

UBER, TASKRABBIT, AND CO.: PLATFORMS AS EMPLOYERS? RETHINKING THE LEGAL ANALYSIS OF CROWDWORK

Jeremias Prassl[†] and Martin Risak^{††}

I. INTRODUCTION

Crowdsourced work is on the rise – presenting opportunities and challenges for workers, businesses, and regulators alike, as the wide range of 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 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 wages to specifying – and supervising – how

[†] Jeremias Prassl is an Associate Professor at Magdalen College, Oxford, and an Associate Research Scholar at Yale Law School.

^{††} Martin Risak is an Associate Professor at the Department of Labour Law and Law of Social Security at the University of Vienna, Austria. We are grateful to the organizers and participants at the Wharton workshop for feedback and discussion of earlier stages of this work. The usual disclaimers apply.

1. See, e.g., the recent call by for the introduction of a new “independent worker” status in the United States. Seth D. Harris & Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First Century Work: The “Independent Worker”* (Hamilton Project, Discussion Paper 2015-10, 2015), available at <http://www.brookings.edu/research/papers/2015/12/09-modernizing-labor-laws-for-the-independent-worker-krueger-harris>.

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 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 ongoing U.S. 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 Article, 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 analyze the multilateral contractual relationships involved in platform work from a different angle, namely 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 Article is structured as follows. Part II 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 stuck with monotonous tasks and long hours, remunerated significantly below minimum wage rates. Part III reviews the regulatory challenges arising from crowdwork: one of the very purposes of employment and labor 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

2. See further Miriam Cherry's contribution in the present volume. Miriam Cherry, *Beyond Misclassification: The Digital Transformation of Work*, 37 COMP. LAB. L. & POL'Y J. (2015).

3. Hannah Jane Parkinson, *Uber Faces Legal Action in UK over Drivers' Rights*, THE GUARDIAN, July 29, 2015, <https://www.theguardian.com/technology/2015/jul/29/uber-legal-action-uk-drivers-rights>.

4. DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE ABOUT IT* (2014).

5. See further Einat Albin & Jeremias Prassl, *Fragmenting Work, Fragmented Regulation: The Contract of Employment as a Driver of Social Exclusion*, in *THE CONTRACT OF EMPLOYMENT* (Mark Freedland et al. eds., forthcoming 2016).

6. Order Denying Cross-Motion for Summary Judgment for Cotter et al. v. Lyft Inc., U.S. Dist. Ct. Case No. 13-cv-04065-VC, at 19 (Mar. 11, 2015).

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. This is the mismatch which we find at the core of above-mentioned classification problems, and the resulting exclusion of workers from even the most basic labor standards.

In response to these problems, Parts IV and V 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 parceled 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 to respond flexibly to changing economic and organizational models, offering conceptual coherence even 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 this Article is deliberately not focused on a single jurisdiction – we hope instead briefly to introduce the model, and then to illustrate its application in the context of two different online platforms. Finally, given present space limitations we are not able to address the difficult jurisdictional and conflict of laws issues that 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 Bd. v. Labour Force Ltd.*, [1970] 3 All ER 220.

8. JEREMIAS PRASSL, *THE CONCEPT OF THE EMPLOYER* (2015).

9. See, e.g., LOUISE MERRETT, *EMPLOYMENT CONTRACTS IN INTERNATIONAL LAW* (2011). Even purely digital platforms, however, are increasingly limiting their workers to single jurisdictions, such as the United States in the case of Amazon's MTurk. *Tips for Requesters on Mechanical Turk* (Jan. 17, 2013), <http://turkrequesters.blogspot.com/2013/01/the-reasons-why-amazon-mechanical-turk.html>.

II. 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 work¹²; a difficult fit for the existing binary legal categories of dependent labor and self-employment.

A particularly salient instantiation of this phenomenon is crowdwork, a relatively recent model also known as crowdsourcing of labor 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 organizational 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 labor outsourcing.¹⁵

10. Antonio Aloisi, *Commoditized Workers: Labor Issues Arising from a Case Study Research on a Set of Online Platforms in the "On-Demand/Gig Economy,"* 37 COMP. LAB. L. & POL'Y J. (2016).

11. Valerio De Stefano, *The Rise of the "Just-in-Time Workforce": On-Demand Work, Crowd Work, and Labor Protection in the "Gig-Economy,"* 37 COMP. LAB. L. & POL'Y J. (2016).

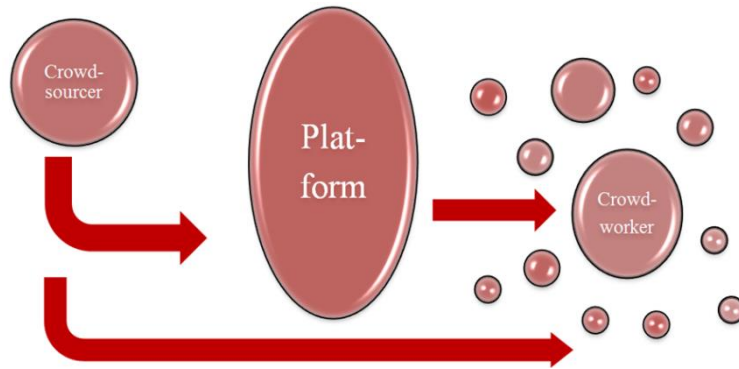
12. See IRENE MANDL ET AL., NEW FORMS OF EMPLOYMENT, 107 (Eurofound 2015), available at <http://www.eurofound.europa.eu/publications/report/2015/working-conditions-labour-market/new-forms-of-employment>.

