The (possible) impact and consequences of *Aslam and others v Uber B.V. and others* for the industry in the UK and the Netherlands

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The gig economy has disrupted the traditional employment relationship. In this new world, digital 'platform companies' using algorithms and smart technologies are creating agile employment models. These new forms of employment are not limited to the standard contractual framework that sets out the employment terms and corresponding wage; rather they are performed through an online account on platform companies' websites. Uber uses such a business model. No form of employment contract exists for its drivers; work schedules and working hours are absent, and drivers only get paid when they carry customers, and they are responsible for their own pensions and health care. In other words, the risks usually borne by companies are being placed back onto individuals. Uber exclusively focuses on its core business, which consists of connecting the supply of and the demand for taxi services, and disclaims all other types of responsibility or commitment with respect to its drivers. This has resulted in two of its UK drivers successfully claiming that they are workers and therefore entitled to, among other things, national minimum wage and paid holiday. This article analyses the consequences of *Aslam and others v Uber B.V. and others* in the industry in the UK so far, as well as the possible future impact of this decision for the industry in the Netherlands.

1. Background

This new model of working has been variously named: the gig economy, the sharing economy, the platform, peer, or the demand-based economy.[2] The companies using this model often share certain characteristics and typically operate through digital platforms.[3] These companies generally have an in-app payment system and a rating-based marketplace. They offer workers the possibility to earn money on a flexible schedule, rather than through professional accession, and have been able to find niches in existing industries.

Consider how these companies affect work, specifically the organisational forms of work. It has been observed that the gig economy has resulted in more flexible work based on new forms of technology, often without fixed working hours and schedules.[4] Uber is the perfect example, converting employees of taxi companies into self-employed contractors who earn a living through the Uber smartphone application (the **App**). Are these self-employed contractors mini-entrepreneurs or are they just extremely vulnerable workers, re-labelled as self-employed contractors? This question came before the Central London Employment Tribunal (the **ET**) on 28 October 2016 in *Aslam and others v Uber B.V. and others* (the ***Uber* decision**).[5] The ET ruled that Uber drivers are workers for the purposes of the Employment Rights Act 1996 (the **ERA**), National Minimum Wage Act 1998 (the **NMWA**) and the Working Time Regulations Act 1998 (the **WTA**).

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2. For the purposes of this article: 'gig economy' is the name that shall be used for this model.
3. For the purpose of this article 'platforms' are: 'frameworks that allow collaborators (users, peers, providers) to undertake a range of activities, often creating de facto standards, forming entire ecosystems for value creation and capture.' The wording stems from and is slightly modified: M. Kenney & J. Zysmann, 'Choosing a Future in the Platform Economy: The Implications and Consequences of Digital Platforms', *Kauffman Foundation New Entrepreneurial Growth Conference, Discussion Paper Amelia Island Florida* 18-19 June 2015.
4. See for example: <www.uber.com>.
5. *Aslam and others v Uber B.V. and others* [2017] IRLR 4.

This article analyses the consequences of the *Uber* decision in the UK and also considers the possible future impact of this decision for the industry in the Netherlands. It does this in the first part by discussing the legal framework in the UK, the major elements of the *Uber* decision and the consequences for the industry in the UK so far (Section 3). In the second part it discusses the legal framework in the Netherlands and the possible future impact of the *Uber* decision in the Netherlands (Section 4). Before going into this, it is necessary to briefly identify the main features of the gig economy business model.

2. What is the gig economy business model?

There is no single definition of the term 'gig economy'. As the name implies, it refers to an economy characterised by independent service providers performing short-term contracts or 'gigs'.[6] The gig economy is generally understood to include two forms of work: 'work on-demand through digital platforms', and 'crowd work'. Work on-demand through platforms is characterised by the provision of traditional work activities through digital platforms (taxis, temporary accommodation, cleaning, food delivery and professional and technical services). Certain forms of clerical work are also channelled through such platforms. The companies maintaining these platforms usually set minimum quality standards with respect to their services, only intervening in the selection and management of the individuals that provide these services.[7] Examples of such companies are Uber, Airbnb and Deliveroo.

Crowd work generally refers to activities that require the completion of set of tasks via digital platforms. These platforms typically facilitate the contact between an unlimited number of organisations and individuals through the internet, potentially allowing clients and service providers from around the world to connect with each other. The type of activities performed on crowd work platforms varies substantially. The largest part of today's crowd work is based on 'micro tasks'; individually these are mainly parcelled, independent and homogenous tasks, which do not require a high skill level (e.g. data entry, completing surveys, filing, tagging photos, etc.). Crowdsourcing may also involve larger, more technical tasks, such as designing a logo or developing a website.[8]

Although these two forms of work have some major differences, they also have several common features. Both are enabled by tools and frameworks that utilise the internet to match the demand for services with supply. This enables platform companies to reduce friction on markets and minimise transaction costs. The speed, at which employment opportunities are offered and accepted, along with the wide range of platforms for service providers, provides platform companies with access to a scalable workforce, available to perform tasks or carry out gigs as required.[9]

The business model found in the gig economy seeks to promote self-employment, or freelancing, with individuals selling their skills and services, possibly on an ad hoc basis, providing them 'just-in-time' and being compensated on a 'pay-as-you-go' basis. Compensation on a 'pay-as-you-go' basis means that in practice, the individuals only receive compensation for the time that they are actually providing the services to the customer. Although a substantial number of service providers make use of a particular platform in their spare time, there is an increasing number of individuals for whom the gig economy represents their main or only source of income. This means that more and more people are becoming dependent on companies using the gig economy business model, such as Uber, for their social and economic security.

