

Platform Economy in China and Germany
Labour Law Policy Recommendations for Decent Work

February, 2023

Contents

0. Introduction	1
1. The Platform Economy and the Social Problems that Come with It	6
1.1. Algorithms and the Related Problems	6
1.1.1. Challenges to Labor Law Protection by Algorithmic Technology	6
1.1.2. Response Strategies in China	9
1.1.3. Response Strategies in Germany.....	12
1.1.4. Summary	14
1.2. Definition of the “Employee”	14
1.2.1. Definition of “Employee” in China and Germany.....	14
1.2.2. New Features of Platform Employment.....	21
1.2.3. Practices of Avoiding Labor Relations in Platform Employment	23
1.2.4. Reasons for Confusions in Labor Relation Identification in China.....	26
1.2.5. Summary	30
1.3. Social Security.....	30
1.3.1. Emergence and Development of Social Security.....	30
1.3.2. Challenges to Social Security Brought by Platform Employment	31
1.3.3. Reasons for Detachment from Social Insurance	32
1.3.4. Summary	33
1.4. Reputation	33
1.4.1. Consumer Rating-Driven Reputation Systems	33
1.4.2. Intangible Assets of Online Work	34
1.4.3. Distorted Systems Unfriendly towards Workers	35
1.4.4. Summary	38
1.5. Self-Organisation.....	38
1.5.1. Challenges to Trade Union Organizations	38
1.5.2. China’s Response Measures	42
1.5.3. Germany’s Response Measures	45
1.5.4. Summary	47

2. Recommendations	48
2.1. Algorithms: Digital Social Rights	48
2.1.1. Further Clarifying the Standard of Algorithmic Transparency.....	48
2.1.2. Further Strengthening Human Intervention Mechanism.....	49
2.1.3. Playing More Active Roles by Labor unions and the Government.....	50
2.2. Definition of the “Employee”	50
2.2.1. Taking Liability by Jointed Subjects	50
2.2.2. Establishing Legal Criteria for Determining Labor Relations	51
2.2.3. Improving Regulations on Part-time Employment	54
2.2.4. Reversing the Burden of Proof	55
2.2.5. Exploring Improvements Suitable to Platform Employment.....	55
2.3. Social Security.....	56
2.3.1. Improving the Social Insurance Payment System.....	56
2.3.2. Improving the Monitoring and Responsibility System	57
2.4. Reputation	58
2.4.1. Broadening the Scope of Application.....	58
2.4.2. Strengthen democratic management	59
2.4.3. Regulating the Transfer of Reputation Data	60
2.5. Self-Organisation.....	60
2.5.1. Adopting More Inclusive Union Membership Policies	61
2.5.2. Creating Organizational Models Suitable to Platform Workers.....	61
2.5.3. Expanding the Coverage of Collective Bargaining	62
2.5.4. Promoting Cross-regional Industrial Collective Bargaining	62
3. Conclusion	62

0. Introduction

The platform economy began to emerge in Europe in the early 2000s. Driven by rapidly-developing technological innovations, such as the internet and the widespread use of mobile devices and online applications, it has been evolving dynamically, taking new forms, creating business models that go beyond previous categories while influencing the organization of work and working conditions.

The rapid development of the platform economy has led to a speedy evolution of platform employment. In 2018, it was estimated that in 16 EU Member States, there are about 11% workers engaged on digital platforms based on surveys (percentage of adult population).¹ An investigation conducted in 2017 in Germany showed that for a vast majority of platform workers, internet platforms are only one among several options to obtain paid work assignments.² Although the number of people working in the platform economy is not as high as in China, there is a clear upward trend. It is expected that people working on digital labour platforms in the EU will increase to 43 million platform workers by 2025.³

Compared with EU countries, the Chinese platform economy has been developing more quickly. According to the China Sharing Economy Development Report (2020), there are about 78 million workers relying on internet platforms for employment.⁴ In 2021, the annual growth rate of market transaction scale was about 9.2%, significantly higher than the previous year.⁵ Information from the China National Bureau of Statistics reports that by the end of 2021, China's flexible employment⁶ has reached about 200 million people (29.3% of the working population) and 61.14% of the enterprises are using workers in the forms of flexible employment.⁷

With the fast growth of the platform economy, platform employment has brought new challenges to the traditional labor law system. Many platform companies deny the existence of

1 World Employment and Social Outlook 2021: The role of digital labour platforms in transforming the world of work
International Labour Office – Geneva: ILO, 2021. p. 49.

2 The Incidence of Platform Work in Germany, Analysis of a survey commissioned by the Federal Ministry of Labour and Social Affairs

3 Rüdiger Krause, Auf dem Weg zur unionsrechtlichen Regelung von Plattformtätigkeiten, 522NZA.8/2022, p. 522.

4 Sharing Economy Research Center of State Information Center: Report on the Development of China's Sharing Economy (2020), p. 8.

5 Sharing Economy Research Center of State Information Center: Report on the Development of China's Sharing Economy (2022), p. 2.

6 Flexible employment is a general term for one or more aspects of labor time, payment of income, workplace, social insurance, and labor relations that differ from the traditional dominant forms of employment based on the modern factory system., See Institute of Labor Science of Ministry of Human Resources and Social Security of China: A Research Report on Flexible Employment in China (2002).

7 <http://www.chinairn.com/hyzx/20220210/085244936.shtml>.

labor relations with platform workers. Platform workers are mostly excluded from the application of labor laws, which are based on clear labor relations and provide protection for employees in many aspects, such as statutory working hours, minimum working standards, industrial injury insurance, etc.

From the perspective of labor protection, Chinese platform workers have long working hours, are exposed to high hazards, lack organization, and thus need labor law protection. According to a survey, 65.3% of the respondents worked 8-14 hours a day, and 10.8% worked more than 12 hours.⁸ Long working hours greatly increase the danger at work. In the first half of 2017, in the city of Nanjing, there were 3,242 traffic accidents involving electric bicycles for food delivery, resulting in 3 deaths and 2,473 injuries, of which food delivery riders were responsible for 94% of the accidents.⁹ Most of the platform workers are not union members, which increases their vulnerability.

In Europe and Germany, platform work in judicial practice is recognized as labor relationship by some courts, providing the protection of labor law and social insurance law to workers. Those judgments have been effective in curbing the denial of labor relations by platforms, but new problems cannot be completely addressed by case-law alone in Europe and Germany yet. In China, the need for platform employment protection is more pressing. While the inappropriateness of the existing system is becoming more and more obvious and a new system has not yet been formed, some employment practices of platform enterprises are in the "gray area", resulting in insufficient protection of workers' rights and interests in many cases..¹⁰

China and Germany are developing new policies

During the early stages of the development of the platform economy, the Chinese government has been active in encouraging the development of platform employment. In 2015, The State Counsel issued "The Guiding Opinions on Promoting the 'internet plus' Action "(Guo Fa [2015] No.40), proposing to "form a new form of economic and social development with the internet as its infrastructure and innovative element." This encouragement stems from the huge employment pressure in China. The number of newly employed people in China is huge every year. It is estimated that only in 2022, the number of newly employed people will reach 13 million,¹¹ which

8 CHEN ET AL., The disembedded digital economy: Social protection for new economy employment in China, Social Policy Administration, 2020; 1-15, wileyonlinelibrary.com/journal/spol.

9 Geng Zhichao: "There were 3,242 takeaway and food delivery traffic accidents in Nanjing in half a year, and "Meituan" accounted for nearly 50%", <http://js.people.com.cn/n2/2017/0906/c360303-30702395.html>.

10 China Sharing Economy Development Report (2022), p. 11.

11 "The 2022 Economic Blue Book" was released, and the number of new urban jobs is expected to exceed 13 million in 2022. <https://news.cctv.com/2021/12/07/ARTIzEvtW9HVGmXDhagzaPk211207.shtml>

explains why the Chinese government has always emphasized that employment is the first livelihood of the people.

Platform employment also has certain new features. The skill requirement for employment is low; the working hours are flexible; the workers bring their own labor tools; the customers pay directly to the workers; the platforms provide order information and charge service fees on a per-order basis. All these are quite different from traditional employment models.

With the quick development, the competition among the platform companies is becoming more and more fierce. Platforms also try to achieve competitive advantages by negating labor relations, reducing labor costs and extorting labor efficiency. The Chinese government is becoming aware of the problems associated with the rapid development of the platform economy and therefore emphasizes the need to reach a balance between development and the protection of workers. In 2020, the National Development and Reform Commission and other 13 departments issued "the Opinions on Supporting the Healthy Development of New Business Forms and Models, Activating the Consumer Market and Promoting Employment Expansion", stressing that suitable protections should be provided to the workers with the development of platform economy.¹²

The Chinese government is focusing on the issue of injuries suffered by platform workers in the course of work, and is currently conducting pilot projects in seven provinces and cities on occupational injury insurance for flexibly employed workers on platforms in an attempt to integrate it into the existing industrial injury insurance system. Except for work-related injuries, there are no policies in place for labor and social protection.

Germany has formulated some policies on the protection of platform employees, and there are judicial guiding cases. Hubertus Heil, the Minister of Labor, issued a list of key points of fair work in platform economy, and proposed to crack down on false self-employment and reverse the burden of proof. On December 1st, 2020, the Federal Labor Court (BAG) issued a decision, according to which crowdsourcing workers can also be identified as employees with labor relations under certain conditions.¹³

In terms of the nature of platform work, it is essentially work for the better operation of society. The workers provide services to the whole society, instead of their own families. Therefore, they should be included in fundamental labor and social insurance protection. However, the new characteristics of platform employment also require a more in-depth study of its characteristics and causes, so as to find out tailored measures to regulate it.

12 National Development and Reform Commission and other thirteen ministries and commissions: "Opinions on Supporting the Healthy Development of New Business Forms and New Models and Activating the Consumer Market to Drive Employment Expansion" [2020] No. 1157.

13 [Eine%20wichtige%20Entscheidung%20für%20die%20digitalisierte%20Arbeitswelt«.html](#)

Technological advancement calls for changes in regulation

The existing labor and social security regulation models were established in the context of the industrial revolution, with labor in the factories as the standard case. However, technological progress has changed the traditional labor model to a large extent. This could be easily understood from the phenomenon that the number of employees in the service sector has surpassed the number employed in the industrial manufacturing companies. Platform economy and platform employment are new revolutions in the service sector driven by technological progress in recent years.

In labor law, the core criterion in identifying labor relations is the characteristic of subordination, which means that in the process of work the worker is under the control of the employer. The worker shall follow the working rules and the orders from the employer. In the platform employment, the instructions received by the workers are issued by the platform system that is based on the algorithmic technology aiming at maximum efficiency. The opaqueness of algorithms makes it difficult for government agencies to regulate them and even harder for workers to challenge them. Therefore, to strengthen the regulation of platform employment, we need to primarily focus on the regulation of algorithms.

Workers are generally the weaker party in the relationship with employers. The only way for the workers to obtain better labor conditions and wages is to organize unions and conduct collective bargaining. In traditional companies, workers engage in collective and collaborative work, share common interests, and therefore can easily organize unions. But in the platform employment, every worker works alone, having no chance to communicate with others. In addition, each platform worker needs to compete with others, otherwise he/she would lose the opportunity to obtain orders. Such characteristics create difficulties for platform workers to organize unions for representing their collective interests.

Rating mechanisms are an effective means commonly adopted by platform companies to control the quality of work performance. Traditional companies have internal management systems to monitor and evaluate the work performance of workers. In contrast, it is the consumers who evaluate the workers' service in the platform economy. The records and ratings of service the workers have achieved constitute their digital reputation on the platform. A good reputation will increase their orders and incomes, while a poor reputation will decrease orders, or even result in job loss. However, reputations on each platform are non-transferable and incompatible. Even though a good reputation brings benefits to workers, it also creates restrictions on their mobility to other platforms.