13. Such as, notably, AMAZON MECHANICAL TURK, www.mturk.com (last visited Apr. 7, 2016); see S. Strube, *Vom Outsourcing zum Crowdsourcing*, in CROWDWORK – ZURÜCK IN DIE ZUKUNFT 75 et seq. (Christiane Benner ed., 2014) [hereinafter CROWDWORK].

14. This term derives from a combination of the words "outsourcing" and "crowd," and was used by Jeff Howe for the first time. Jeff Howe, *The Rise of Crowdsourcing*, WIRED MAG., June 1, 2006, www.wired.com/2006/06/crowds/.

15. See Jan Marco Leimeister et al., *Crowdwork – digitale Wertschöpfung in der Wolke*, in WIRTSCHAFTSINFORMATIK IN WISSENSCHAFT UND PRAXIS, 51-64 (Walter Brenner & Thomas Hess eds., 2014); Aniket Kittur et al., *The Future of Crowd Work* (Paper Presented at 16th ACM Conference on Computer Supported Cooperative Work, 2013), www.lri.fr/~mbl/ENS/CSCW/2012/papers/Kittur-CSCW13.pdf.

Figure 1. Parties Involved in the Crowdsourcing of Labor



A. Characterizing Crowdwork Platforms

We have already alluded to the nearly unlimited factual variety that characterizes the emergence of online platforms, both in terms of crowdsourcing in general (including crowdfunding,¹⁶ or the allocation of non-labor resources such as accommodation¹⁷), and crowdsourcing of labor, 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 Article, we 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 services (cleaning, repair work, etc.) delivered via platforms such as Helpling²⁰ and

16. KICKSTARTER, www.kickstarter.com (last visited Apr. 7, 2016).

17. AIRBNB, www.airbnb.com (last visited Apr. 7, 2016).

18. See Julia Neugebauer & Thomas Klebe, *Crowdsourcing: Für eine handvoll Dollar oder Workers of the Crowd Unite?*, GEGEN BLENDE, Mar. 18, 2014, at AuR 4.

19. See MANDL ET AL., *supra* note 12, at 110.

20. HELPLING, www.helpling.com (last visited Apr. 7, 2016). In the United Kingdom, this platform operates under a different brand. See www.hassle.com (last visited Apr. 7, 2016).

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. Helpling operates in a similar way, even though the physical work takes place in the client's home or business premises – customers log in on a platform or app, type in their postcode, and indicate 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 a task, workers 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 comparatively simple, repetitive activities involving low pay and highly standardized or automated processes. These “microtasks” include digital labeling 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 Turk²⁶ 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 equaling an average wage of about \$2 per hour.²⁸

21. UPWORK, www.upwork.com (last visited Apr. 7, 2016).

22. *Make Money Driving Your Car*, UBER, <https://www.uber.com/ride> (last visited Apr. 7, 2016).

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. Dara Kerr, *Uber Tests Taking 30% Commission from New Drivers*, CNET, May 18, 2015, <http://www.cnet.com/news/uber-tests-30-commission-for-new-drivers-in-san-francisco/>.

24. Florian Alexander Schmidt, *The Good the Bad and the Ugly: Why Crowdsourcing Needs Ethics*, in CROWDWORK, *supra* note 13, at 378.

25. Leimeister et al., *supra* note 15, at 32.

26. AMAZON MECHANICAL TURK, *supra* note 13.

27. CLICKWORKER, www.clickworker.com (last visited Apr. 7, 2016).

28. MANDL ET AL., *supra* note 12, at 115.

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 labor 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 specializing in different segments of the crowdsourcing market.

Second, 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

29. Ronald Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937).

30. PASCAL PAOLI & DAMIEN MERLIÉ, *THIRD EUROPEAN SURVEY ON WORKING CONDITIONS* (Eurofound, Aug. 26, 2000); European Parliament, *Atypical Work in the EU* (SOC106EN, 1998).

31. On some platforms, including Uber, customers are rated by crowdworkers in turn. See Shawn Langlois, *Don't Tip Your Uber Driver? It Could Cost You a 5-Star Rating*, MKT. WATCH, Aug. 12, 2015, www.marketwatch.com/story/dont-tip-your-uber-driver-it-could-cost-you-a-5-star-rating-2015-08-12.

32. JAMES SUROWIECKI, *THE WISDOM OF THE CROWDS* (2005).

33. Emran Mian, *In Praise of the Gig Economy*, TELEGRAPH, Jan. 21, 2016, <http://www.telegraph.co.uk/technology/uber/12086500/In-praise-of-the-gig-economy.html>.