The gig economy is currently moving the boundaries of businesses and challenging the existing paradigm of the workplace. This has been achieved through platform companies creating a highly-flexible parallel labour market, without a traditional employment contract.[10] In fact, both work on-demand through apps and crowd work promote the far-reaching personal 'outsourcing' of tasks to individuals rather than to high-end businesses. This provides platform companies with leverage to standardise the terms and conditions of contracting and assigning work while maintaining substantial control over business processes and output. Within this model an employment contract, that includes working time regulations, standard working hours, workplace location, training, trade union membership and the ability to strike does not exist. The service providers, or rather 'partners', are left to manage, based on their self-employment, their own social security (e.g. old-age pension, incapacity for work and income protection insurance), occupational health and safety.

As previously seen in the Netherlands, certain companies often pay little attention to whether or not they operated within the boundaries of the law, their preferred strategy being that of the *fait accompli*.[11] The law has failed to keep pace with the rapid

6. R. Oliverre a.i., 'Labor in the Gig Economy: Opportunities for Information Studies', *iConference 2017 Proceedings*, p. 820.
7. V. De Stefano, 'The Rise of the 'Just-in-Time Workforce': On-Demand Work, Crowd Work and Labour Protection in the 'Gig-Economy', *Comparative Labor Law & Policy Journal, Forthcoming; Bocconi Legal Studies Research Paper No. 2682602*, p. 4-5.
8. Ibid p. 5.
9. Ibid p. 6.
10. C. Degryse, 'Digitalisation of the economy and its impact on labour markets', *Working Paper 2016.02., European Trade Union Institute*, Brussels: 2016, p. 35.
11. See e.g.: W. Keuning, 'UberPop verboden in Nederland', *Het Financieele Dagblad*, 8 December 2014,

evolution of these companies and ways of working. As the law currently stands, some commentators take the view that it is failing to achieve some of its policy objectives and this could have a serious impact on the European labour market.

3. Relevant legal framework in the UK

Under current UK law, individuals providing their services in the UK job market fall into one of three categories: worker, employee and self-employed. Although 'workers' and 'employees' are defined by statute, the definitions are far from comprehensive and have evolved over time as a result of case law.

Under the ERA, an employee is defined as 'an individual who has entered into or works under... a contract of employment'.[12] A contract of employment is, in turn, defined as 'a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing'.[13] A worker is defined in the ERA as 'an individual who has entered into or works under... (a) a contract of employment, or (b) any other contract... whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer'.[14] While the concepts of 'employee' and 'worker' are similar, they are still distinct within the UK legislative framework. This is because the concept of 'worker' is a European construct, applying more widely than the original UK concept of 'employee'. As a result, it is often found in legislation originating in the European Union, such as the WTR. Self-employed individuals fall outside both definitions, as they work under a contract *for* services, rather than *of* service.

Why is this distinction so important in the UK? Employment status matters because an individual's status determines their entitlement to statutory benefits and protections. For example, while both workers and employees are protected against discrimination and entitled to the national minimum wage in the UK, only employees are entitled to statutory maternity pay, minimum notice periods and protection from unfair dismissal.[15] Additionally, a worker will not necessarily have a legal right to statutory sick pay.[16]

While there are significant differences between the entitlement of an employee and a worker, the differences are even greater for self-employed contractors, who are not entitled to the statutory benefits and protections afforded to workers. Therefore, there are clear advantages available if a contractor is able to secure worker or, even better, employee status. Employers, however, will often try to engage staff in the most flexible and cost-efficient way.

Given the benefits of securing worker or employee status, along with a lack of clarity in the legal framework, it is perhaps unsurprising that there have been a number of high-profile legal cases involving individuals seeking to 'improve' their employment status. This has been increasingly true of self-employed contractors in the so-called gig economy, who often provide their services in novel, technology-driven ways. When the legal framework in the ERA was developed over 20 years ago, the draftsmen did not have such innovative employment arrangements in mind and the law has struggled to keep pace with the developments in technology. Individuals in these progressive, flexible arrangements have increasingly turned to the courts for clarity in the hope of obtaining statutory benefits and protections, such as holiday and sick pay.

