to whichever entity – or combination of entities – has exercised the relevant function. As a result, multiple entities may come to be seen as employers for different purposes; the model is able at the same time to recognise elements of (genuine) self-employment, as the concluding examples have demonstrated.

A detailed discussion of potential avenues to operationalize each of these options is beyond the scope of the present paper. We hope that the brief examples nonetheless demonstrate how the proposed reconceptualisation would allow for a more subtle approach to effective

¹²⁷ S Deakin and F Wilkinson, *The Law of the Labour Market* (OUP 2005) 4.

employment law enforcement. By looking at the full range of functions exercised across various relationships to determine actual responsibility, obligations are placed on the most relevant party, but not beyond it. Whilst under the traditional approach, privity (or at most a specific statutory extension) would select the employer from this array of entities potentially able to exercise employer functions, in the reconceptualised concept of the employer this role is replaced by the exercise of various functions. As a result, different employers may bear (or share) a range of obligations, depending always on their specific roles.

Whilst the advantages of a functional approach have been discussed more extensively elsewhere,¹²⁸ suffice it to say at present that this conceptualisation allows for flexibility across different regulatory domains, and can thus deal with the complexities arising from the fact that there are multiple entities, and multiple modes in which these entities can share the exercise of employer functions. The successful identification of the relevant employer for each function would restore coherence to the scope of employment law, resolving questions as to employee (and indeed customer) status in its wake.

¹²⁸ *The Concept of the Employer* (n 8), ch 5.