Why we are writing this paper

From the history of labor law and social insurance law, it is well known that labor law came into being because laborers were excessively exploited and needed legal protection. Social insurance laws came into being because the risks arising from industrial employment needed socialized legal solutions. Therefore, when discussing how to protect platform workers under the platform economy, the basic concepts of avoiding excessive exploitation and providing social protection to workers who provide labor to the society are of key importance. Thus, this paper is based on the following three notions:

Labor relation harmony

Labor relations are an important part of the relations of production and one of the most basic and important social relations. On March 21, 2015, the Central Committee of the Communist Party and the State Council of China issued *the Opinions on Building Harmonious Labor Relations*, which points out that whether labor relations are harmonious or not is related to the vital interests of the majority of employees and enterprises, as well as economic development and social harmony; party committees and governments at all levels are required to deeply understand the great significance of building harmonious labor relations, earnestly enhance their sense of responsibility and mission, regard the construction of harmonious labor relations as an urgent task, place them in a more prominent position, and take effective measures to grasp them well.

The goals and tasks proposed in *the Opinions on Building Harmonious Labor Relations* include strengthening the laws, systems, mechanisms and capacity building for adjusting labor relations, realizing more standardized labor employment, continuous improvement of labor conditions, effective protection of employee safety and health, comprehensive coverage of social insurance, effective prevention and resolution of labor relations contradictions, and the establishment of standardized, orderly, just and reasonable, mutually beneficial and harmonious and stable labor relations. To achieve these goals, reasonable norms for platform employment should be established as soon as possible.

Decent work

In 1999, the International Labour Organization defined the concept of decent work in order to reflect the workers' universal work rights and interests. The concept of decent work is based on a consensus that “work” is fundamental in achieving personal dignity and family stability, promoting community safety and democracy of the people, and driving economic growth that provides more productive jobs and business development. “Decent” emphasizes that work is not

just about getting a job, but about being able to earn a fair income, to ensure safety in the workplace and to obtain social protection for one's family. It is clear that where there is a lack of decent work, there will be poverty, inequality, social tension or social conflicts.

The Chinese government representatives have stated many times at the International Labour Conference that achieving decent work is the universal aspiration of workers all over the world, and China will make unremitting efforts for all workers to have decent jobs.¹⁴ In reality, some platform employees work long hours all year round and do not have any social insurance. Therefore, in order to achieve the goal of decent work, we must pay attention to and address the basic rights and interests of platform workers.

Balance among industries

According to China's current laws and regulations, employers, no matter what industry they are in, shall abide by labor laws and regulations in the process of employing workers, and shall assume social insurance responsibilities for workers. However, many platforms have evaded the liabilities of labor laws and social insurance laws by various ways. Such practices have created unfair competition advantages for platforms relative to traditional industries.

Unbalanced labor costs among employers in various industries will undermine fair market competition, infringe on the legal rights of workers, and create a substantial risk for social security.¹⁵ Currently, the platform economy is thriving but, at the price of unequal application of laws, which is not sustainable in the long term.

1: The Platform Economy and the Social Problems that Come with It

1.1. Algorithms and the Related Problems

1.1.1. Challenges to Labor Law Protection by Algorithmic Technology

Algorithms are mechanisms of interactive decision-making between humans and machines, i.e. a set of mechanisms for humans to make decisions through code setting, data computing and automated machine judging.¹⁶ As a new economic model based on digital technology, platform

14 Han Fangming: Realizing decent work is one of the Chinese dreams of workers, <https://opinion.huanqiu.com/article/>.

15 Fan Wei, The Dilemma of Rights Protection of Internet Platform Practitioners and Its Analysis of Judicial Adjudication, *Journal of Chinese Resources Development*, No. 12, 2019.

16 Ding Xiaodong, "On the Legal Regulation of Algorithms," *Chinese Social Sciences*, Vol. 12, No. 12, 2020, p. 141.

enterprises commonly use algorithmic technology to continuously optimize enterprise employment management, which brings challenges to labor law protection.

(i) Discrimination Issues

Algorithmic technology may cause discrimination and inequality in the labor market due to its automated decision-making.¹⁷ There are two main aspects:

First, the bias of algorithm design, that is, the selection of parameters and the setting of weights in the design and development stages of algorithms are in the hands of algorithm designers, whose intentional or unintentional bias may be reflected in the design of algorithms.¹⁸

Second, the bias of data samples. The algorithm makes assumptions by continuously analysing existing data. But in this process, the algorithm can neither ensure the comprehensiveness of the data samples nor can it identify discriminatory data samples, which may lead to discriminatory results for certain groups.¹⁹

In practice, the discrimination generated by platform companies using algorithms can occur both at the recruitment stage and at job evaluation. On one hand, platform companies collect a large amount of workers' data, which is fed into the algorithm system and used as the information basis for its operation. Among them, sensitive information such as workers' gender, age, physical condition, and criminal records are also collected and processed by the algorithm system.²⁰ The algorithm classifies and scores workers based on the above information according to the employment preference criteria defined by the platform companies, and automatically excludes candidates who do not meet their criteria. On the other hand, the use of seemingly neutral algorithmic rating by platform companies may also lead to indirect discrimination results.

For example, the Italian company Deliveroo offers riders a flexible self-booking system that allows riders to log into the system at different times each Monday and book the hours and areas they wish to take orders. The later a rider enters the system, the fewer work opportunities they get. The time at which riders are able to log into the system is determined by the platform's algorithm. The algorithm included as an important parameter "whether the rider did not perform the job as scheduled". However, the court found that this algorithm produced discriminatory results because the worker would lose the opportunity to prioritize his work because of legitimate reasons such as participation in a strike, illness or child care. Therefore, this type of algorithm

17 Arianne Renan Barzilay, Data Analytics at Work: A View from Israel on Employee Privacy and Equality in the Age of Data-Driven Employment Management, 40 Comp. Lab. L. & Pol'y J. 421,425 (2018).

18 Zane Muller, Algorithmic Harms to Workers in the Platform Economy: The Case of Uber, 53 Colum. JL & Soc. Probs.167,180 (2019).

19 Ignacio N. Cofone, Algorithmic Discrimination Is an Information Problem, 70 Hastings L.J. 1389,1440 (2019).

20 Xu Zhihua, Xie Caixia, "Research on the Challenges and Regulation of Platform Economy Algorithm Employment", in Ningxia Social Science, Vol. 3, No. 2022, p. 101.

constitutes a form of indirect discrimination.

(ii) Privacy Issues

The platform enterprise algorithm operates on the basis of the collected workers' data, but there is a risk of how the data is collected and relating to the privacy of workers.

Platform companies usually use digital tools and devices, such as apps, location trackers, biometric technologies, wearable devices, implantable technologies, etc., to collect data and information,²¹ while the workers themselves are often unaware of their data being collected. Workers' communication devices contain not only their work information, but also their personal data, which may also be exposed to algorithmic systems.²² For example, Lieferando, Germany's largest food delivery service provider, has been accused of over-supervising its riders' data information.²³

(iii) Occupational Safety Issues

Algorithms, as an invisible management tool for platform companies, can have an impact on the occupational safety of platform workers if they over-prioritize economic efficiency.

First, the operation rules of some platform enterprises' algorithms excessively pursue efficiency and ignore the protection of workers' occupational safety. Take some Takeaway Platforms as an example, where the algorithm provides route navigation for the riders, and the primary goal is the shortest time with the fastest speed, which sometimes may produce impractical route plannings such as, riding on the wrong side or taking overpasses,²⁴ which leads to the frequent traffic accidents.

Second, the algorithmic reward and punishment mechanism induces excessive labor problems. Some platform companies set strict criteria for working hours, workloads and work continuity in the algorithm system, and automatically rate workers' behaviors based on these criteria.²⁵ The algorithm system gives priority to workers with higher ratings and reduces the amount of work available to workers with lower ratings. In order to be rewarded with more assignment, those workers who rely on platform work to survive are forced to complete a large

21 Richard A. Bales & Katherine V.W. Stone, *The Invisible Web at Work: Artificial Intelligence and Electronic Surveillance in the Workplace*, 41 Berkeley J. Emp. & Lab. L. 1,1 (2020).

22 Xu Zhihua, Xie Caixia, "Research on the Challenges and Regulation of Platform Economy Algorithm Employment", in *Ningxia Social Science*, Vol. 3, No. 2022, p. 101.

23 Josef Forster, Bericht enthüllt: Lieferando soll Fahrer ausspionieren - Datenschützer sind schockiert, <https://www.merkur.de/wirtschaft/lieferando-fahrer-datenschuetzer-deutschland-scoober-app-tracking-essen-bestellung-just-eats-takeaway-90662488.html>.

24 Yuxuan Lai, "Food delivery riders, stuck in the system," *People*, No. 8, 2020, p. 74.

25 Zheng Wenrui, *Legal Analysis and Legislative Response to the Change of Labor Relations in the Era of "Internet+" --- Qualification of Labor Relations on Internet Platforms*, *Social Science*, Vol. 1, No. 1, 2021, p. 91.

number of platform orders continuously for long hours and efficiently, which further increases the risks of occupational safety accidents.

1.1.2. Response Strategies in China

In response to the challenges posed by algorithms to the protection of platform workers' rights, China has made initial responses through legislation, regulations and policies. Specific measures are as follows:

(i) Strengthen the Protection of the Rights of Personal Information

China enacted the Personal Information Protection Law in 2021 to strengthen the protection of the rights of personal information, which helps to limit the illegal collection and use of workers' personal information by platform companies.

On the one hand, the legislation gives individuals the right to know and decide on the handling of their personal information and the right to restrict or refuse the handling of their personal information by others. Therefore, the processing of workers' personal information by platform companies shall be subject to their voluntary and explicit consents.²⁶ On the other hand, if the worker's personal information falls within the scope of sensitive personal information as stipulated in the legislation, such as biometric, religious beliefs, specific identity, medical and health care, financial accounts, whereabouts, etc., platform companies shall comply with the requirements of "having a specific purpose and sufficient necessity", "taking strict protection measures" and "obtaining specific consent from an individual".²⁷

Therefore, the platform companies should be subject to the above restrictions when collecting and processing platform workers' information, especially the sensitive personal information.

(ii) Promote the Openness and Transparency of Platform Companies' Algorithms

First, although the Personal Information Protection Law does not explicitly mention the word "algorithms," the regulations on automated decision-making are closely related to the issue of algorithms.²⁸ For example, Article 24 of the Law stipulates that when personal information processors use personal information to make automated decisions, they shall ensure the

²⁶ Articles 14 and 44 of the Personal Information Data Protection Law of PRC.

²⁷ Articles 28 of the Personal Information Data Protection Law of PRC.

²⁸ Tian Ye, The Progression of Labor Law in the Regulation of Platform Employment Calculation Law, Contemporary Law, Vol. 5, No. 2022, p. 140.

transparency of the decisions and the fairness and impartiality of the results, and shall not apply unreasonable differential treatment to individuals in terms of transaction prices and other transaction conditions. The individual has the right to request clarification from the personal information processor for the decisions that significantly affect the rights and interests of the individual through automated decision making, and the right to refuse to accept the personal information processor's automated decision-making.

Second, the State Internet Information Office and nine other ministries and commissions promulgated the "The Guiding Opinions on Strengthening Comprehensive Governance of Algorithms for Internet Information Services" in 2021, which is China's first specialized regulation of algorithms. It requires that algorithms should be open and transparent, and enterprises should be urged to disclose information on algorithm fundamentals, optimization goals, decision criteria and other information in a timely, reasonable and effective manner, and make a good preparation of interpretation of the algorithm results.²⁹

According to the above provisions, the platform enterprises should ensure the transparency of their algorithms and the non-discriminatory nature of the algorithm results. As the owners of their personal information, the platform workers should have the right to know how their information is processed by the algorithm system, and have the right to ask the platform enterprise to explain the results; after learning about the algorithm decision results, they should have the right to agree or reject the processing of their information by the platform algorithm.