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, as 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 can also help the underemployed, providing additional income to their regular earnings,³⁵ and (at least through purely virtual crowdwork) allow those excluded from regular labor 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, focused 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 A lack of union representation and organizing power, the oligopoly of but a few platforms offering certain kinds of tasks, and constant economic and legal insecurity result in a considerable imbalance of bargaining power, as evident primarily from 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

34. As quoted in Moshe Z. Marvit, *How Crowdworkers Became the Ghosts in the Digital Machine*, NATION, Feb. 5, 2014), www.thenation.com/article/how-crowdworkers-became-ghosts-digital-machine/.

35. Nancy Mann Jackson, *10 Flexible Side Gigs to Bring in Extra Income*, DAILYWORTH, Mar. 23, 2015, <https://www.dailyworth.com/posts/3410-flexible-side-gigs-to-bring-in-extra-income/4>.

36. See Kathryn Zyskowski et al., *Accessible Crowdwork? Understanding the Value in and Challenge of Microtask Employment for People with Disabilities* (SIGCHI Conference Paper, Mar. 2015), available at http://research.microsoft.com/pubs/228714/crowdwork_and_disability.pdf.

37. Marvit, *supra* note 34.

38. Michael Rosenblum, *The Digital Slave – That Would Be You*, HUFF. POST, June 5, 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), Julian Dibbell, *The Life of the Chinese Gold Farmer*, N.Y. TIMES MAG., June 17, 2007, http://www.nytimes.com/2007/06/17/magazine/17lootfarmers-t.html?_r=2&oref=slogin; Julian Dibbell, *The Unreal Estate Boom*, WIRED MAG., Jan. 1, 2003, www.wired.com/2003/01/gaming-2.

Two problems in particular are repeatedly highlighted: low wages and workers' dependence of their ratings with a particular platform. With regard to the former problem, for example, some reports suggest that the average wage on Amazon's Mechanical Turk is less than \$2 per hour,⁴⁰ considerably below the U.S. minimum wage.⁴¹ A related aspect is insecurity with regard to payment: in accordance with the general terms and conditions of microtasking-platforms, crowdsourcers have the right to reject work without having to give a reason or providing payment, whilst still receiving the fruits of a worker's labor.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 issues: a customer-input based system of stars or points not only puts crowdworkers in a permanent state of probation, but also infringes their mobility as it ties them to particular platforms.⁴³ As more attractive and better paid tasks are only offered and assigned to those with the best reputation, a change of platforms will be difficult because digital reputation is not transferable between individual platforms – a fact that also further impairs the bargaining situation of crowdworkers.

III. THE REGULATORY CHALLENGE

One of the very purposes of employment and labor 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 Part, 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 sit uneasily with the received binary divide. It is this mismatch that sits at the core of crowdworkers' legal difficulties, and their resulting exclusion from even the most basic labor standards.

40. See Alek Felstiner, *Working the Crowd: Employment and Labor Law in the Crowdsourcing Industry*, 32 BERKELEY J. EMP. & LAB. L. 143 (2011); Joel Ross et al., *Who Are the Crowdworkers? Shifting Demographics in Mechanical Turk* (Paper Prepared for Chi, 2010), <http://dl.acm.org/citation.cfm?doid=1753846.1753873>.

41. In the United States, there are different minimum wages, depending on the State. See *Minimum Wage Laws in the States – January 1, 2016*, U.S. DEP'T OF LAB., www.dol.gov/whd/minwage/america.htm (last modified Jan. 2016).

42. For an illustration in the context of Mechanical Turk, see S. Strube, *Vom Outsourcing zum Crowdsourcing – Wie Amazons Mechanical Turk funktioniert*, in CROWDWORK, *supra* note 13, at 78, 83; David Martin et al., *Being a Turker*, (Performing Crowd Work, CSCW'14, Feb. 15-19, 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 Carolyn Y. Johnson, *Study Finds Online Ratings Easily Overinflated*, BOSTON GLOBE, Aug. 8, 2013, <https://www.bostonglobe.com/news/science/2013/08/08/the-pitfalls-crowdsourcing-online-ratings-vulnerable-bias/pw6HhJrZ3ZkP6oG6XYM2wO/story.html>.

A. The Received Analytical Approach

Most jurisdictions have developed a more or less elaborate legal framework regulating the employment relationship based on 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 antitrust 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 struggle with the crowdsourcing of labor 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:

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.

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 factual situation, and is of considerable practical importance: employment law protection does not attach to genuinely independent contractors.