4. Aslam and others v Uber B.V. and others

The first major decision in relation to the alternative working arrangements that are widespread in the gig economy was the *Uber* decision.[17] The claim was brought in the ET by a group of 21 Uber drivers, with Mr Y. Aslam and Mr J. Farrar, drivers for Uber in London, selected as "test claimants" (the **Claimants**).[18] The three respondents were Uber B.V., a Dutch corporation holding the legal rights to the App, Uber London Ltd and Uber Britannia Ltd (the **Respondents**), who are subsidiaries of Uber B.V. and hold private hire vehicle operator's licences for inside and outside London respectively.[19]

The core issue identified by both the ET and the parties was whether the Claimants were workers for the purposes of the ERA, the NMWA and WTA, and thus entitled to the benefits and protections afforded to workers.[20] The Claimants, of course, claimed that they were workers for these purposes, arguing that the written terms governing the relationship did not reflect the true nature of the relationship and were designed to misrepresent their employment status.[21] They asserted that the true relationship was that they worked for Uber, and not the other way around.[22] The Respondents rejected this interpretation of the relationship, claiming that the written terms were valid and fairly defined the

<www.fd.nl>.

12. Section 230(1) of the ERA.
13. Section 230(2) of the ERA.
14. Section 230(3) of the ERA.
15. See Section 1 of the National Minimum Wage Act 1998, the Equality Act 2010, and the Social Security and Benefits Act 1992, and Sections 86 and 94 of the ERA.
16. See Statutory Sick Pay (General) Regulations 1982 (SI 1982/894) and Social Security Contributions and Benefits Act 1992.
17. *Aslam and others v Uber B.V. and others* [2017] IRLR 4.
18. Ibid paragraph 10.
19. Ibid paragraphs 3-5.
20. Ibid paragraph 12.
21. Ibid paragraph 83.
22. Ibid paragraph 83.

status of drivers as falling outside the definition of 'worker'.[23]

In a much anticipated judgment, the ET decided that Uber drivers were, in fact, workers (subject to certain conditions, described below) for the purposes of the ERA, NMWA and WTA. Having quoted the definition of a worker from the ERA, as set out above, the ET considered the reasoning in *Byrne Brothers (Formwork) Ltd v Baird*, where the policy behind the decision to widen the definition of worker to individuals who are not employees was identified as 'extend[ing] the benefits of protection to workers who are in the same need of that type of protection as employees... who are, substantively and economically, in the same position... whose degree of dependence is essentially the same as that of employees.'[24] In this way, Mr Recorder Underhill QC held that it was intended that there be a distinction between such workers and 'contractors who have a sufficient arm's length and independent position to be treated as being able to look after themselves in the relevant respects'.[25]

In making its decision, the ET also relied upon the reasoning of the Employment Appeal Tribunal (the EAT) in *Cotswold Development Construction Ltd v Williams*, where it was stated that 'a focus of whether the purported worker actively markets his services as an independent person to the world in general... on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls'.[26] When considering the nature of the relationship between the Claimants and Respondents, the ET drew attention to the judgment of the Supreme Court in *Autoclenz Ltd v Belcher*, where, rejecting the view that a court does not have the freedom to disregard terms apparently agreed between contracting parties, Lord Clarke stated that, 'The question in every case is... what was the true agreement between the parties'.[27]

It was on the basis of these authorities that the ET held that 'any driver who (a) has the App switched on, (b) is within the territory in which he is authorised to work, and (c) is able and willing to accept assignments, is... working for Uber under a "worker" contract and a contract within each of the extended definitions'.[28] As a result, the Claimants were held to be workers for the purposes of the ERA, NMWA and WTA, and so were entitled to the benefits and protections afforded to workers thereunder. The ET set out several reasons for the decision, the most significant of which are summarised below.

First, the 'remarkable lengths' Uber went to in order to have drivers agree to its analysis of the legal relationship, along with it publicly reinforcing its image as a transportation business *employing* drivers for that purpose, meant that the Respondents' arguments that Uber was a provider of a platform and not a supplier of transportation services were met with a large degree of scepticism.[29] The ET cited a recent case in the North California District Court, where it was stated that 'Uber does not simply sell software; it sells rides. Uber is no more a "technology company" than Yellow Cab is a "technology company" because it uses CB radios to dispatch taxi cabs'.[30] Rejecting the argument of the Respondents, the ET stated that '[t]he notion that Uber in London is a mosaic of 30,000 small businesses linked by a common "platform" is to our minds faintly ridiculous'.[31] In this respect, the ET held that the written terms governing the relationship between Uber and its drivers did not correspond with the practical reality and so, following the *Autoclenz Ltd* case, the ET had to look for the 'true agreement' between the parties.