(iii) Clarify Algorithm Use in the Field of Employment

In addition to the general rules for algorithms, China has also made special requirements for algorithm use in employment. On July 10, 2021, the State Administration of Market Supervision issued Guidance on the Implementation of the Responsibility of Online Catering Platforms to Effectively Safeguard the Rights and Interests of Take-away Food Delivery Workers, which makes clear provisions for the use of algorithms in the online food delivery industry, incorporating the requirements for the protection of rights and interests of workers. Specifically, they are as follows: The food delivery platforms should optimize their algorithms, and shall not take the strictest algorithm for assessments. They should take a middle way, and reasonably determine the number of orders, on-line rating by customers and other assessment elements, and appropriately relax the delivery time limit. At the same time, the food delivery platforms should use data technology, so as to further improve the order assignment mechanism, optimize routes and reduce labor intensity. Order saturation should be scientifically determined. Safety should be fully taken into account

²⁹ *Guidance on Strengthening the Comprehensive Governance of Internet Information Service Algorithms* (State Information Office Document [2021] No. 7).

when assigning concurrent orders to food deliverers. Working hours should be reasonable controlled. After the continuous delivery of orders for more than 4 hours, the system should issue a fatigue alert, and no orders should be dispatched within 20 minutes.³⁰

In July 2021, the Ministry of Human Resources and Social Security of China and other ministries and commissions issued the Guiding Opinions on Safeguarding Labor Security Rights and Interests of Workers in New Employment Forms, which makes provisions for the use of algorithms in new employment forms from a macro perspective, i.e., “to supervise enterprises to develop and revise system rules and platform algorithms directly related to the workers’ rights and interests such as platform entry and exit, order allocation, piecework unit price, draw ratio, compensation composition and payment, working hours, rewards and punishments, etc., to fully listen to the opinions and suggestions of trade unions or workers’ representatives, and publicize the results and inform the workers”.³¹ This, de facto, treats the “algorithm” as an enterprise regulation.³² Workers have the right to be informed and to propose algorithmic rules on matters of significant interests to them.

In December 2021, the State Internet Information Office and four other departments promulgated the Regulations on the Administration of Algorithmic Recommendation of Internet Information Services to strengthen the obligation of algorithms to protect the rights and interests of workers at the regulatory level. According to the document, if an external service provider uses algorithm to set up work schedules, he should protect the workers’ legitimate rights and interests, such as obtaining labor compensation, rest and leave, and establish and improve algorithms related to platform order distribution, compensation composition and payment, working hours, rewards and punishments.³³

Thus, in general, China is trying to regulate platform algorithms by strengthening the protection of personal data information, promoting algorithm transparency and integrating the protection of workers’ rights into algorithm design. Driven by the introduction of such policies and legislation, some platform companies have also taken the initiative. For example, Meituan has made public the algorithm rules of order distribution through its official WeChat account, explained the algorithm logic and principles of order distribution, and launched the functional innovation of “post-order adjusting” and “rider-activated reassignment” based on the problems in

30 *Guidance on the Implementation of the Responsibility of Online Catering Platforms to Effectively Safeguard the Rights and Interests of Take-away Food Delivery Workers* (Issued by National City Supervision and Net Supervision [2021] No. 38.

31 *Guiding Opinions on Safeguarding the Labor Security Rights and Interests of Workers in New Employment Forms*, Issued by Ministry of Human Resources and Social Security, No. 56 [2021].

32 Xie Zengyi, *The Legislative Approach to the Protection of Labor Rights and Interests of Platform Workers*, Chinese and Foreign Law, Vol. 1, No. 1, 2022, p. 121.

33 See *Regulations on the Administration of Algorithmic Recommendation of Internet Information Services* (State Internet Information Office, Ministry of Industry and Information Technology of the People’s Republic of China, Ministry of Public Security of the People’s Republic of China, State Administration of Market Supervision and Administration Order No. 9.

the operation of the algorithm.³⁴ However, because the legislation and policy documents do not stipulate detailed rules for platform algorithm disclosure and transparency, , much depends on the voluntary disclosure of platforms so far. Further legislation is still necessary.

1.1.3. Response Strategies in Germany

Regarding the challenges arising from platform algorithms for the protection of workers, the EU and Germany mainly respond to them through the following rules.

(i) Prohibiting Discrimination against Platform Workers

On the issue of discrimination, the German General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz, or AGG) is applicable to platform workers. Specifically, the Act includes “employee-like workers” into the definition of employee and stipulates that the prohibition of discrimination in recruitment and promotion is equally applicable to self-employed persons.³⁵ Thus, from the perspective of German anti-discrimination legislation, platform workers, regardless of their status, are at least able to claim discrimination protection.

However, the AGG also has some problems in dealing with new types of discrimination originating from the use of algorithms. On the one hand, direct and indirect discrimination on the basis of race, ethnicity, gender, religion and other beliefs, disability, age and gender identity are prohibited under the AGG regulations.³⁶ However, algorithms may circumvent these explicit grounds of discrimination by adopting political views, biometric features, etc.³⁷ The platform companies may set other variable factors, such as work experience, to exclude older workers.³⁸ On the other hand, the AGG does not provide a collective redress mechanism, and individual redress may be difficult to implement because of the difficulty of obtaining evidence of algorithmic discrimination.³⁹ For this reason, how to expand the scope of application of the AGG and improve the remedy mechanism are the focus of reform to deal with algorithmic discrimination in Germany.

34 See Regulations on the Administration of Algorithmic Recommendation of Internet Information Services (State Internet Information Office, Ministry of Industry and Information Technology of the People's Republic of China, Ministry of Public Security of the People's Republic of China, State Administration of Market Supervision and Administration Order No. 9.

35 § 6 Persönlicher Anwendungsbereich, AGG.

36 § 6 Persönlicher Anwendungsbereich, AGG.

37 Orwat, Carsten: “Risks of Discrimination through the Use of Algorithms”, Berlin: Federal Anti-Discrimination Agency (2020), p74.

38 Algorithm Watch: Algorithmic Discrimination – How to adjust German anti-discrimination law, <https://algorithmwatch.org/en/algorithmic-discrimination-law/>

39 Orwat, Carsten: “Risks of Discrimination through the Use of Algorithms”, Berlin: Federal Anti-Discrimination Agency(2020), p72.

(ii) Restricting Access to Workers' Data and Establishing Basic Privacy Guidelines

Data protection in Germany is mainly regulated by the EU's General Data Protection Regulations (EU's GDPR) and the Federal Data Protection Act of Germany (Bundesdatenschutzgesetz, or German BDSG), some of which are conducive to the data protection of platform workers.

Article 4 of EU's GDPR provides that "personal data" means any information relating to a data subject, including name, social security number, geographic data, IP address or a range of physical, genetic, psychological, economic, cultural or social factors of the natural person that can be used to identify that person. Article 7 of EU's GDPR establishes the rules for data processing based on the principle of consent, emphasizing that the genuineness of the intention given by the data subject should be taken into account. Although EU's GDPR does not explicitly provide for labor relations as a special case, given the unequal status of the parties to the labor relations, a higher standard of scrutiny is usually required for the expression of consent by the workers.⁴⁰

The German BDSG then makes special provision for data issues related to employment purposes, further limiting the conditions for the processing of employee data by employers. According to Article 26 of the German BDSG, personal data of employees may be processed for employment purposes when the following circumstances exist: (1) when it is necessary to make an employment decision, to conclude or terminate an employment contract, to exercise or perform the rights and obligations of employee representatives; (2) when there are written reasons to believe that the data subject has committed a crime in the course of employment and that the employee's personal data are used for crime detection. In addition, if the employer processes the employee's personal data on the basis of the employee's consent, it should also assess whether the consent was given on the basis of free will.

(iii) Enhancing the Transparency of Platform Algorithms

Chapter 3 of the EU's GDPR sets out the rights of data subjects to achieve fairness and transparency in algorithms by giving them the right to information, access, correction and deletion, and freedom from automated decision-making. Based on EU's GDPR, when the algorithmic for evaluating workers or assigning jobs are not transparent, platform workers have the right to access the evaluated data information and to request corrections if the evaluation is inaccurate. For algorithmic systems that automate decision-making, platform workers have the right to request human intervention in the decision-making process, to express their views, and to challenge

40 Wu Wenfang, "Application and Limitation of Consent in the Processing of Workers' Personal Information," Chinese Jurisprudence, 2022, No. 1, p. 231.

decisions.⁴¹

German domestic trade union organizations are also actively advocating for greater transparency in platform algorithms to safeguard the workers' right to know. In a position paper on the platform economy, the Deutscher Gewerkschaftsbund (DGB) said that platform evaluation systems should be transparent, and that both the DGB and its member unions claim that the platform workers, regardless of their status, should have the right to know the information about the data collected by the platform and the degree of workers' supervision. The platform companies should be transparent in classifying, ranking and rating workers, and the personal data collected that falls within the scope of EU's GDPR must be informed and explained to platform workers, and the platform companies should not refuse to disclose the above information on the grounds of commercial confidentiality.⁴² Therefore, enhancing the transparency of algorithms is also a strategy that EU and German trade unions are actively promoting, but it remains to be seen how it will be implemented in practice.

1.1.4. Summary

Algorithmic technology has posed risks to the protection of platform workers in terms of discrimination, privacy, and occupational safety. The common focus of both China and Germany is to limit the use of platform workers' data by platform companies from the perspective of personal information protection and to enhance algorithmic transparency to ensure fair and reasonable algorithmic decision-making. However, the relevant measures are still too principled and need to be further refined and implemented.

1.2. Definition of the “Employee”

1.2.1. Definition of “Employee” in China and Germany

(i) Definition of “Employee” in China

In Germany and other European countries a labor relation is established between an employer

41 Michael 'Six' Silberman and Hannah Johnston, Using GDPR to Improve Legal Clarity and Working Conditions on Digital Labour Platforms: Can a Code of Conduct as Provided for by Article 40 of the General Data Protection Regulation (GDPR) Help Workers and Socially Responsible Platforms? Working Paper 2020.05, ETUI, p.8.

42 Deutscher Gewerkschaftsbund: “The German Trade Union Confederation’s Position on the Platform Economy”, available at <https://www.dgb.de/downloadcenter/++co++6a41577e-a1ea-11eb-bae1-001a4a160123>, last accessed on 10th September, 2022.

and an employee, while in China it is between an employing unit [用人单位] and a laborer [劳动者]. For convenience, the concepts of employer and employee are used consistently in this paper.

In accordance with the current laws in China, only the employees that have labor relations with the employers could have the protections of labor and social insurance laws. However, there is no definition of employee in the current labor law in China, and the identity of the employee is judged through the existence of a labor relation, and the labor relation is judged through a written labor contract. In accordance with Article 16 of Labor Law of China (1995), an employee and an employer shall enter into a written labor contract when establishing a labor relation.

In Labor Contract Law of China (2008), the requirement of a written contract is further strengthened. Article 10 of Labor Contract Law of China (2008) stipulates that a written labor contract shall be concluded for the establishment of a labor relation, otherwise, where an employer which has not concluded a written labor contract with an employee for more than one month and less than one year from the date of employment, it shall pay the employee twice the monthly wage according to Article 82 of Labor Contract Law of China (2008).

But in practice, many employers did not sign written contracts with employees before 2008 when the severe double wage penalties for not signing written contracts were introduced. In 2005, the Ministry of Labor and Social Affairs issued the Notice on Matters Related to the Establishment of Labor Relations⁴³ (hereinafter refer to as “2005 Notice”). Article 1 of the 2005 Notice stipulates that if an employer recruits a worker and does not enter into a written labor contract, but meets the following conditions at the same time, the labor relationship is established: (1) the employer and the worker meet the subject qualifications prescribed by laws and regulations; (2) various work rules and regulations formulated by the employer in accordance with the law are applicable to the worker, and the worker is subject to the management of the employer, and engages in the paid labor arranged by the employer; (3) the labor provided by the worker is an integral part of the employer's business.

In current judicial adjudications of China, Article 1 of 2005 Notice has been the main basis for determining labor relations. The reason is that the provision includes two important criteria: personal and economic subordination, which are considered the most important attributes of labor relations in many countries. It is explained that work rules applicable to the worker embodies the criterion of personality subordination and that the worker engaging in the paid labor that is an integral part of the employer's business embodies the criterion of economic subordination.

In the labor arbitration and lawsuits in China, where there are no written labor contracts, or written contracts with other titles such as co-operative contract, civil labor service contracts or

43 Notice on Matters Related to the Establishment of Labor Relations, Office of Ministry of Labor and Social Affairs (2005) No. 12.

entrusting contracts, etc., labor relationships are judged by the criteria in the 2005 Notice. If the labor relations are confirmed, the identity of the employees are also confirmed, thus, the employees would have the protection of the labor laws and social insurance laws.