Subsequent paragraphs look at the potential (bi-partite?) relationships underlying crowdsourcing arrangements, focusing 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

44. MARK FREEDLAND & PAUL DAVIES, *KAHN-FREUND'S LABOUR AND THE LAW* 14, 69 (1983).

45. See Case C-413/13, *FNV Kunsten Informatie en Media v. Staat der Nederlanden*, 2014 E.C.R. 2411.

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, § 230) or the “employee-like status” (*Arbeitnehmerähnlichkeit*) in Austria and Germany; cf. MARTIN E. RISAK, *AUSTRIAN LABOUR LAW* 36 (2010); MANFRED WEISS & MARLENE SCHMIDT, *LABOUR LAW AND INDUSTRIAL RELATIONS IN GERMANY* 47(2010); see further ILO, *Regulating the Employment Relationship in Europe: A Guide to Recommendation No. 198*, at 23 (European Labour Law Network, 2013), http://www.ilo.org/wcmsp5/groups/public/@ed_dialogue/@dialogue/documents/publication/wcms_209280.pdf.

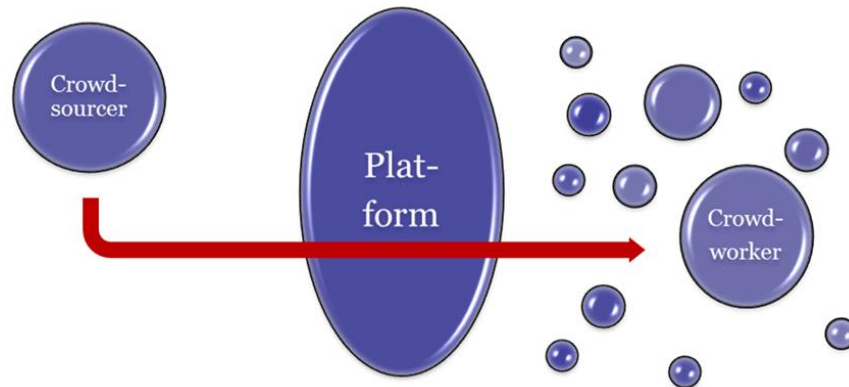
employee has been classified as such, she may struggle to point at her employer, which could be the platform or indeed the crowdsourcer.

B. Identifying Parties, Characterizing Contracts

1. 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 which the task is to be performed (including time available, and work-related behavior – from directing a driver's route to screen-shot monitoring⁴⁷).

Figure 2. Contractual Relationship between the Crowdworker and the Crowdsourcer



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

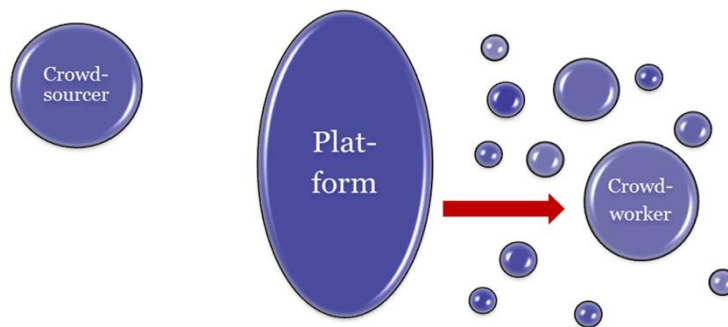
47. Kittur et al., *supra* note 15.

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

When it comes to the legal classification of the relationship between the crowdworker and the crowdsourcer, it is important to note that the relationship might often last but for a very limited time (e.g., for a ride or the fulfillment of a microtask) and that contractual partners may 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 crowdsourcer's 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 her overall situation might suggest the contrary.

2. 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

49. For an overview, see, e.g., GIUSEPPE CASALE, *THE EMPLOYMENT RELATIONSHIP: A COMPARATIVE OVERVIEW* (2011).

50. E.g., *Amazon Mechanical Turk Participation Agreement*, AMAZON MECHANICAL TURK, § 1(a), <https://www.mturk.com/mturk/conditionsofuse> (last modified Dec. 2, 2014) [hereinafter *Amazon Mechanical Turk Participation Agreement*] (“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.”).

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 part of the crowdworker's reputation.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., beginning a ride) or simply through performance. Under the common terms and conditions of many platforms, the task may still be rejected by the crowdsourcer without either having to give a reason or 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, no contract is concluded until the completed task is accepted by the platform (either as an agent for the crowdsourcer or on its own behalf).

The underlying contract might once more be classified as 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

51. This is notably the case with Uber passengers. *I'd Like to Know My Rating*, UBER, <https://help.uber.com/h/e9302f73-8625-427f-abf7-dbe7ab25af7d> (last visited Apr. 7, 2016).

52. TaskRabbit, for example, will deactivate accounts that have not completed tasks for more than ninety days. *Support Center*, TASKRABBIT, <https://support.taskrabbit.com/hc/en-us/articles/204409440-TaskRabbit-Community-Guidelines> (last visited Apr. 7, 2016).

53. E.g., *Amazon Mechanical Turk Participation Agreement*, *supra* note 50, § 3(a)-(b) ("If a Requester is not reasonably satisfied with the Services, the Requester may reject the Services. . . . However, if the Services do not meet the Requester's reasonable satisfaction, the Requester may reject the Services and repost the specific request.").