This requirement to look for the 'true agreement' between the parties was reinforced by the fact that following the logic of the Respondents' arguments led to absurd consequences. The ET pointed out that if there was no contract for the provision of transportation services between the Claimants and the Respondents, but instead this contract existed between the Claimants and the passengers, as the Respondents had sought to argue, a driver would enter into a contract with 'a person whose identity he does not know (and will never know) and who does not know and will never know his identity, to undertake a journey to a destination not told to him until the journey begins, by a route prescribed by a stranger to the contract [(the Respondents)]... from which he is not free to depart (at least not without risk), for a fee which (a) is set by the stranger, and (b) is not known by the passenger (who is only told the total to be paid), (c) is calculated by the stranger (as a percentage of the total sum) and (d) is paid to the stranger'.[32] Summarising the fault with such logic, the ET was satisfied that the supposed driver/passenger contract was 'a pure fiction' which bore no relation to the real dealings and relationships between the parties.[33]

Secondly, having reasoned that the relationship proposed by the Respondents was not the 'true agreement', the ET agreed with the description of the relationship submitted by the Claimants, being that 'Uber runs a transportation business. The driv-

23. Ibid paragraph 84.
24. *Byrne Brothers (Formwork) Ltd v Baird* [2002] IRLR 96, paragraph 17.
25. Ibid.
26. *Cotswold Development Construction Ltd v Williams* [2006] IRLR 181, paragraph 53.
27. *Autoclenz Ltd v Belcher* [2011] IRLR 820 SC, paragraph 29.
28. *Aslam and others v Uber B.V. and others* [2017] IRLR 4, paragraph 86.
29. Ibid paragraphs 87 and 88.
30. *Douglas O'Connor v Uber Technologies lnc* Case 3:13-cv-034260EMC, dated 11 March 2015, p. 10.
31. *Aslam and others v Uber B.V. and others* [2017] IRLR 4, paragraph 90.
32. Ibid paragraph 91.
33. Ibid.

ers provide the skilled labour through which the organisation delivers its services and earns its profits'.[34] The ET was persuaded by the fact that Uber interviewed and recruited drivers, controlled the key passenger information, set the default route, fixed the fare, imposed conditions on, instructed and controlled drivers, subjected drivers to a rating system that amounted to performance management, handled complaints about drivers, reserved the right to unilaterally amend the drivers' terms and accepted the risk of loss that would usually fall on the drivers if they were genuinely in business on their own.[35] Given these considerations, the ET was satisfied that the drivers fall 'full square' into the definition of a worker in the ERA.[36]

Having decided on the core issue, the ET went on to discuss the implications of the decision given the specific facts, holding that Uber London Ltd, rather than Uber B.V., was the employing entity and determining the parameters of the Claimants' benefits under the NMWA.[37] However, less than a year on from the decision, it is already clear that it will have implications far beyond the working arrangements of the parties.

5. Implications for the industry

The *Uber* decision was quickly followed by a succession of similar cases, each affirming the ET's application of the legal framework to the gig economy. In the first, *Dewhurst v CitySprint UK Ltd*, the ET followed similar reasoning in holding that a bicycle courier was a worker under the ERA and not an independent contractor.[38] In *Pimlico Plumbers Ltd and Mullins v Smith* the Court of Appeal upheld the decision of the ET that a plumber was a worker and not self-employed.[39] While the facts and reasoning in the *Pimlico Plumbers* case differed slightly to the *Uber* and *CitySprint* decisions, it is clear that a trend has been established when applying the legal framework to the gig economy. This was confirmed by the ET in both *Boxer v Excel Group Services Ltd* and *Gascoigne v Addison Lee Ltd*, where it was held that bicycle couriers were workers for the purposes of the WTR.[40] The apparent certainty of this trend was evident when eCourier settled an upcoming case in the ET by admitting that it unlawfully classified its couriers as independent contractors.[41]

It should be remembered that, as previous ET decisions are not binding on future tribunals, guidance from appellate authority will be essential in solidifying the current approach. However, given the current trend, it would be reasonable to expect that a dispute involving Deliveroo before the Central Arbitration Committee at the end of May 2017 will be decided in the same way as the *Uber* decision.

However, despite the general trend of ET decisions, employers within the gig economy are attempting to turn back the tide. Most notably, this has involved Pimlico Plumbers Ltd appealing to the Supreme Court and the Respondents appealing the *Uber* decision to the EAT. At the time of writing, these appeals are still to be heard. However, while some employers in the gig economy are hoping to reverse the direction in the courts, others are attempting to do so commercially. In advance of the decision of the Central Arbitration Committee with respect to the status of Deliveroo's drivers, it has been reported that Deliveroo has offered to pay drivers per job rather than per hour in the hope of reinforcing their status as independent contractors.[42] Such commercial planning should be expected over the coming months, as employers seek to adapt their business models in order to reinforce the status of their staff as contractors rather than workers. The possibility of employers successfully doing so was acknowledged by the ET in the *Uber* decision, stating that 'none of our reasoning should be taken as doubting that the respondents *could* have devised a business model not involving them employing drivers. We find only that the model which they chose fails to achieve that aim'.[43] If the appeals in the *Pimlico Plumbers* and *Uber* decisions are rejected, employers in the gig economy will undoubtedly race to find the 'perfect model' that will allow them to maintain the status quo that they have found to be so profitable. If no such model can be found, the *Uber* decision could signal the beginning of the end of the gig economy, which has thrived and expanded based on the flexibility offered to both customers and contractors.