However, it is not easy to conclude that there is a unified judicial standard for identifying labor relation in China. Although Article 1 of 2005 Notice covers a variety of external features of labor relations, including work rules, labor management and paid labor etc., different courts may have different interpretations. Without the rule of following the precedents, it is difficult to form one unified interpretation.

(ii) Definition of “Employee” in Germany

In Germany, the concept of employee is also very important for employees to obtain the protection of labor and social insurance law. The first three important social insurance laws in Germany, the Sickness Insurance Law, Accident Insurance Law and the Disability and Retirement Insurance Law, are aimed at employees.⁴⁴

In Germany, there is also no definition of employee in the legislation. A famous labor law expert named Alfred Hueck gave an academic definition for “employee” in his classic Textbook of Labour Law, which stated that “an employee is a person who provides service to others under a private contract and is obligated to provide labor service” and that definition is widely accepted.⁴⁵

Paragraph 611a of the German Civil Code (BGB), which came into force on April 1, 2017, contains a decisive norm on when a worker can be classified as “an employee”, and stipulates: “According to the employment contract, the employee is obliged to serve others in the case of personal dependence, be bound by instructions and be determined by others.” Being bound by instructions and determined by others (external determination) are two characteristics that each have an independent meaning.⁴⁶

The criterion of external determination covers “in particular contractual arrangements deviating from the normal type of employment contract” and shows itself in particular in the integration into the work organisation created by the employer.⁴⁷ Whether integration alone is sufficient to establish the status of employee remains a little unclear, as it is stated shortly before

44 Lin Gengsheng: Recent Discussion and Legislation on the Concept of Labor in German Law, Chief Editor: Cai Dunming, Selected Judgments in the Labor Law (III), Taiwan Yuanzhao Publishing Company, 2000 Edition, page 2.

45 Wang Qian: The Determination of Labor Relations in German Law, Jinan Journal (Philosophy and Social Sciences Edition), No. 6, 2017.

46 Sittard/Pant, jM 2021, 416, 418; Söller, NZA 2021, 997, 1000; MünchArbR-Temming, § 18 Rn. 19, from Wolfgang Däubler, “Crowdworker als Arbeitnehmer”, p. 10. <https://www.daeubler.de/wp-content/uploads/2022/10/2204Crowdworker-als-Arbeitnehmer.pdf>, accessed 12th April 2023.

47 BAG (Fn. 28) Tz. 31, from Wolfgang Däubler, Crowdworker als Arbeitnehmer? p. 10. <https://www.daeubler.de/wp-content/uploads/2022/10/2204Crowdworker-als-Arbeitnehmer.pdf>, accessed 12th April 2023.

that only if there is no obligation to follow instructions is there "as a rule" no employment relationship. Exceptions are therefore permitted.⁴⁸

In fact such criteria is a reflection of changes in the organisation of production. In traditional societies, the family was the most basic unit of production, and its members bound by kinship ties could work autonomously or collaboratively. In industrial societies, the enterprise becomes the most basic production unit. As modern enterprises are both highly differentiated, workers are dependent on the orders of their employers and are subject to external control over the process of their work, and are not able to work autonomously as they wish.

Traditionally, the family members worked harmoniously together for their common benefits. However, the modern enterprises are organizations established by employers with the purposes to make profits. Naturally, there are conflicts of interest between employers and employees, which were the main reasons for the creation of labour laws aiming at the protection of employees.

The Imperial Labor Court proposed that the key to distinguish between labor contracts and labor service contracts should be whether the service provider has "personality dependency" on the service recipient. The Federal Labor Court of Germany mainly takes the following factors as the judgment criteria: whether the worker is incorporated into the enterprise organization, whether the service that the worker provides is under the instruction of the employer, and the time and place of work are determined by the employer instead of the worker, and emphasizes that the degree and extent of its subordination should be judged according to the overall situation of the case, so as to determine whether it is the basis of labor relation.⁴⁹

As for economic subordination, it is not the main focus of the distinction. Because, in German labor law, the characteristic of the quasi-labor relation is that the "employee-like person" only have economic subordination. Therefore, in German law, the definition of employment is only based on the personal subordination and not on the economic subordination.⁵⁰

The norm set up in Paragraph 611a of the German Civil Code (BGB) is based on the German judicial experience. It is clear from the legislative history of the provision that the legislature intended to codify the case-law of the BAG. Unfortunately, however, the legislator did not take advantage of the opportunity to take on the new forms of employment, especially in the platform economy.⁵¹ The regret has been compensated for to some extent, because on 1 December 2020 the BAG issued a decision according to which crowd-workers can be employees under certain

48 Wolfgang Däubler, Crowdworke als Arbeitnehmer? p. 10.

<https://www.daeubler.de/wp-content/uploads/2022/10/2204Crowdworke-als-Arbeitnehmer.pdf>, accessed 12th April 2023.

49 Lin Gengsheng: Recent Discussion and Legislation on the Concept of Labor in German Law, Chief Editor: Cai Dunming, Selected Judgments in the Labor Law (III), Taiwan Yuanzhao Publishing Company, 2000 Edition, p. 3.

50 Ibid, p. 3.

51 Henssler/Pant, RdA 2019, 322; Sittard/Pant, jM 2021, 416, from Wolfgang Däubler, Crowdworke als Arbeitnehmer? p. 9.

<https://www.daeubler.de/wp-content/uploads/2022/10/2204Crowdworke-als-Arbeitnehmer.pdf>, accessed 12th April 2023.

conditions, which will be introduced in the later part of this paper.

In accordance with the current generally accepted theory in Germany, the employee with labor relation is not a concept, but actually a type, and its scope cannot be clearly defined in a single and abstract way. The judgement is wholly based on the facts of the case and the degree of measuring the relevant characteristics. The Federal Labor Court of Germany emphasizes that the degree of personal subordination of workers should be taken as the judgment standard, and there is no universally applicable standard, and the judgment should be based on the actual situations of the employment contract.⁵²

From the concrete labor law cases, we can see the factors that the judges consider when deciding whether a worker is an employee with labor relation. For example, a driver who owns a truck registers as an individual businessman, but he carries goods for a transportation company. According to the requirements of the company, the driver's truck is painted with the marks and colors of the company, and the driver is also required to wear the uniforms of the company when working for the company. The company also has the rights to inspect the cleaning and equipment of his truck, the goods transported, and decide when the vehicles should be refueled and repaired. And the goods must be delivered within the time specified by the company, so that the driver and the truck must be ready to provide services between 6:00 am and 4:00 pm. Actually, it is almost impossible for the driver to deliver goods for other customers. The company prohibits the driver to carry goods for other customers while carrying goods for the company. In general, the above restrictions imposed by the transportation company have severely limited the driver's discretion when providing labor services. Therefore, the driver is identified as an employee of the transportation company.⁵³

Conversely, if the driver only transports goods on behalf of a transport company, but the amount and time of work could be decided by the driver, and it is actually possible that the driver could transport goods for his own customers, then the driver is not an employee of the transportation company. As for whether he actually delivers goods for his own customers, it is not that important ⁵⁴

In Germany, there is an academic point of view that, due to factors such as the adoption of new production, management, operating organizations, enterprise transformation, market competition pressure, and the requirements for loosening labor laws, if we still take the traditional "subordination" standard for blue collar workers in factories as the standard to distinguish employees from other workers, proper protections will not be provided to those who do not have

52 Lin Gengsheng: Recent Discussion and Legislation on the Concept of Labor in German Law, Chief Editor: Cai Dunming, Selected Judgments in the Labor Law (III), Taiwan Yuanzhao Publishing Company, 2000 Edition, p. 4.

53 Ibid, p. 4.

54 Ibid, p. 5.

the subordination of personality but still need same social and economic protections that the traditional employees need.⁵⁵

In this regard, some scholars advocate that "labor" and "subordination" should be redefined. In that opinion, in principle, those who have the following characteristics are workers with labor relations: (1) long-term employment, (2) providing labor services for only one counterpart; (3) providing labor services in person without other assistants, (4) no investment important capital, and (5) no important production organizations. On the contrary, if a worker (1) voluntarily bears the business risks of his enterprise, (2) participates in market competition, and (3) there is a reasonable proportion between the benefits and risks of the enterprise's operation, it is an independent business person. This opinion has been approved by some lower courts.⁵⁶

(iii) Employee-like person in Germany

In German labor relations, the big difference with China is that there is a concept of an "employee-like person", the third category of workers other than employees and non-employees. The original word of like-employees is "arbeitnehmerähnliche Person", which can also be translated as "workers like employees". According to Paragraph 12a (1) of the Collective Contract Law (TVG), "employee-like persons" refer to those who have economic subordination and need preferential protection like employees.⁵⁷ Generally, employee-like workers have the following characteristics:

Firstly, unlike an employee, an employee-like person does not integrate into the business organization of the other party of the contract, and he does not need to submit or is rarely subject to its control and command structure, and there is no personal dependency between the employee-like person and the other party of the contract.⁵⁸

Secondly, a employee-like person must have an economic dependency on the opposite party of the contract, that is, the income obtained by the employee-like person from the contractual relationship constitutes his main economic source. If an employee-like person serves several customers at the same time, as long as his cooperation with one of them is crucial and his income from it accounts for more than half of the total income, he can also be considered as an economic subordination to the other party of the contract.⁵⁹

⁵⁵ Ibid, p. 7.

⁵⁶ Lin Gengsheng: Recent Discussion and Legislation on the Concept of Labor in German Law, Chief Editor: Cai Dunming, Selected Judgments in the Labor Law (III), Taiwan Yuanzhao Publishing Company, 2000 Edition, p. 7.

⁵⁷ Qiu Yufan: A Preliminary Analysis of Labor Protection and "like-employee" Legislation of Self-employed Workers — Taking German Law as Reference, Journal of Yuedan Law, No.314, 2021.7.

⁵⁸ Wang Qian: The Determination of Labor Relations in German Law, Jinan Journal (Philosophy and Social Sciences Edition), No. 6, 2017.

⁵⁹ Ibid.

Finally, an employee-like person requires specific protection different from an employee, which means that specific circumstances of the case should be taken into account, such as the level of income, whether there is some others to help in the process of work, and whether the worker can complete his own work tasks, and then the legal decision should be made based on the concept of social transactions. If the worker's dependence on the other contract party often only occurs in the labor relationship, the same work is generally performed by employees, then it is sure that he is an -employee-like person.⁶⁰

The Scope of employee-like persons. According to Article 12a (1) of the German Collective Agreement Law, there are several types of employee-like persons. The first type are those who are only employed by one employer in principle. “in principle” means most of the time, i.e. more than half of the worker's working hours. In this case, when the worker loses the job, it will endanger the basis of his survival.⁶¹

The second type is the one whose more than half total income on average is received from a specific employer. Besides, Article 12a (3) of the German Collective Agreement Law has a relatively loose special provision for those who are engaged in the technical design of art, literature or journalism services. On average, at least 1/3 of their total income needs to be received from a specific employer, which means that they are economically dependent with the need for social protection, such as free journalists, free writers, photographers or splicers. In line with the income standard of this type, even if workers provide labor services for multiple institutions, it does not hinder the establishment of their economic dependence and the recognition of the necessity of social protection.⁶²

The third type is a employee-like status in the individual case recognized by the German courts. For example, accountants in tax consulting firms, employees in customer service centers, lecturers in training centers or in private teaching institutions, freight drivers, freelancers in radio and television companies, radio toll collectors, etc.⁶³

What protections could employee-like persons have? On the one hand, the relationship between a employee-like person and the other party is regulated by the corresponding legal provisions according to the type of contract to which they belong. On the other hand, employee-like persons can also enjoy the protection of some labor laws and regulations. There are some laws

60 Ibid.

61 Qiu Yufan: A Preliminary Analysis of Labor Protection and "like-employee" Legislation of Self-employed Workers — Taking German Law as Reference, *Journal of Yuedan Law*, No.314, 2021. 7.