54. See, e.g., *Partridge v. Crittenden*, [1968] 1 W.L.R. 1204 (U.K.). Or even an offer for reward, see, e.g., BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Aug. 18, 1896, REICHSGESETZBLATT [RGL.] § 657 (Ger.); ALLGEMEINES BÜRGERLICHES GESETZBUCH [ABGB] [CIVIL CODE] JUSTIZGESETZSAMMLUNG [JGS] § 860 (Austria).

terms and conditions, for example, suggests that the crowdworker might find herself providing 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, the setup 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 the (supposed) 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 an employment relationship. For this to be the case, it is essential for the work to be rendered in a relationship characterized 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

The challenges quickly mount: in crowdwork arrangements, the tasks are often very short in duration – with the resulting relationships potentially characterized 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 the occasional finding to that effect.

55. Cf. crowdworkers experiences reported in Marvit, *supra* note 34.

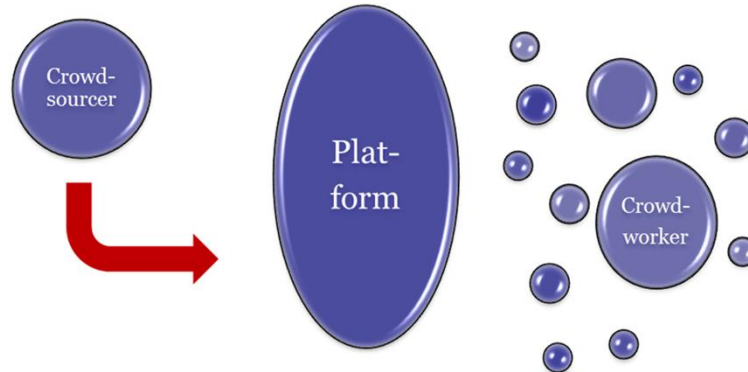
56. It is also possible to arrive at this estimation if it is concluded that, despite a bogus direct legal relationship between the crowdworker and crowdsourcer, the relationship actually exists between the crowdworker and the platform, due to the real economic content and the fact that the platform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

57. Cf. ILO, *supra* note 46, at 28 *et seq.*

58. Abi Adams et al., *The "Zero-Hours Contract": Regulating Casual Work, or Legitimizing Precarity?*, 147 *GIORNALE DI DIRITTO DEL LAVORO E DI RELAZIONI INDUSTRIALI* 529 (2015).

3. 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 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.

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, 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 colored threads of wool without taking into account the knitting pattern. The received analytical approach thus tends to ignore complex multi-party relationships, and analyzes 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 relationships⁵⁹: it challenges the very existence of a contract of employment, leaving individual workers without recourse to the majority of domestic employment protective legislation. The complete breakdown of employment law coverage – for example, in case of agency work in the United Kingdom – 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.

IV. A SINGLE PLATFORM AS THE EMPLOYER

How, then, could we find ways to side-step this “constant and increasing counter-factuality” of the received approach?⁶¹ 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 Article takes up the suggestion, first raised by Paul Davies and Mark Freedland (albeit in a different context), that the problems at stake might “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

59. MARK FREEDLAND, *THE PERSONAL EMPLOYMENT CONTRACT* 36ff (2003).

60. Lizzie Barnes, *Learning from Case Law Accounts of Marginalised*, in CHALLENGING THE LEGAL BOUNDARIES OF WORK REGULATION, 303, 308 (Judy Fudge et al. eds., 2012).

61. Paul Davies & Mark Freedland, *The Complexities of the Employing Enterprise*, in BOUNDARIES AND FRONTIERS OF LABOUR LAW 273, 274 (Guy Davidov & Brian Langille eds., 2006) [hereinafter BOUNDARIES AND FRONTIERS OF LABOUR LAW].

62. *Id.* at 273.

63. Jeremias Prassl, *The Notion of the Employer*, 2013 LAW Q. REV. 380.

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 reconceptualized 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 legal domains – from antidiscrimination law to minimum wage provisions. This Part 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. Part V then turns to the more difficult question of multiple entities’ joint exercise of employer functions.

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 categorization purely on the basis of past decisions of limited assistance.⁶⁵ The result of this analysis of concepts underlying different fact patterns, rather than the actual results on a case-by-case basis, is the following set of functions, with the presence or absence of individual factors becoming less relevant than the specific role they play in any given context. Individual

64. PRASSL, *supra* note 8, at 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.

elements can vary from situation to situation, as long as they fulfill the same function when looked at as a whole.⁶⁶

The five main functions and their functional underpinning of the employer are⁶⁷:

- (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 of dismissal.
- (2) *Receiving Labor and Its Fruits*: duties owed by the employee to the employer, specifically to provide his or her labor and the results thereof, as well as rights incidental to it.
- (3) *Providing Work and Pay*: the employer’s obligations toward 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 conceptualization of the employer, then, is one where the contractual identification of the employer is replaced by an emphasis on the exercise of each function – whether by a single entity, as demonstrated immediately 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 Part V.