We should, nevertheless, be careful of pronouncing such a verdict too soon. Even if employers are unable to reverse the current trend legally or commercially, recent political developments have indicated that there is a willingness to legislate in order to both guarantee a satisfactory level of protection for those who work in the gig economy and allow for the continuation of the innovative and flexible working arrangements which have proved successful. Most notably, the final report of the Independent Review of Employment Practices in the Modern Economy, led by Matthew Taylor and known as the 'Taylor Review', was published on 11 July 2017.[44] Perhaps the most significant recommendation in

34. Ibid paragraph 92.
35. Ibid paragraph 92.
36. Ibid paragraph 93.
37. Ibid paragraphs 98-128.
38. *Dewhurst v CitySprint UK Ltd* ET/2202512/2016.
39. *Pimlico Plumbers Ltd and Mullins v Smith* [2017] EWCA Civ 51.
40. *Boxer v Excel Group Services Ltd* ET/3200365/2016; *Gascoigne v Addison Lee Ltd* ET/2200436/2016.
41. 'First gig-economy company to admit to unlawfully classifying its couriers as independent contractors', 12 May 2017, <www.iwgb.org.uk>.
42. T. Wallace, 'Deliveroo offers workers pay per trip in bid to defuse self employment row', 1 June 2017, <www.telegraph.co.uk>.
43. *Aslam and others v Uber B.V. and others* [2017] IRLR 4, paragraph 97.
44. Good Work: The Taylor Review of Modern Working Practices.

the final report is that the definition of a worker be redefined in order to provide more clarity and consistency, and a new employment status be introduced, that of a 'dependent contractor', in order to provide limited protections and benefits for those working in the gig economy.[45] While such proposals are only recommendations to be considered at this stage, the on-going Business, Energy and Industrial Strategy Committee inquiry into the future world of work is likely to add further support to the growing body of opinion that argues it is necessary to amend the legal framework currently operating in the UK.

6. Relevant legal framework in the Netherlands

In principle, the Netherlands has a binary system: a working relationship is an employment contract, or if there is no relationship of subordination it is a contract for services. As the dividing line between being self-employed and an employee can be fairly narrow, it is important to briefly discuss under what circumstances, and facts, the working relationship of an individual who is presented as self-employed qualifies as an employment contract within the meaning of article 7:610 Dutch Civil Code (**DCC**). A contract will qualify as an employment contract; if one of the parties – the employee – commits personally towards the other party – the employer – to perform work (i) for a period of time in service of this opposite party, (ii) in exchange for payment, (iii) by which the parties operate in a relationship of subordination. Subordination and the obligation to personally perform the work are the key considerations in this definition: if the subordination requirement is not satisfied and there is no obligation to perform the work personally, there generally is a contract for services (article 7:400 DCC) or a contract to realise work (article 7:750 DCC). Case law instructs that an assessment of all circumstances of the case is always necessary when determining whether there is a relationship of subordination between the employer and employee or between the principal and contractor. A 'limited degree of authority' could be enough to determine that there is a relationship of subordination; however, the ability to provide instructions on how the job is done is insufficient for the presence of a relationship of authority, the ability to give at least a certain degree of formal instruction is required.[46]

Although it does not affect the fact that the principal and the contractor can make arrangements with respect to the extent to which the principal may instruct the contractor and whether the contractor has the right to replace himself, the statutory starting point is that in principle the contractor works independently – i.e. without having a relationship of subordination with the principal – and, moreover, is free to arrange for a replacement. Within this context, it should be noted that the mandatory provisions with respect to the employment contract are written to protect the party in a dependent position (i.e. the employee); the parties cannot evade the statutory regime by calling the contract something different (e.g. when a self-employed contractor has a contract named 'contract for services' or 'contractor agreement', it could be in fact an employment contract).[47] Therefore, when answering the question whether the individual is an employee or self-employed contractor, the elements (i) and/or (ii) above are usually the 'bottleneck'.[48]

Since the *Groen/Schoevers* ruling, the assessment whether there is subordination and thus an employment contract or a contract for services is made on the basis of an evaluation of all circumstances of the case, where no single factor is decisive, which is called the 'holistic approach'.[49] Not only the intention of the parties when entering into the contract, but also how the contract is performed in practice and the social standing of the parties are the important factors here.[50]

Thus, when determining whether an individual is self-employed, it is relevant: (i) whether there is a relationship of subordination between the parties; (ii) whether the individual is exposed to a commercial and financial risk; and (iii) to what extent the individual is part of and embedded in the economic organisation or business of the principal.[51] If the work is performed in a relationship of subordination in the organisation or as part of the employer's organisation, and belongs to the employer's ordinary activities, an employment contract will quickly be assumed.[52] A self-employed contractor is therefore an individual who performs work outside any relationship of subordination concerning the choice of activity, payment or working conditions, under that individual's own responsibility, and to whom the compensation is paid directly and in full.[53] Thus, compared to an employee, a self-employed contractor enjoys more freedom and flex-