62 Ibid.

63 Ibid.

in which employee-like persons are explicitly included, including: (1) employee-like persons have the right to four weeks of statutory paid annual leave under the Federal Vacation Act (BUrlG). (2) they have the right to join the enterprise pension system. They can join the enterprise pension system in accordance with the Law on Improving Supplementary Endowment Insurance for Enterprises (Be trAVG). (3) they can enjoy the protection granted by the Labor Safety Protection Act (ArbSchG) and the General Equal Treatment Act (AGG). (4) *The Labor Court Law* (ArbGG) stipulates the jurisdiction of the labor court over disputes between employee-like persons and the other party to the contract. (5) Both parties to a collective agreement can also sign a collective agreement applicable to employee-like persons in accordance with *the Collective Agreement Law*.⁶⁴

The German courts are very cautious about the analogous application of the provisions originally applicable only to employees. At present, the only rules that can be analogically applied are the rules of non-competition and the employer's obligation to issue a work experience certificate after the termination of the labor relationship. In addition, the labor laws and regulations are basically not applicable to like-employees, such as the Termination Protection Act (KSchG) and the Continuing Wage Payment Act (EFZG).⁶⁵

Employee-like persons are basically excluded from the statutory social insurance system, but there is one exception: according to Item 9 of Article of Part VI of the Social Insurance Code (SGB VI), if like-employees themselves do not employ any other persons and basically only serve one customer for a long time, then such employees are obliged to participate in the statutory pension insurance, but they need to pay all the premiums themselves, and their customers do not have to bear half of the costs.⁶⁶

1.2.2. New Features of Platform Employment

Platform economy is a new economic system based on digital technology and composed of data-driven, platform supported and network coordinated economic activity units. Under the background of "Internet of things", platform economy has become a new economic model to comprehensively integrate the industrial chain and improve the efficiency of resource allocation.

Platform economy brings a large number of work opportunities. Platform work refers to that the workers obtain work tasks through electronic data from the platforms, and then provide services to customers. There are different kinds of platform work in China: (1) food delivery services,

64 Wang Qian: The Determination of Labor Relations in German Law, Jinan Journal (Philosophy and Social Sciences Edition), No. 6, 2017.

65 Ibid.

66 Ibid.

like Meituan, Ele.Me; (2) postal services, such as EMS, Shunfeng, Yunda, Zhongtong, Shentong, Yuantong, etc.; (3) taxi services, such as Didi, Gaode, T3, Caocao and dozens of other similar platforms; (4) freight services, Yunmanman, Huolala, etc.; (5) network anchor platform, such as Tik Tok, Huya, Kuaishou; (6) microwork, such as Zhu Bajie, 58 Tongcheng.

Around 2008, with the development of digital technology and equipment, takeaway platforms such as "Ele.Me" (2008), "Order Me" (2009), "Meituan Takeaway" (2013), and "Baidu Takeaway" (2015) emerged and expanded rapidly.⁶⁷ In the early development period of takeaway platforms, the platform companies established labor relations directly with riders or adopt labor dispatching to form employment relations with riders. Therefore, in judicial decisions, platform enterprises are required to bear sole responsibilities as employers⁶⁸ or joint responsibilities with the dispatching companies.⁶⁹

However, with the development of the platform economy, the competition between platforms became increasingly fierce. In order to reduce costs, takeaway platforms have been adjusting legal arrangements for riders since around October 2015.⁷⁰ Subsequently, almost all platform employers tried their best to adopt various legal designs to avoid the formation of labor relations with the platform workers. Under such efforts, in the specific judicial cases, labor relations were identified in some cases, while in other cases they were denied, which has brought about confusions in judicial practice and controversies in academic circles.

The reasons that the platforms emphasize their workers are of non-labor relation are based on new features. In platform employment, the responsibilities of the employers have changed in many respects: (1) from organizing production elements to connecting production elements; (2) from providing work tools by employer to that workers themselves bringing their own tools ; (3) from providing work to employees to grabbing orders by workers; (4) from paying salary to employees to service fees paid to the workers directly by customers; (5) from labor risks in closed workplaces to labor risks in outdoor areas. These new features have also led to disputes over the determination of labor relations.

67 Yongjun: The Evolution Practice of Meituan Distribution System, <https://tech.meituan.com/2018/07/26/peisong-sys-arch-evolution.html>, 2022 年 9 月 17 访问。

68 Beijing Zhicheng Migrant Worker Legal Aid and Research Center: An Analysis of Labor Relations of Cooperative Employment Model under Platform Economy: An Example of Takeaway Platform, <https://zgngm.org/wp-content/uploads/2021/09/zhicheng-report-on-food-delivery-workers.pdf>.

69 Beijing Xicheng District People's Court (2017) , Beijing 0102 Minchu No. 27267 Civil Judgment.

70 Beijing Zhicheng Migrant Worker Legal Aid and Research Center: An Analysis of Labor Relations of Cooperative Employment Model under Platform Economy: An Example of Takeaway Platform, <https://zgngm.org/wp-content/uploads/2021/09/zhicheng-report-on-food-delivery-workers.pdf>.

1.2.3. Practices of Avoiding Labor Relations in Platform Employment

In the western developed countries, the practice of avoiding labor relations with platform workers is comparatively simple. For example, in the relationship between Uber and its drivers, Uber emphasizes Uber drivers are independent contractors and that its operating characteristics are different from traditional enterprises, thus, hoping to avoid labor relations with the Uber drivers.⁷¹ The practices of avoiding labor relations with platform workers in China are more diverse and complex, which mainly includes:

First, cooperative employment by multi-employers. Workers take orders through the platform, but they need to sign a labor contract or civil labor service contract with a labor service company or a labor dispatch company designated by the labor service company. Their insurance may be purchased by the labor service company or another company entrusted by the labor service dispatch company, and their salaries may be paid by another entrusted company or an individual person. In judicial practice, courts are constrained by the relativity of the labor contract and only recognize the company that signed the contract as the employer,⁷² but the company may not be capable of assuming the employer's responsibility.

Under such arrangement, the platforms have set up "firewalls" of direct employment responsibility. The research group of Beijing Zhicheng Migrant Workers' Legal Aid and Research Center analyzed 1907 case decisions of different courts, and found that the legal segregation effect of this approach is significant in judicial practice, with less than 1% of food delivery platforms have been held to have labor relationships with riders.⁷³

The second pattern is a cooperative contract, which is very popular between online live broadcast platforms and anchors. Platforms formulate standard cooperative contracts in advance and sign them with workers in an attempt to exclude the labor relationships between the two parties. In this kind of contract, the platform agrees on fulfilling some obligations, such as training anchors and promotion, providing live broadcast equipment, guiding in the process of live broadcast, etc. The contract specifies the obligations of the anchor, such as the minimum number of hours of live broadcast and the service period; in addition, it also specifies the share ratio between the two parties and the damages for violating the service period.

Cooperation agreements are, on the surface, civil contracts. In cases of disputes between live

71 Wang Tianyu: On the Identification of Labor Relations Based on the Internet Platform to Provide Labor Services-Based on the Judgments of the Courts of "e-Driving" in Beijing, Shanghai and Guangzhou, Law Science, No.6, 2016.

72 Huang Hongtao: Rider died accidentally, complicated labor relations are difficult to identify, Workers' Daily, July 28, 2022, p. 7.

73 Beijing Zhicheng Migrant Worker Legal Aid and Research Center: An Analysis of Labor Relations of Cooperative Employment Model under Platform Economy: An Example of Takeaway Platform, p. 3. <https://zgnmg.org/wp-content/uploads/2021/09/zhicheng-report-on-food-delivery-workers.pdf>.

broadcast platforms and anchors, a low percentage of labor relations were held. From 2015 to 2017, through research on a lawsuit case net named “Wusong Net”[无讼网], there were total 28 cases of disputes between live broadcast platforms and anchors. Of the 28 cases, only 5 cases adjudicated by the courts were held to be labor relation.⁷⁴

The third pattern are outsourcing contracts. In China, the franchise system is commonly applied in the express delivery industry. The franchise could be divided into three categories: the franchisee at the receiving end, the franchisee for main-line transportation and the franchisee at the delivery end. The franchisee may be a company, or an individual industrial and commercial household, or an individual person.⁷⁵

Express delivery companies sign contracts with franchisees to avoid the establishment of labor relations with deliverymen. Although in some arbitration or litigation cases, the “contractors” are identified as employees of express delivery companies, most workers are denied of labor relations. Therefore, most workers in the express delivery industry cannot be protected by labor laws and social insurance laws.

The fourth pattern is the entrusting contract. In the driving-service industry, the service platforms generally sign an “entrusting driving agreement” with the drivers. For example, in the labor dispute cases of Zhuang Yansheng v. Beijing Yixin Yixing Automobile Technology Development Service Co., Ltd⁷⁶, Sun Youliang v. Beijing Yixin Yixing Automobile Technology Development Service Co., Ltd⁷⁷ and Wang Zheshuan v. Beijing Yixin Yixing Automobile Technology Development Service Co., Ltd⁷⁸, the drivers sued the platform company and requested the court to determine labor relation existed between the platform and the drivers. The evidence provided by the drivers include the platform company uniforms, company identity cards, entrusting driving agreements and service confirmation sheets, etc. The courts, based on the facts that the drivers did not have a fixed workplace and working hours, did not receive wages from the company on a monthly basis, held that the evidence submitted by the driver alone is not enough to confirm that the two parties have a labor relation.⁷⁹ Also, there are other cases where the companies sued the drivers and claimed that there is no labor relation, and the courts denied the labor relation. For example, in Jiangxi Yi Zhi Zhi Xing Auto Operation Service Co. v. Li Wanyin.⁸⁰

74 Pan Jianqing: Reflections on Online Livestreaming Employment Relations from the Perspective of Labor Law, Journal of China Institute of Labor Relations, No. 4, 2018.

75 Yang Xin: Regulating “new business formats”? The Impact of the Industrial Model of Express Delivery Industry on Labor Relations and the Adjustment of Legal Control, Chinese Resources Development, No. 2, 2018.

76 Beijing First Intermediate People's Court, (2014) Min Zhong Zi No. 6355.

77 Beijing First Intermediate People's Court, (2015) Min Zhong Zi No. 176.

78 Beijing First Intermediate People's Court, (2015) Min Zhong Zi No.01359.

79 Wang Tianyu: On the Identification of Labor Relations Based on the Internet Platform to Provide Labor Services-Based on the Judgments of the Courts of “e-Driving” in Beijing, Shanghai and Guangzhou, Law Science, No.6, 2016.

80 Nanchang Economic and Technological Development Zone People's Court, (2020) Gan 0192 Civil Minchu.No. 1221.

However, in cases where traffic accidents occurred in the process of driving, some courts held there were labor relations even in the case of entrusting contracts. For example, in the case of Beijing Yixin Yixing Automobile Technology Development Service Co., LTD v. Zhao Baochun concerning liability dispute arising from a traffic accident, the Second Intermediate People's Court of Beijing held that the fact that the driver receives the driving information through the internet platform showed that the driver accepted the work "assigned by the company", therefore, the company should bear the liability for compensation.⁸¹ However, there are also cases in which the labor relation was denied even if the drivers were injured in traffic accident. For example, in the case of Li Yongzhong v. Beijing Yixin Yixing Automobile Technology Development Service Co., LTD, the People's Court of Haizhu District of Guangzhou City held that there was an "entrusting driving agreement", so the traffic accident belonged to a "service contract dispute"; that the platform company only provided the driving information as a third party, therefore, the platform was not liable.⁸² in the similar case of Tian Min v. Beijing Yixin Yixing Automobile Technology Development Service Co., LTD⁸³, Beijing Shijingshan District People's Court held the same opinion. In dealing with a similar case, Shanghai Pudong New Area Court applied the standards stipulated in the Notice and held that the driver was controlled by the company during working hours, and the driver's performance of work was based on the company's instructions; and that the platform had a labor relation with the driver.⁸⁴

In addition, there is a popular type of work on the platform, crowdsourcing work. There is no statutory definition of crowdsourcing work, which literally means outsourcing work tasks through a platform and having the public do the posted tasks.⁸⁵ There are various crowdsourcing platforms in China, such as Zhu Bajie.com, Ganji.com and 58 Tongcheng, which post small tasks or provide information of professionals, forming a bridge between labor demanders and providers. This kind of labor service consists mostly of one-time job assignments, and according to Chinese law, it is a civil contract for labor service.