B. *Uber: The Platform as a Sole Employer*

The operation of transportation platforms causes significant problems when analyzed through the traditional (contractual) lens of employment law

66. The “equipollency principle” (*Äquivalenzprinzip*). Luca Nogler, *Die Typologisch-Funktionale Methode am Beispiel des Arbeitnehmerbegriffs*, 10 ZESAR 459, 463 (2010).

67. For earlier attempts at such lists see, e.g., FREEDLAND, *supra* note 59, at 40.

68. The term *locus* of control is designed to avoid additional complexities arising out of the fact, noted *inter al* by FREEDLAND, *supra* note 59, at 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.

– not least because the platform will often go to great lengths to (mis)characterize its relationships with workers and consumers alike. In the United Kingdom for example, Uber stipulates that it “accepts Bookings acting as disclosed agent for the Transportation Provider” (as principal).⁶⁹ Its United States 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 program (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

1. Inception and Termination of the Employment Relationship

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

69. *Terms and Conditions*, UBER (last modified Jan. 2, 2016), <https://www.uber.com/legal/gbr/terms>.

70. *Terms and Conditions*, UBER, Clause 2 (last modified Jan. 2, 2016), <https://www.uber.com/legal/usa/terms>; cf. *Nutzungsbedingungen*, UBER, <https://www.uber.com/legal/deu/terms> (“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.”).

71. For details, see *How to Use Uber*, UBER, <https://help.uber.com/h/15b0d4d8-2763-40d4-80c0-ff83a9a37cc4> (last visited Apr. 7, 2016).

72. *Masked Phone Numbers*, TWILIO, <https://www.twilio.com/use-cases/masked-phone-numbers> (last visited Apr. 8, 2016).

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 app⁷⁴; but the process is significantly more intensive than mere registration: the company will vet drivers' cars, check their licenses, 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 (when 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 retraining 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

73. *Always the Ride You Want*, UBER, <https://www.uber.com/features> (last visited Apr. 8, 2016).

74. *Sign Up to Drive*, UBER, <https://get.uber.com/drive/> (Apr. 8, 2016).

75. *A Safe Ride from A to B*, UBERNEWSROOM, <https://newsroom.uber.com/australia/ubersafeau/> (last visited Apr. 8, 2016).

76. *Fired from Uber: Why Drivers Get Deactivated, and How to Get Reactivated*, RIDESHARINGDRIVER (July 15, 2015), <http://www.ridesharingdriver.com/fired-uber-drivers-get-deactivated-and-reactivated/>.

77. Jack Smith, *Uber Drivers: The Punishment for Bad Ratings Is Costly Training Courses*, OBSERVER (Feb. 3, 2015), <http://observer.com/2015/02/uber-drivers-the-punishment-for-bad-ratings-is-costly-training-courses/>.

78. *What You're your Uber Driver Think of You?*, NPR (July 18, 2015), <http://www.npr.org/sections/alltechconsidered/2015/07/18/423549092/what-does-your-uber-driver-think-of-you>.

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 canceled.⁷⁹ Second, drivers will 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 Labor and Its Fruits

Uber similarly exercises the second employer function, as it is the direct recipient of the fruits of a driver's labor: payment is taken automatically from the customer by the platform. Uber also handles all aspects of invoicing, claim reconciliation, and complaints⁸⁰; 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

With regard to 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 can fall 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 that 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 anymore."⁸⁴

79. *Fired from Uber*, *supra* note 76.

80. *Payment Options*, UBER, <https://help.uber.com/h/3eb4e4a1-94ed-42d2-9cb6-d13d03166234> (last visited Apr. 8, 2016).

81. *Do I Need to Tip My Driver?*, UBER, <https://help.uber.com/h/1be144ab-609a-43c5-82b5-b9c7de5ec073> (last visited Apr. 8, 2016).

82. Kerr, *supra* note 23.

83. *View My Payment Statements*, UBER, <https://help.uber.com/h/8ba64dc9-a85b-4923-8277-c0e813395d79> (last visited Apr. 8, 2016).

84. Noam Scheiber, *Uber Drivers and Others in the Gig Economy Take a Stand*, N.Y. TIMES, Feb. 2, 2016, <http://www.nytimes.com/2016/02/03/business/uber-drivers-and-others-in-the-gig-economy-take-a-stand.html>.

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

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 in the United States recalls, however, in

85. *My Driver Took a Poor Route*, UBER, <https://help.uber.com/h/0487f360-dc56-4904-b5c9-9d3f04810fa9> (last visited Apr. 8, 2016).

86. *Driving Jobs vs Driving with Uber*, UBER, <https://www.uber.com/driver-jobs> (last visited Apr. 8, 2016).

87. *Uber & Spotify = Music for Your Ride*, UBERNEWSROOM (Nov. 17, 2014), <https://newsroom.uber.com/uber-spotify-music-for-your-ride/>.

88. Benjamin Sachs, *Uber and Lyft: Customer Reviews and the Right-to-Control*, ONLABOR (May 20, 2015), <http://onlabor.org/2015/05/20/uber-and-lyft-customer-reviews-and-the-right-to-control/>.