45. Ibid Chapter 5.
46. See e.g.: Supreme Court 14 April 2006, *NJ* 2007/447, with annotation Verhulp (*Beurspromovendi*); Court of Appeal 's-Hertogenbosch 15 November 2016, ECLI:NL:GHSHE:2016:5109.
47. L. van den Berg, 'Dwingendrechtelijke omschrijving arbeidsovereenkomst in art. 7:610 BW', in: *Flexibele arbeidsrelaties, Monografieën Sociaal Recht* nr. 25, <www.navigator.nl>; Court of Appeal The Hague 1 September 2015, *JAR* 2015/242 (*FNV/Kiem*)
48. Asser/Heerma van Voss 2015 (7-V), nr. 20.
49. See e.g.: Supreme Court 17 February 2012, *NJB* 2012/551 (*B-notarissen*).
50. Supreme Court 14 November 1997, *NJ* 1997/263 (*Groen/Schoevers*); Supreme Court 13 July 2007, *JAR* 2007, 231.
51. See e.g. Court of Appeal The Hague 1 September 2015, *JAR* 2015/242 (*FNV/Kiem*).
52. Supreme Court 15 September 2006, *JAR* 2006/244 (*Slipschoolinstructrice/ANWB*).
53. See e.g.: Court of Appeal Arnhem-Leeuwarden 6 August 2013, ECLI:NL:GHARL:2013:5856; Court of Appeal 's-Hertogenbosch 28 January 2014, ECLI:NL:GHSHE:2014:183.

ibility in determining his working schedule, place and contents of his work but is exposed to a financial and commercial risk.

Although the Netherlands does not formally have a three-way system as in the UK, the current tax and social legislation provide for the protection of certain individuals who are not an employee but also not a self-employed contractor on a (fairly) limited scale. For Dutch income tax, wage tax and social security purposes, the law distinguishes three categories, being: (i) the employment relationship, (ii) the deemed employment relationship and (iii) self-employment. In relation to payments made by the principal to the self-employed contractor no wage withholding tax, which is a pre-levy to the income tax due by the self-employed contractor, and social security premiums are due by the principal.

The self-employed contractor is liable for his own income taxes and – depending on his self-employed status – could also be entitled to specific benefits for entrepreneurs. The employment relationship, on the other hand, results in the employer having to withhold wage withholding tax and paying social security premiums with respect to the employee. A similar holistic approach is taken in assessing whether a working relationship qualifies as an employment relationship for Dutch income tax, wage tax and social security purposes. This means that a substance over form approach is taken rather than only looking at the contract entered into between the principal and the contractor.

Pursuant to a deeming provision, i.e. a section or statutory provision, that explicitly states how something is to be treated or regarded, certain relationships are qualified as a deemed employment relationship based on the elements laid down in article 7:610 DCC a working relationship would not qualify as an employment relationship, but nevertheless is treated as an employment relationship for tax purposes.[54] The law identifies this category in order to extend the obligation to withhold wage tax for these working relationships since they resemble employment relationships, for instance working relationships with musicians, artists, sportsmen and individuals working for other individuals in their home for at least four days a week (e.g. cleaners working for individuals, nannies and private cooks). To add to the complexity, the status of the deemed employment relationship does not always imply that the principal should also pay social security premiums with respect to an individual.[55] We note, however, that the working relationship of Uber drivers would not be captured by the deeming provisions.

54. *Kamerstukken II* 1962/63, 5380, nr. 23, p. 4 within the context of the Wages and Salaries Tax Act 1964; Supreme Court 18 April 1951, *BNB* B.9002.
55. Articles 4 and 5 Sickness Benefits Act, Unemployment Insurance Act and Work and Income (Capacity for Work) Act; Article 1 Besluit aanwijzing gevallen waarin arbeidsverhouding als dienstbetrekking wordt beschouwd, *Stb.* 1986, 665 (*Rariteitenbesluit*).

6.1. Relevant case law

The *PostNL* cases, 11 individual cases with similar facts, share certain features with the *Uber* decision. They concerned couriers who delivered parcels for PostNL on the basis of a transport service agreement. The couriers got paid for each package they delivered through submitting an invoice to a self-billing system. They had to invest in their own van, have a VAT number and needed to register with the Chamber of Commerce. In three of these cases an employment contract was found between PostNL and the courier despite the fact that they were entitled to replace themselves.[56] In eight other cases, it was held that the fact that: (i) PostNL set specific requirements with respect to the van they drove; (ii) the couriers received detailed instructions from PostNL with respect to the way the work was performed (e.g. regarding their work clothing and footwear and how they wore the parcel scanner) and PostNL performed checks in that regard; and (iii) the couriers were economically dependent on PostNL and there was a lack of independence, did not constitute enough to hold that there was an employment contract. The decisive factor in these cases appeared to be that while the couriers were not allowed to structurally replace themselves – in practice – this was done anyway.[57]

In the other three cases, other than the elements of an employment agreement as set out in article 7:610 DCC, the fact that just before the commencement of their contract of services with PostNL the couriers registered themselves as self-employed contractors with the Chamber of Commerce played an important role. Particularly due to the nature of the work, (i.e. unskilled and low-paid work with a high 'level of production') the District Court North Holland doubted that the couriers realised, and perhaps could not be expected to do so given their circumstances, the extent to which they would become economically independent from PostNL.[58] Therefore, the District Court Amsterdam held a month later that considering the strict conditions under which the work had to be performed, and due to their economic dependency it was almost impossible for the couriers to negotiate about that framework, the im-