However, in China's food delivery industry, "crowdsourcing" refers to registered riders grabbing orders through an APP on cellphones to complete the corresponding delivery tasks.⁸⁶ This type of crowdsourcing differs from the above described in that riders need to register through

81 Beijing Second Intermediate People's Court, (2014) Min Zhong Zi No. 07157.

82 Wang Tianyu: On the Identification of Labor Relations Based on the Internet Platform to Provide Labor Services-Based on the Judgments of the Courts of "e-Driving" in Beijing, Shanghai and Guangzhou, Law Science, No.6, 2016.

83 Beijing, Beijing Shijingshan District People's Court, 2022, Minchu, 7320.

84 Wang Tianyu: On the Identification of Labor Relations Based on the Internet Platform to Provide Labor Services-Based on the Judgments of the Courts of "e-Driving" in Beijing, Shanghai and Guangzhou, Law Science, No.6, 2016.

85 Wolfgang Daubler, Digitalization and Labor Law: Internet, Labor 4.0 and Crowdsourcing, translated by Wang Jianbin, Lou Yu, et al., China University of Political Science and Law Press, 2022, pp. 253-254.

86 Yu Hui, The Dilemma of Labor Rights Protection of Platform Workers in China and the Path to Improvement, China Youth Social Sciences, No. 4, 2022.

an APP and generally provide full-time or part-time labor for a specific platform on a regular basis. Currently the platforms only sign electronic civil labor service contracts with riders. “In the crowdsourcing app, every other quarter, the APP system will prompt a pop-up notice for riders to confirm whether they will continue to work in the next quarter, full time or part time?”⁸⁷

Essentially, such crowdsourced workers who provide labor service on a specific platform may be full-time or part-time employees with a labor relationship. However, in practice, few claim the existence of labor relations, and almost none claim the existence of part-time labor relations. The reason why few people claim the existence of part-time labor relations is that the protection for part-time workers is very limited in China. Apart from the requirement of being included into industrial injury insurance, they do not have any special rights and interests than civil labor providers. This is worthy of rethinking on China's part-time employment legal system.

1.2.4. Reasons for Confusions in Labor Relation Identification in China

(i) Reasons in legislation and legal practice

It can be seen from the above introduction that the employment mode of the internet platforms has posed new challenges to the identification of labor relations, which has caused confusion in judicial practice and resulted in many contradictory judgments, which is an urgent problem to be solved. The reasons for this confusion are manifold.

First, the definition of employee is not clearly defined in the Chinese legislation, so there is no legal standard to be followed judicially. The Labor Contract Law of China requires the employer and the worker to sign a written labor contract.⁸⁸ However, this is essentially an external formalistic standard of recognition, which is, to a certain extent, one of the reasons why many platform companies have evaded labor relations by signing written contracts under other names, which is analyzed in 1.2.3. of this paper.

Second, although the Notice established the criteria for determining labor relations without signing a written labor contract, the Notice is actually only a referable policy, because according to the Legislation Law of China, the Notice is not a law and does not have legally binding power. Even if a decision of a labor arbitration or a court directly ignores or violates the Notice, it does not constitute a violation of law in nature.

Third, the legal system for dealing with labor disputes in China is briefly called “one arbitration

87 Mei Jing and Chen Mei (reporter of Financial News): Riders under the Icy Algorithm, Do the Meituan Treat Them as Employees? https://www.sohu.com/a/417564135_387251

88 In judicial practice, though the labor relationship could be recognized where the factual labor relation exists without a written contract, it is very difficult for the worker to prove the fact that the factual labor relation exists.

and two trials”, which means that a labor dispute case must first be arbitrated, and a lawsuit can be filed if the arbitration result is not satisfactory, and an appeal can be filed for a second trial if the first trial decision is not satisfactory. The labor cases in China mostly end in the intermediate people’s court. Only a very small number of cases could get the opportunity to be retried. This trial system makes each intermediate court an independent jurisdiction with final adjudication, resulting in the trial standards that vary widely from place to place.

Fourth, there is no precedent system in China’s judicial system, which means that the prior decisions are not legally binding on subsequent decisions, and the decisions of the higher courts are not judicially binding on the lower courts. Under this system, even if a few cases are granted retrials, the judgments rendered are not necessarily binding on the lower courts. The Chinese retrial system is designed to correct the cases that have been wrongly decided, not to create new standards of judicial discretion for the lower courts. Therefore, there is a need to establish clearer, more detailed and legally effective criteria for determining labor relations in Chinese justice.

(ii) Reasons in the social context

Of course, there are deep-seated reasons for such confusing and contradictory judicial decisions that make us reluctant to change the status quo of platform employment.

One is that China’s platform economy does promote employment. The judiciary may worry that if the judicial ruling is too strict, it may completely reverse the status quo of employment in platform enterprises, and may also lead to the unsustainable operation of platforms, resulting in the loss of jobs of platform employees and the increase of unemployment and other social problems, which will go against the concept of “employment is the first livelihood” advocated by Government.

Secondly, the platform employment in China is really welcome by young workers. One of the most important aspects of its attractiveness is the opportunity to earn a “high salary” not available in other industries. On the Tik Tok, a popular internet media, there are many videos shot by delivery boys and taxi drivers, narrating that they have realized their “dreams of earning more than 10,000 yuan a month”.

Thirdly, the whole Chinese society has enjoyed the benefits of the platforms that are not subject to the labor law. China’s platform services are among the best in the world in terms of price and efficiency. Strict application of the labor law control will have negative social effects, resulting in the loss of the price and efficiency advantages in China’s platform services. Due to the constraints of the labor law, the cost of platform services will be increased, which will make the society pay higher fees to obtain the service of the platforms.

The current tolerance of the de-regulation of labor law of platform employment may imply the

thought that China is originally a “dual social and economic structure of urban and rural areas”[二元城乡社会经济结构], and that migrant workers enter the market with the means of production given by the state, and they have free farming land, free homesteads, and the corresponding medical and pension protection systems in rural areas. Even if the majority of those employed on the platform as migrant workers are not protected by labor and social insurance laws, there will be no problem in the future, as they can return to the rural land. However, studies have shown that this thought is actually wrong. The younger generation of migrant workers, who have no experience in farming and no affinity to the land, are unwilling and unable to return to the rural areas.⁸⁹

China’s urbanization rate has increased from 17.9% in 1978 to 64.7% in 2021, and is expected to reach about 75% by 2035. The overall acceleration of urbanization and the high mobility of the population between urban and rural areas and regions are forcing China’s social security system to move toward uniformity and equity.⁹⁰ With the unstoppable trend of urbanization, we should include the platform workers among the protection of the labor law and social insurance law so as to prevent future potential risks and unbearable burdens.

(iii) Controversies on the regulation of platform employment in China

At present, there are two main views concerning platform employment among Chinese scholars:

one is that although platform employment has certain new features, they are only superficial, not essential, and thus there are no needs to establish incomplete labor relations.⁹¹ The other view is that some scholars believe that, since platform employment has new features, a new incomplete labor relationship should be established, and special regulations can be applied in terms of working hours, wages and social insurance, but workers should enjoy the same rights as those in traditional labor relationships in terms of fair employment and labor protection.⁹²

With regard to the protection of platform workers, the official statement of the Chinese government also tends to establish “incomplete labor relations”, which is similar to the concept of employee-like persons. We believe that the choice of this path must be taken very carefully.

First, in Germany, even where employee-like persons exist, platform employees have not been

89 Li Peilin, Tian Feng: The New Generation of Migrant Workers in China: Social Attitudes and Behavioral Choices, Society, No.3, 2011.

90 Zheng Gongcheng: China’s Social Security: Current Situation, Challenges and Future Development, China Social Security, No. 9, 2022.

91 See also: Chang Kai, Zheng Xiaojing: Employment relationship or cooperation relationship? -- Analysis of the Nature of Employment Relations in Internet Economy, Journal of Renmin University of China, No. 2, 2019.

92 Zhang Jing: Discussion on the Nature and Legal Application of “Incomplete Labor Relations”, Jiangsu Workers Daily, January 24, 2022, p. 7.

recognised as employee-like persons by any German courts. Judging from the existing judicial precedents in the world, the existing labor relation standards are used to make decisions on whether platform workers are employees with labor relations.

Second, if the "incomplete labor relation" is introduced rashly, and if the control is not strict, it may be abused and lead to the result that workers with actual labor relations being pushed into "incomplete labor relation". The experience of countries with a third type of workers in legislation, such as Italy and the United Kingdom, also shows that it is more difficult for workers to obtain labor relation after the introduction of "quasi labor relation" in law. On April 1, 2017, the German Civil Code implemented the newly added Paragraph 611a, which clarifies the definition of labor, and also aims to combat the problem of false self-employed workers (*Scheinselbstständigkeit*), even this is not very efficient.⁹³

Third, the current focus mainly on the idea that work-related injuries should be preferentially protected for platform workers. On one side it is favorable to the platform workers as far as industrial injury insurance is concerned. On the other side, it is worried that it may bring unfavorable side-effects that the labor relation of the platform workers may become more difficult to be identified.

We believe that despite the new characteristics of platform enterprise employment, this does not deprive platform enterprises as economic organizers of the ability to include practitioners in labor law protection and social insurance coverage. The characteristics of platform enterprises are not a reason for their non-compliance with labor and social insurance laws. On the contrary, because the platform's electronic algorithm management capacity is more refined and accurate than the general manpower management capacity, it has an even better ability to provide legal protection for the practitioners.

The current tolerance of the deregulation of labor law and social security laws has caused problems at least in two aspects. One is that it has created an imbalance in labor costs among the industries, leading to a large number of young people from the manufacturing industry leaving to work in the platform, which has caused an undue loss of manufacturing talent. Even if the employment of platform enterprises has gained development, its development is perverse, which is not worth encouraging and advocating. The law seeks justice and cannot favor one industry over another at the expense of fairness. The other is that the "high salary" is the result of overtime labor, the result of the sacrifice of labor law protection, and the result of labor violating overtime work in labor law, which is, in essence, the harm to the workers, and contrary to the goal of "decent work".

93 Qiu Yufan: A Preliminary Analysis of Labor Protection and "like-employee" Legislation of Self-employed Workers — Taking German Law as Reference, *Journal of Yuedan Law*, No.314, 2021.7.

1.2.5. Summary

In both China and Germany, the status of an employee is determined by considering his or her relationship with the employer. This consideration requires reference to judicial and theoretical standards. The new characteristics of platform employment have brought new challenges to the determination of labor relations, especially in China, where various operations of de-labor relations have emerged. Therefore, the criteria for determining labor relations need to be more refined to meet the challenges of platform employment on the determination of labor relations.

1.3. Social Security

Social security means “social safety”. From the meaning of this word, it can be seen that for the individual person, it is a safeguard measure to provide help in the state of old age, sickness, disability, unemployment and life difficulties, and for the society, it is a safety net constructed to maintain social security.

1.3.1. Emergence and Development of Social Security

Social security was created and developed under the impetus of industrial society. Industrial society has overturned the way production and life that were organized in traditional agricultural and nomadic societies when family and clan lived together naturally. The families worked together and their social risks were borne by the family (including the clan). However, the industrialized mode of production has broken up the work combination by family members and replaced it with employers organizing strangers to provide labor required by the society. The social risk of helpless individuals or small families urgently needed social assistance,⁹⁴ which led to the establishment and development of the social security system.

The social security system first emerged in Germany and was subsequently followed by various industrialized countries. Germany started medical insurance in 1883, industrial injury insurance in 1884, pension insurance in 1889, and unemployment insurance in 1927. China’s social security system started late, and was only gradually established after the founding of PRC in 1949. However, until the 1990s, China’s social security system was built on the basis of the planned economy. With the advancement of reform and opening-up, China’s marketization has been strengthened and the original social security system needed to be reformed. Therefore, it was only in the 1990s that China initially established a social insurance system adapted to the market

94 Li Kungang, Qiao Anli: The Difference between Labor Contracting and Labor Relations: Based on the Analysis of Employment History Development, China Labor, 2015 (3).

economy.

China's society today is a "dualistic" society, and the so-called "dualistic" society means that the Chinese social security system under the "dualistic" society has distinctive "dualistic" features. In rural areas, there are rural medical and pension insurance systems for rural residents based on land distribution, while in urban areas, there are urban medical and living guarantee systems for urban residents apart from social insurance.