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

As even a brief overview of Uber's business model has thus shown, the platform very clearly exercises the full range of employer functions: analyzed 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.

V. A MULTIPLICITY OF EMPLOYERS

As the previous Part demonstrates, 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 Part I has highlighted, however, that a multiplicity of parties might often be involved in the organization 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 parceled out between different parties arise where platform work arrangements lead to

89. *Administrator's Interpretation No. 2015-1*, U.S. DEP'T OF LAB. (July 15, 2015), http://www.dol.gov/whd/workers/misclassification/AI-2015_1.htm; see *supra* Part III.B.

90. Bill Gurley, *A Deeper Look at Uber's Dynamic Pricing Model*, ABOVE THE CROWD (Mar. 11, 2014), <http://abovethecrowd.com/2014/03/11/a-deeper-look-at-ubers-dynamic-pricing-model/>.

91. Jessi Hempel, *The Inside Story of Uber's Radical Rebranding*, WIRED (Feb. 2, 2016), <http://www.wired.com/2016/02/the-inside-story-behind-ubers-colorful-redesign/>.

92. PRASSL, *supra* note 8, at 16-23.

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 and platforms' performing employer roles; even customers could potentially become subject to regulatory obligations.

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 and 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 ("Tasks") 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

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 preset level. Instead, they find

93. THE TASKRABBIT HANDBOOK 12 (on file with authors) [hereinafter HANDBOOK].

94. *TaskRabbit Terms of Service*, TASKRABBIT, <https://www.taskrabbit.com/terms> (last modified Mar. 1, 2016) (excerpts from clauses 1 & 2).

95. *Id.* clause 12.

96. *Adventures of a First-Time TaskRabbit*, LONEPLACEBO (July 22, 2014), <http://loneplacebo.com/adventures-of-a-first-time-taskrabbit/>.

97. Alyson Shontell, *My Nightmare Experience as a TaskRabbit Drone*, BUSN. INSIDER, Dec. 7, 2011, <http://www.businessinsider.com/confessions-of-a-task-rabbit-2011-12?IR=T&page=1>.

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 Labor and Its Fruits

Similarly to the analysis of Uber in the previous Part, it appears that in most scenarios, the platform will be the primary recipient of the fruits of Taskers’ labor: it organizes 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 that appears to be strongly reminiscent of traditional agency work, where the receipt of labor and its fruits is split between the platform and the long-term client.¹⁰²

3. Provision of Work and Pay

The division of this third employer function is amongst the more difficult to analyze, as it varies drastically across different tasks. Looking first at the provision of day-to-day work, Clients post their tasks – from cleaning and shopping to repair services – on TaskRabbit. The platform 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 organized similarly: Taskers are paid by the platform on a weekly basis, either by check or via Paypal. If the former method is chosen, TaskRabbit also complies 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

98. *Best Practices for Tasker Success*, TASKRABBIT (Mar. 7, 2016), <https://support.taskrabbit.com/hc/en-us/articles/204409440-TaskRabbit-Community-Guidelines>.

99. Josh Dzieza, *The Rating Game: How Uber and Its Peers Turned Un into Horrible Bosses*, VERGE (Oct. 28, 2015), <http://www.theverge.com/2015/10/28/9625968/rating-system-on-demand-economy-uber-olive-garden>.

100. On TaskRabbit “points and levels,” see HANDBOOK, *supra* note 94, at 9.

101. *April’s Runner of the Month Is...*, TASKRABBIT (Apr. 29, 2011), <https://blog.taskrabbit.com/2011/04/29/aprils-runner-of-the-month-is/>.

102. *Takin’ Care of Business: Tips for Business Tasks*, TASKRABBIT (May 22, 2013), <https://blog.taskrabbit.com/2013/05/22/takin-care-of-business-tips-for-business-tasks/>.

103. HANDBOOK, *supra* note 94, at 8.

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 their own pricing mechanisms.¹⁰⁵

4. Managing the Enterprise – Internal Market

TaskRabbit carefully couches work in terms of “micro-entrepreneurship,” “neighborhood heroes,” and “entrepreneurs like you who can help [busy people] get things done.”¹⁰⁶ In reality, the fourth employer function is usually exercised by a combination of the platform, the Tasker, and the client.¹⁰⁷ With regard to 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, are 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 your smiling face, not anyone else’s . . . so please don’t send someone that hasn’t gone through our vetting process.”¹¹¹

104. Casey Newton, *Taskrabbit Is Blowing Up Its Business Model and Becoming the Uber for Everything*, VERGE (June 17, 2014), <http://www.theverge.com/2014/6/17/5816254/taskrabbit-blows-up-its-auction-house-to-offer-services-on-demand>.

105. Elena Kerzner, *Lessons Learned from Creating My TaskRabbit Pricing Strategy*, PRICE INTELLIGENTLY (Dec. 22, 2013), <http://www.priceintelligently.com/blog/bid/192053/Lessons-Learned-from-Creating-My-TaskRabbit-Pricing-Strategy>.