56. District Court North Holland 18 December 2015, ECLI:NL:RBNHO:2015:11226; District Court North Holland 18 December 2015, *JIN* 2016/98 with annotation S.E. Bos and W.J. Moll; District Court Amsterdam 14 January 2016, ECLI:NL:RBAMS:2016:152.
57. District Court Central Netherlands 6 January 2016, *AR Updates* 2016-014; Cantonal Court Eindhoven 10 February 2016, *AR Updates* 2016-0157; Court of Appeal Amsterdam 5 July 2016, ECLI:NL:GHAMS:2016:268; Court of Appeal Arnhem-Leeuwarden 18 August 2016, *AR Updates* 2016-0928.
58. District Court North Holland 18 December 2015, ECLI:NL:RBNHO:2015:11226, paragraph 4.9; District Court North Holland 18 December 2015, *JIN* 2016/98 with annotation S.E. Bos and W.J. Moll, paragraph 4.9.

age of a relationship of subordination was created more than that of a self-employed contractor.[59]
Another important consideration was that the couriers were not entitled to structurally provide for a replacement and that the replacement had to be approved by PostNL; like Uber drivers, replacements were obliged to provide PostNL with a certificate of good conduct and a copy of their driver's licence and pass a specific test. It follows from these three cases that failure to always personally perform the work does not automatically mean that the requirements set out in article 7:659 DCC are not met. This, in combination with the reasons set out above, according to the District Court North Holland, required protection of the couriers and to attach less importance to the parties' (written) intention.[60]
The couriers being dependent on one principal (e.g. PostNL) played an important role, and may even have been the decisive factor, in concluding that in reality there was indeed an employment contract between PostNL and the couriers.

7. Impact of *Aslam and others v Uber B.V. and others* in the Netherlands

The key question highlighted in this article is whether the providers of services through digital platforms or apps, like Uber drivers for example, are really self-employed. In order to answer this question it must be determined whether such individuals operate in a relationship of subordination, or dependence, with the platform companies. Can they refuse a request to perform a task, for example? Do their rates take account of the fact that they utilise and have to maintain their own assets, that they lack cover if they get sick or involved in an accident, that they should be paying social security contributions and that they pay for their own insurance?
Ultimately, addressing the qualifications within article 7:610 DCC and answering such question comes down to a holistic weighing-up of all the facts and circumstances. These facts must be considered in combination with each other; no single circumstance can be decisive. The parties' intention when entering into the agreement, the way the agreement operates practically and the social position of the parties are all relevant factors. The nature of the holistic approach could lead to a different qualification of the working relationship in cases with a similar body of facts. The *PostNL* cases are a perfect example of this.
In the *PostNL* cases, where no employment contract was found, the parties' intention appeared to be an important factor. The parties' intention was concluded from all facts and circumstances. For example, a parties' intention was concluded in some cases from the fact that a courier refused PostNL's offer of an employment contract.[61] In a number of *PostNL* cases, it was noted that the couriers had to hire assistants as they were provided with too much work for one person. This was regarded as indicating that they were self-employed contractors.[62] In other cases, the fact that couriers were already performing work as 'self-employed couriers' for a longer period of time was considered relevant.[63]
It follows from the Uber decision that Uber drivers are obliged to comply with a long list of detailed requirements imposed on them by Uber. Furthermore, they are graded and subject to termination, based on their failure to adhere to these requirements (e.g. rules regarding conduct with their customers, the tidiness of their vehicles, their timeliness in picking up customers and taking the shortest route to their destination, what they are allowed to discuss with their customers) or their failure to meet customer service standards – as determined by Uber. Uber is in the business of providing a car service to clients; that is the service that Uber drivers provide. The drivers are fully integrated into Uber's organisation, and without the drivers, Uber's business would not be able to exist.
Taking into account these factors as well as current legislation and regulations, it can be concluded that while there are some indications of Uber drivers' independence, the overriding evidence establishes that Uber exercises sufficient direction, supervision, and control over key components of the services rendered by the drivers such that a relationship of subordination is created. However, it is still by no means certain whether this reasoning still matches the continuous modernisation of the labour market. The increased individualisation and autonomy of employees has led to a different approach to employment relationships; employers can no longer exercise a significant influence on the work as carried out by their employees, who have become increasingly less subordinated. Moreover, companies are increasingly only willing – and even able – to have their work carried out by self-employed contractors, as they consider employment contracts an impediment. It can be favourable to have the work carried out by self-employed contractors as they are not covered by (mandatory) collective arrangements that apply to employees. Therefore, the mandatory protection of employees can even be seen as an obstacle to their position in