The social security system in China has been improving. Because of its short history, China's vast territory and the large differences in the level of economic and social development of different regions, there are many problems in the current social security system. The two big problems are the localization and fragmentation in the social insurance management.⁹⁵ Except for pension insurance, which was coordinated at the provincial level in 2020, other kinds of social insurance are operating on municipal or county level.

1.3.2. Challenges to Social Security Brought by Platform Employment

As mentioned before, social insurance is generated by the change of the pattern of social labor in industrial society. In countries around the world, social insurances for industrial injury, unemployment, and pension are related to labor relations. Where there are labor relations, there are payments of social insurance premiums. However, with the rise of platform employment and the so called "*flexibility*" in employment, many platforms in China and abroad deny that they are employers and emphasize that they are providers of job information, which makes it difficult for platform employees to be included in the social insurance system.

This situation is not yet very serious in Germany, where the number of people employed on platforms keeps at a relatively low percentage of the overall employed population. In addition, the German Federal Labor Court has already played a role in reversing the practice of platform's negation of labor relations through the determination of labor relations between platform employed persons and platforms in individual cases. However, in China, it is much more serious that the platform employed persons are not covered by social insurance.

First, China's platform employment accounts for a high proportion of the total working population. 3.987 million riders received income through Meituan in 2019,⁹⁶ and as of December 2019, the number of China's online registered taxi drivers reached 38.09 million.⁹⁷ The proportion

95 Liu Huan, Xiang Yunhua. Social Security System Reform Based on Common Prosperity: Internal Mechanism, Existing Problems and Practical Path, Social Security Research, No. 4, 2022.

96 Meituan Research Institute, Meituan Rider Employment Report during Epidemic Period in 2019 and 2020, <https://mri.meituan.com/research/report>.

97 Sohu.com: Ride-hailing Encyclopedia: 2019 Ride-hailing Market Analysis Report 70% Drivers' Monthly Average Income Is below 6000 Yuan, <https://www.sohu.com/a/361610299j80395>.

of full-time employment in platform employment is high, and in 2021, “The Ele.Me platform” had 65.3% of riders engaged in full-time rider jobs.⁹⁸ At the end of 2018, the number of couriers in China reached 3 million,⁹⁹ and in the platform of Huolala 900,000 new drivers added in 2020.¹⁰⁰ So if more and more workers are left out, it will not only be detrimental to the protection of workers’ rights and interests, but also to the sustainable healthy development of the current platform economy.¹⁰¹

1.3.3. Reasons for Detachment from Social Insurance

The reasons for the current situation of social insurance for platform employment are complex.

First, unclear labor relations hinder the payment of social insurance. According to the current Chinese legal system, social insurance premiums need to be paid only when there is a full-time labor relationship. But platform companies take various measures to attempt to deny relations, which is a great obstacle to include platform employees into social insurance systems.

Secondly, under the fragmented social insurance system, the enforcement of social insurance mainly relies on the local labor inspection administration. But the local governments in labor importing cities may not pay much attention to the social insurance issues of the migrant workers; in addition, there is competition among cities to attract more investments, and too strict enforcement will discourage enterprises from investing, which is also the reason that even if labor relations are established, some platform employees are not included in the social insurance system.

Third, part-time labor relations only need to pay industrial injury insurance, and other social insurance does not have to be paid, which makes both part-time workers and employers pay no attention to the social insurance of part-time employees. Some enterprises simply buy commercial accidental insurance to prevent employment risks of part-time workers.

Fourth, instead of facing punishment for evading social insurance obligations and violating the law, employers can gain save labor costs and win advantages in the market competition, leads to more platform employers to compete in the market by evading legal responsibilities and breaking the bottom line of legality.

However, any difficulties of social insurance collection should be overcome. Whether social insurance is paid or not is an important matter that involves social stability and social security. Local governments can ignore it, but the central government must act strongly and should not pursue

98 Lan Dingxiang, Zhu Qi, Wang Jin: A Study on Labor Relations of Platform Flexible Employment: A Case Study of Outsourcing Riders, *Chongqing Social Sciences*, No.10, 2021.

99 Ibid.

100 Huolala Official website: Xinhua News Agency Client and Huolala Jointly Released 2020 Urban Freight Data Report <https://www.163.com/tech/article/FVR3IP6400097U7R.html>.

101 Zheng Gongcheng: China’s Social Security: Current Situation, Challenges and Future Development, *China Journal of Social Security*, No. 9, 2022.

immediate short-term benefits at the expense of social security and long-term benefits. The central government's policy has always been oriented toward social stability and has always emphasized that the people should have a sense of being rewarded. The policies of the central government are not well implemented if the social security issues of the hard-working platform employees are neglected.

Of course, paying social insurance will increase the operating cost of the platform economy, which may affect the operating efficiency of the platform economy, and may even lead some platforms to stop operating, but this is , the price of social security. Just as Helpling left Germany, Dr. Johanna Wenckebach, head of Germany's Hugo Sinzheimer Institute for Labour Law, said in an interview: "the departure of such a company from the market that cannot keep the bottom line, that enjoys rights without fulfilling its obligations and that does not create a safety net, is not regrettable."¹⁰² The law is intends to create a fair market, for the benefit of society as a whole, not for the benefit of a few companies. Exactly this function needs to be strengthened.

1.3.4. Summary

The purpose of social security is to include the working population into a social insurance. In China platform employment has led to a large number of workers not being covered by social insurance through the denial of labor relations, the use of part-time employees, and multi-platform employment, etc. This phenomenon implies a great social risk and public finance risk, which should be solved by improving the relevant system.

1.4. Reputation

1.4.1. Consumer Rating-Driven Reputation Systems

Platform labour market is typical of "transactions with strangers", which is distinctly different from traditional employment management. During the transaction, the platform would identify itself as a "market" or "information service provider", while the worker would be depicted as an "independent contractor", a "freelancer", or a "self-employed person" rather than an employee. As a result, in the world of digital economy, real-life and constant interpersonal communications are being replaced by instant human-computer interactions without personal emotion.

Thus, traditional evaluation and motivation mechanisms are no longer suitable to platform labour management. The long-term incentive methods like internal promotion and employee stock

102 Eine%20wichtige%20Entscheidung%20für%20die%20digitalisierte%20Arbeitswelt«.html

ownership plan, which are common in traditional employment, cannot be applied in on-demand platform work featuring in short-term microtasks. Since online workers are atomized individuals in social relationships with scarcely any communications with each other, informal group norms cannot be formed to regulate individual behaviors either.¹⁰³

In order to effectively control moral hazard and overcome information asymmetry, consumer-based reputation systems are adopted by the overwhelming majority of platforms.¹⁰⁴ Completely different from traditional labour control, in the platform labour market, consumers are assigned with the power of supervising and rating online work performance. After receiving services, it is the consumers who give scores or grades and make comments or complaints. Thus, the reputation systems are formulated based on digital information including consumer ratings and comments, worker's profiles, historical service records and so on. Such digital reputation is the foundation of trust in the "transacting with strangers" in the platform labour markets. By the virtue of reputation systems, the platforms can effectively regulate labour behaviors and efficiently match supply and demand.

1.4.2. Intangible Assets of Online Work

The digital reputations formed from consumers ratings in the process of online work are intangible assets for platform workers, highly correlated with their income levels and opportunities.¹⁰⁵ In the location-based platforms with a high degree of labour process control, such as Meituan and Uber, the platforms would give rewards and punishments, and allocate orders according to consumers' ratings. In the web-based platforms with a low-degree labour control, such as MTurk and Upwork, the platforms would disclose the workers' historical service records and prior clients' feedbacks, thus potential clients could compare and choose the workers with comparatively good reputation records. The major reputation systems adopted by the platforms are illustrated below.

Meituan is one of China's largest internet companies providing food delivery, travel booking, movie reviews, restaurant reviews, and other various lifestyle services. The time when an order is received, the platform would disclose live to the customer the locations and conditions of the

103 Anne M. Farrell, Jonathan H. Grenier & Justin Leiby, "Scoundrels or stars? Theory and evidence on the quality of workers in online labor markets," *The Accounting Review*, no.1 (2017): 93-114, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2424718, accessed on 6th September 2022.

104 Lukac, Martin & André Grow, "Reputation Systems and Recruitment in Online Labor Markets: Insights from an Agent-Based Model," *Journal of Computational Social Science*, no. 1 (2020): 207-29, <https://link.springer.com/article/10.1007/s42001-020-00072-x>, accessed on 6th September 2022.

105 Alessandro Gandini, Ivana Pais & Davide Beraldo, "Reputation and trust on online labour markets: the reputation economy of Elance," *Work organisation, labour & globalisation*, no.1 (2016): 27-43, https://www.jstor.org/stable/10.13169/workorglaboglob.10.1.0027#metadata_info_tab_contents, accessed on 6th September 2022.

delivery worker called “rider”. The customer could supervise the whole service process, for instance, whether the rider has timeout. After each delivery, the customer would be prompted to review the rider’s performance on a five-stars scale ranging from “very bad” to “very good”. The better reviews a rider has, the more rewards he would have and the higher rankings he would be promoted. High-ranking riders are privileged to get orders, and could get higher percentages of service fees.¹⁰⁶

Uber is a well-known transportation company, nearly ubiquitous in North America and Europe. Passengers are encouraged to rate drivers’ services scaled from one- to five-star and give specific comments. Rewards and punishments in Uber are based on these feedbacks including acceptance rate, cancellation rate, and scoring. The drivers with sufficient low rates are then suspended or fired, a process labeled “deactivation”.¹⁰⁷ In order to get good feedback, drivers would voluntarily accept passengers’ control on services, such as adjusting temperature and music according to passengers’ tastes, providing other amenities like phone-charges and tissues, etc.

As one of the largest freelancing platforms globally, the platform of Upwork discloses some relevant key information of the freelancers, such as personal information (including education background, work experience, etc.), work history (including number of completed jobs, hours worked and total earnings, etc.), and prior clients’ reviews (including up to 5-stars ratings, specific comments, etc.). Such personal profiles, especially client feedbacks therein, play the crucial role in the future jobs of freelancers’ performance. Upwork even calculates freelancers’ Job Success Score, which comprehensively reflects clients’ satisfaction with their overall work history. Clients assign or algorithmically filter more tasks towards freelancers who built strong reputations by getting positive clients’ feedback. Upwork also certifies the top 10% ranked talents with a dedicated badge “Top Rated”.¹⁰⁸ This badge not only helps a freelancer stand out from others and attract more clients, but also brings a package of benefits including reduced fees, faster payments, premium supports etc.

1.4.3. Distorted Systems Unfriendly towards Workers

In the typical two-sided market of online work, with the platforms systematically handing over to consumers the power of surveillance and evaluation on workers’ service process, the workers

106 Irene Zhou, “Digital Labour Platforms and Labour Protection in China,” ILO Working Paper, October 2020, https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-beijing/documents/publication/wcms_757923.pdf, accessed on 6th September 2022.

107 Alex Rosenblat & Luke Stark, “Algorithmic Labor and Information Asymmetries: A Case Study of Uber’s Drivers,” *International Journal Of Communication*, no.10 (2016): 3758-3784, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2686227, accessed on 6th September 2022.

108 Upwork, “Top Rated,” <https://support.upwork.com/hc/en-us/articles/211068468-Top-Rated>, accessed on 6th September 2022.

have become the most vulnerable party even compared with consumers. At present, consumer rating-driven reputation systems are playing a prominent role on all types of platforms. However, a range of problems are emerging when platforms rely heavily on those reputation systems which means that the consumer rating-driven reputation systems have failed the most vulnerable party - the workers.