106. HANDBOOK, *supra* note 94, at 2.

107. Shontell, *supra* note 97.

108. *TaskRabbit Terms of Service*, *supra* note 94 (excerpts from clauses 1 and 2).

109. *Task Rabbit’s Guiding Principles*, TASKRABBIT (Dec. 8, 2011), <https://blog.taskrabbit.com/2011/12/08/taskrabbits-guiding-principles/>.

110. *Does My Driver Take Insurance*, TASKRABBIT (Nov. 17, 2015), <https://support.taskrabbit.com/hc/en-us/articles/204411640-Does-my-Tasker-have-insurance->.

111. HANDBOOK, *supra* note 94, at 15.

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 functions, work organized through TaskRabbit is highly heterogeneous: Some clients provide tools and closely supervise the work, whereas others 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 tested¹¹³: 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 \$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 incentivizes – Taskers to advertise its services, both through physical coupons and online.¹¹⁵ It also provides detailed social media guidelines, encouraging workers to "Tweet or post about your great @TaskRabbit experiences" – whilst at the same time prohibiting them 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, Section B suggests, employment law needs to build on the identification of different employer

112. Brad Stone, *My Life as a TaskRabbit: A Short Career in the Distributed Workforce*, BLOOMBERG (Sept. 13, 2012), <http://www.bloomberg.com/bw/articles/2012-09-13/my-life-as-a-taskrabbit#p1>.

113. Harrison Weber, *TaskRabbit User Revolt as the Company Shuts Down Its Bidding System*, VENTUREBEAT (July 10, 2014), <http://venturebeat.com/2014/07/10/taskrabbit-users-revolt-as-the-company-shuts-down-its-bidding-system/>.

114. Compare, e.g., the reports at Jackie Zimmermann, *This Is What It Takes to Make \$2,000 a Week Working on TaskRabbit*, MONEY (Mar. 12, 2015), <http://time.com/money/3714829/working-for-task-rabbit/with-those-at-stone>, *supra* note 112.

115. HANDBOOK, *supra* note 94, at 11.

116. *Id.* at 12.

117. *Id.* at 11.

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).

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 conceptualization 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 Section 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” that 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

118. Judy Fudge, *Fragmenting Work and Fragmenting Organizations: the Contract of Employment and the Scope of Labour Regulation*, 44 OSGOODE HALL L.J. 609, 636 (2006); see also Simon Deakin, *The Changing Concept of the “Employer” in Labour Law*, 30 ILJ 72, 79 (2001).

119. Judy Fudge, *The Legal Boundaries of the Employer, Precarious Workers, and Labour Protection*, in BOUNDARIES AND FRONTIERS OF LABOUR LAW, supra note 61, at 310-13.

120. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 822 (1935).

sociological literature is beyond the scope of our contribution; we focus instead 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 consider the specific role different elements play in the relevant context, instead of looking at the mere absence or presence of 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, with regard to the employer, functions the right to play a decisive role in a particular function is as relevant as the actual exercise thereof.

Prassl's 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 conceptualization into practice. First is the recognition that for each employee, a functional approach to different models of inter-entity relationships leads 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 labor 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 reconceptualization'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

121. Nogler, *supra* note 66. The following paragraphs draw extensively on this article and related work.

122. *Id.* pt. 3.

123. *Id.* at 463.

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 reconceptualized 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 multifunctional 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, parceled 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-specificity: depending on the regulatory context, different subsets of the five employing functions are 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 house 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

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

125. Though see a notable countermove. MARK FREEDLAND & NICOLA KOUNTOURIS, *THE LEGAL CONSTRUCTION OF PERSONAL WORK RELATIONS* 17, 25ff (2011).

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 marketplace. Her work commands a significant premium, to which she responds 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. Imagine, on the other hand, that the same worker 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 antidiscrimination norms here would fall on the platform, as the operation of the ratings mechanism is solely under its control.

VI. 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 Article, as indeed in the current special issue more generally, we have argued that crowdwork is the most recent threat to emerge to this need for underlying coherence from dramatic changes in the labor market: online platforms or apps act as intermediaries in a spot-market for labor, providing clients with workers for a wide range of jobs referred to as "gigs," "rides," or "tasks."

At 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 Part II, however, a series of problems arising from this

126. This example is sadly less hypothetical than one might expect. See Johnson, *supra* note 43.

127. SIMON DEAKIN & FRANK WILKINSON, *THE LAW OF THE LABOUR MARKET* 4 (2005).

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. Part III 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 challenges, Part IV 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. Part V 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 recognize 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 this Article. We hope that the brief examples nonetheless demonstrate how the proposed reconceptualization would allow for a subtler approach to effective employment law enforcement in the "gig economy." 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 reconceptualized 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.

2016] LEGAL ANALYSIS OF CROWDWORK 651

Whilst the advantages of a functional approach have been discussed more extensively elsewhere,¹²⁸ suffice it to say in conclusion that this conceptualization 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. PRASSL, *supra* note 8, ch. 5.