59. District Court Amsterdam 14 January 2016, ECLI:NL:RBAMS:2016:152, paragraph 19.
60. District Court North Holland 18 December 2015, ECLI:NL:RBNHO:2015:11226, paragraph 4.9; District Court North Holland 18 December 2015, *JIN* 2016/98 with annotation S.E. Bos and W.J. Moll, paragraph 4.9.
61. District Court East Brabant 12 January 2016, ECLI:NL:RBOBR:2016:83; District Court Amsterdam 11 July 2016, ECLI:NL:RBAMS:2016:4521.
62. Court of Appeal Amsterdam 5 July 2016, *JAR* 2016/291, paragraph 3.3; District Court East Brabant 12 January 2016, *AR Updates* 2016-0046, paragraph 4.10.
63. District Court Amsterdam 11 July 2016, *AR Updates* 2016-0756; District Court Amsterdam 14 January 2016, ECLI:NL:RBAMS:2016:153; District Court North Holland 18 December 2015, ECLI:NL:RBNHO:2015:11230.

the labour market. For example, Deliveroo is currently replacing its couriers with an employment contract for self-employed contractors.[64] Deliveroo argues that their couriers will benefit from this transition as their compensation will be higher (i.e. €5 per stop instead of €6 minimum hourly wage) and they can decide when and how long they work. However, the transition has led to parliamentary questions and criticism from the Minister of Social Affairs and Employment (**Minister of SAE**). He criticised that companies like Deliveroo and UberEats evade employee contributions by not providing for insurance and pension for their couriers.[65]

We can conclude that the labour market is changing rapidly, particularly in recent years. Work is increasingly being performed on a project or 'gig' basis. Furthermore, economic dependency is no longer reserved for employees only, with self-employed contractors also becoming economic dependants. This was made clear in a recent judgment of the Den Bosch Court of Appeal, where it was held that when evaluating whether there is an employment contract the capacity of the parties should be taken into account, in view of the economic dependency and the ensuing compensation for inequality in labour relations. However, additionally it considered that economic dependency carries little weight when qualifying the working relationship, given the current timeframe, where large numbers of individuals choose to work as self-employed contractors or freelancers but are just as dependent on the income from that work.[66]

In response to these changes, the Ministry of Economic Affairs (the **Ministry of EA**) has recently directed more attention to the gig economy and new revenue models, products and services. In July 2015, the Ministry of EA noted that more attention needed to be given to the gig economy, as well as to the introduction of legislation that is suitable for the future.[67] On 30 September 2015, the then Minister of SAE requested the advice of the Social and Economic Council of the Netherlands (SEC) regarding the effects of technological developments on the labour market and working relationships. The advice provided by the SEC on 18 October 2016 suggested that we stand on the eve of the fourth industrial revolution with technological developments such as robotisation and digitalisation ensuring that production and work will look completely different in 50 years from now.[68]

Parliament has acknowledged that a potential consequence of the advent of platform companies is further technological innovation that will allow for new ways to link supply and demand and the replacement of current forms of work. In response to this, it has indicated that it wishes to provide platform companies with new forms of work that will allow for this further development, while preventing damage to the labour standards.[69] The SEC is currently investigating the relationship between platforms and the organisation of labour for this end.[70]

The gig economy is most likely here to stay. Therefore, it is clear that making it fair should be a priority. The question that remains is whether the concept of the employment contract, with the accompanying protection and subordination, can operate effectively within the gig economy. Dissatisfaction clearly exists among certain groups of service providers (among others, Uber drivers), but also in groups of employers, who consider the (statutory) protection related to employment contracts an impediment. Therefore, in order to match the developments in the labour market, the definition of 'employment contract' and the related protection should be evaluated and, if required, adjusted.

A great deal of thought and consideration should be given to the way forward, as the rules and regulations adopted now will determine in what way the digital platforms are allowed to operate. If we want a spirit of enterprise brought into the digital platforms, then risk-taking entrepreneurs will be required, whether in forming the platforms or operating as self-employed contractors within them. However, how do we assure such individuals that by accepting the flexibility offered they will be beneficiaries of the growing gig economy and not victims? Stated simply, new rules and regulations will determine the gains to be had and risks to be faced in the future. In the *Uber* decision the existing definitions of labour law were successfully applied to Uber's gig economy business model. However, it is strongly recommended, also in the Netherlands, to assess whether the existing definitions are still aligned with the way in which work is currently organised. It could even be considered to introduce a three-way system, as in the UK, creating an intermediate form of contract, half way between an employment contract and a contract for services.

64. *Kamerstukken II* 2016/17, nr. 2017Z11033; see e.g.: J. Leupen, 'Alle koeriers in loondienst geleidelijk vervangen door zelfstandigen', *Het Financieele Dagblad*, 22 augustus 2017, <www.fd.nl>.
65. Ibid.
66. Court of Appeal Den Bosch 19 July 2016, *AR Updates* 2016-0935.
67. Letter to Parliament from the Minister of Economic Affairs dated 20 July 2015, 'Ruimte voor vernieuwing door toekomstbestendige wet- en regelgeving'.
68. SER (2016) *Verkenning en werkagenda digitalisering; Mens en technologie: samen aan het werk*, 18 October 2016.
69. Letter to Parliament from the Minister of Social Affairs and Employment dated 13 February 2017, 'Kabinetsreactie op SER-verkenning 'Mens en Technologie: samen aan het werk'', p. 7.
70. Ibid.