Consumer-ratings are becoming a source of potential employment discrimination. This kind of ratings is quite subjective and nearly uncontrollable. Consumers are highly likely to give negative comments on online workers merely because of their bias on gender, region, religion, race or ethnic origin. Such consumer's prejudice can hurt a worker's digital reputation, and it would even lead to deactivation, which is an absolute employment discrimination. Thus, reputation systems have provided a facially neutral channel for consumer discrimination dictating workers' employment environment. Worse still, platforms may implement biases without taking legal responsibilities, as the decisions of penalty or deactivation are grounded on a bulk of systemically biased consumer prejudices.¹⁰⁹ A considerable number of surveys and researches have established that the platform economy is no less biased than the real sector.¹¹⁰ For instance, in a survey report conducted by Meituan itself, there were 3.987 million riders working on its platform, while the male accounted for up to 93.3%.¹¹¹ The empirical statistics indicates that the gender pay gap and other forms of unequal treatment are even wider in platform-facilitated work.¹¹²

Platforms always label themselves as "customer-centered", which place consumers' satisfaction as a primary goal.¹¹³ Actually, they are driven by expanding market shares to please consumers, because consumers' experience is a key factor to the survival and success of platforms' business. For example, Meituan and its rival, Ele.Me, have been competing fiercely for shortening delivery time to cater for consumers. In contrast, with indulgence towards consumers, the workers have to face strict control and abusive punishment. The "strictest algorithm", which arouses wide social concern in China, is applied by platforms which optimizes the efficiency at the cost of rigorous work conditions. For instance, an investigative report revealed that Meituan's riders could

109 Alex Rosenblat, Karen E.C. Levy, Solon Barocas & Tim Hwang, "Discriminating tastes: Uber's customer ratings as vehicles for workplace discrimination," *Policy and Internet*, no.3 (2017): 256-279, <https://doi.org/10.1002/poi3.153>, accessed on 6th September 2022.

110 Nicola Countouris & Luca Ratti, "The Sharing Economy and EU Anti-discrimination Law," in *The Cambridge Handbook of the Law of the Sharing Economy*, ed. Nestor M. Davidson, Michèle Finck, John J. Infranca (London: Cambridge University Press, 2018), 486, https://discovery.ucl.ac.uk/id/eprint/10052445/10/Countouris_sharing_economy_and_eu_antidiscrimination_law.pdf, accessed on 6th September 2022.

111 Meituan Research Institute, "Report on employment of Meituan riders in pandemic period of 2019 and 2020," <https://about.meituan.com/research/report>, accessed on 6th September 2022.

112 Arianne Renan Barzilay & Anat Ben-David, "Platform Inequality: Gender in the Gig-Economy," *Seton Hall Law Review*, no.393 (2017): 394-431, <http://dx.doi.org/10.2139/ssrn.2995906>, accessed on 6th September 2022.

113 Meituan, "About Meituan," <https://about.meituan.com/en/details>, accessed on 6th September 2022.

fulfill tight timelines the algorithm set for deliveries only by riding aggressively and flouting traffic rules like over-speed or running the red lights, which endangers their lives and health and others.¹¹⁴ In addition to the stringent algorithm control, “penalty-based management”, a dominant instrument embedded in most of China’s platforms, further deteriorates work conditions. When receiving complaints or negative reviews from consumers, platforms tend to penalize the workers directly without investigating into the facts or listening to the defense opinions from the riders. The penalty is predatory, which would be the toil on the part of the labour. It is reported that one penalty normally amounts to 30 to 50 deliveries, which renders a rider’s a day or several days’ work in vain.¹¹⁵ By shifting the surveillance and evaluation power, the labour disputes and conflicts arising from the platform work have transferred to consumers. Paradoxically, even abusive fines are imposed by platforms, instead of aiming at the platforms, the workers’ furies are aiming at the consumers who give unreasonable negative feedback which they cannot accept. This management technique exacerbates social contradictions, just as the clashes between riders and consumers covered by media reports, for example, the event of a deliveryman stabbing customer for a bad rating.¹¹⁶

Though digital reputations are important assets for workers, they are not compatible nor portable across platforms. To create its own network effects, the platform restricts workers from sharing or transferring reputation data to other platforms such as consumer ratings, text comments, certifications, trading records.¹¹⁷ Either working on several platforms simultaneously or changing platforms is a common rather than exceptional phenomenon. Workers have to manage separate reputations on multiple platforms, and the ones who have built good reputation in specific platforms would find it challenging and costly to change platforms. Thus, the exclusivity and non-transferability of digital reputation constitutes a powerful lock-in effect which limits workers’ options and increases their dependency on platforms. In a more general sense, such practice hampers competition between platforms, and large incumbents could develop into monopolies consequently.¹¹⁸ At an early stage, platforms compete for users (workers, consumers, etc.) by

114 Youxuan Lai, “Delivery Drivers, Stuck in the System [外卖骑手，困在系统里],” *People [人物]*, September 2020, <https://mp.weixin.qq.com/s/Mes1RqIOdp48CMw4pXTwXw>, accessed on 6th September 2022.

115 Hui Huang, “Algorithmic management in food-delivery platform economy in China,” *New Technology, Work and Employment*, January 2022, <https://doi.org/10.1111/ntwe.12228>, accessed on 6th September 2022.

116 The Paper[澎湃新闻], “The Dilemmas of Platforms”, https://www.thepaper.cn/newsDetail_forward_9520041, accessed on 6th September 2022.

117 Timm Teubner, Florian Hawlitschek & Marc T. P. Adam, “Reputation Transfer,” *Business & Information Systems Engineering*, vol.61 (2019): 229-235, <https://doi.org/10.1007/s12599-018-00574-z>, accessed on 6th September 2022.

118 Timm Teubner, Marc T. P. Adam & Florian Hawlitschek, “Unlocking Online Reputation: On the Effectiveness of Cross-Platform Signaling in the Sharing Economy,” *Business & Information Systems Engineering*, vol.62 (2020): 501-513, <https://doi.org/10.1007/s12599-019-00620-4>, accessed on 6th September 2022.

fierce subsidy wars, for example, Uber and Lyft in the US, Didi and Kuaidi in China.¹¹⁹ Once one platform has established its own network effects, and has the assurance that workers and consumers become dependent on itself, it will begin to reap the value from workers and consumers, such as increasing commission rates or pushing advertisements, rather than giving subsidies. Hence, maintaining fair and open competition is crucial for the sustainable development of the platform economy. Creating a cross-platform reputation mechanism could remove the entry barriers, in that start-up platforms could launch their business easily by importing workers and their reputation data from large incumbents. In this respect, making the digital reputation compatible and portable is not only beneficial for platform workers, but also for the whole market.

1.4.4. Summary

In order to effectively control workers' service quality and satisfy consumers' demands, platforms have introduced and widely adopted the consumer rating-driven reputation systems. These systems assign the consumers to supervise and rate work performance, which is distinctly different from internal management systems deployed in traditional companies. The consumer ratings shape workers' reputation and determine their income capacities in platforms. However, the consumer-based reputation systems, if not well regulated, have the potential to be distorted to undermine the workers' rights and interests, for example, enabling discrimination originated from consumer ratings, generating strict control and harsh penalty management, and restricting the sharing and transfer of reputation data across platforms.

1.5. Self-Organisation

1.5.1. Challenges to Trade Union Organizations

Similar to traditional labour relationship, under the platform employment model, platform workers also face the dilemma of lacking bargaining power. On the one hand, with the help of the digital technology resources, platform companies have more diversified employment options, which could subcontract work tasks to unspecified labor service provider groups through network platforms and complete work through socialized large-scale collaboration.¹²⁰ On the other hand, platform companies are showing a trend of centralization in the relevant market. For example, in

119 Zhixiang Fang, Rongxiang Su & Lian Huang, "Understanding the Effect of an E-Hailing App Subsidy War on Taxicab Operation Zones," *Journal of Advanced Transportation*, vol.2018, <https://doi.org/10.1155/2018/7687852>, accessed on 6th September 2022.

120 Li Jingfeng and Liang Minhui, "A Preliminary Study on the Internet based Crowdsourcing Model of Human Resource in the Sharing Economy Era", *On Economic Problems*, No.4,2016, p.96.

China's food delivery platform market, the two platforms "Meituan" and "Ele.me" account for more than 90% of the market share.¹²¹ In the EU, two food delivery platforms, Delivery Hero and Glovo, have also become the target of EU antitrust investigations.¹²² Therefore, platform companies can unilaterally determine or change the working conditions of platform workers by taking advantage of their dominant market and technological position, while workers either choose to accept or lose the platform job opportunity. However, compared to traditional employment model, the union organizations face multiple challenges under the platform employment.

(i) Platform employment brings challenges to traditional union's organization model

Under the traditional work mode, the workers usually have a common workplace, relatively stable working hours and group structure, which is conducive to the establishment and activities of trade union organizations. However, the platform employment model presents the characteristics of decentralized workplaces, fragmented work tasks and isolated worker groups, which are not conducive to the formation and development of trade union organizations.¹²³

The workplace space where platform workers coexist is a virtual online platform system, and workers are usually in different physical places even if they provide labor offline according to system orders. The work content of platform workers is usually fragmented order tasks, and platform workers have greater work freedom, with relatively free access and exit of platform software. In the whole work process, platform workers rely more on their own skills and order information from the platform, and lack collaboration with other workers.

(ii) The platform workers lack bargaining power

The imbalance of bargaining power is the essential necessity for collective bargaining. Under the platform employment model, in the face of large platform companies, platform workers who provide on-demand services are facing the dilemma of lacking bargaining power.

On the one hand, with the help of Internet platform software and digital information resources, platform enterprises have more diversified employment options. Enterprises can subcontract work tasks to unspecified labor service provider groups through network platforms

121 Qianzhan Industry Research Institute, Analysis of the market size and competition pattern of China's food delivery industry in 2021 Douyin's two major advantages in entering the food delivery market, <https://bg.qianzhan.com/report/detail/300/211223-4098960b.html>

122 Joan Faus and Toby Sterling, Germany's Delivery Hero, Spanish Unit Glovo Targeted in EU Antitrust Raids, Reuters, July 6, 2022. <https://www.reuters.com/business/retail-consumer/eu-antitrust-watchdog-raids-online-food-groceries-delivery-companies-2022-07-06/>

123 Ban Xiaohui, "Beyond Labor Relations: The Expansion and Path of Collective Labor Rights in the Platform Economy," *Jurisprudence*, No. 8, 2020, p. 162.

and complete work through socialized large-scale collaboration.¹²⁴ Without technical supports, it would be difficult for platform workers to engage in on-demand labor.

On the other hand, platform companies are showing a trend of centralization in the relevant market. For example, in China's food delivery platform market, the two platforms "Meituan" and "Ele.me" account for more than 90% of the market share.¹²⁵ The Meituan platform has been subject to antitrust penalties for abusing its dominant market position to restrict competition by "choosing one over the other".¹²⁶ In the EU, two food delivery platforms, Delivery Hero and Glovo, have also become the target of EU antitrust investigations.¹²⁷

Therefore, platform workers are obviously in a disadvantaged position in the face of platform companies that occupy the advantages of digital technology. While registering on the platform and engaging in work, platform workers either accept the working conditions unilaterally proposed by the platform company, or choose to lose the platform job opportunity.

(iii) The ambiguous legal status of platform workers affects their participation in union organizations and collective bargaining

Since platform companies usually define their legal relationships with platform workers as non-labor relations, this leads platform workers to face legal obstacles in organizing or joining trade unions and conducting collective bargaining.

First of all, the Chinese *Trade Union Law* is unclear as to whether union membership is limited to employees under a labor relation. Article 3 of the *Trade Union Law* limits the eligibility for participation in and organization of trade unions to "employees" who "earn wages as their main source of livelihood", but the *Trade Union Law* does not explain whether "wages" and "employees" are concepts under labor relations.

Second, China's regulations on the subject of collective bargaining are also vague. Article 2 of China's *Collective Contract Provisions* provides that a collective contract refers to "a written agreement between the employer and the employees on labor remuneration, working hours, rest and leave, occupational safety and health, vocational training, insurance and welfare, etc., signed

124 Li Jingfeng and Liang Minhui, "A Preliminary Study on the Internet based Crowdsourcing Model of Human Resource in the Sharing Economy Era", *On Economic Problems*, No.4, 2016, p.96.

125 Qianzhan Industry Research Institute, Analysis of the market size and competition pattern of China's food delivery industry in 2021 Douyin's two major advantages in entering the food delivery market, <https://bg.qianzhan.com/report/detail/300/211223-4098960b.html>

126 Coco Liu, China Fines Meituan \$530 Million in End to Antitrust Probe, *Bloomberg*, October 8, 2021. <https://www.bloomberg.com/news/articles/2021-10-08/food-delivery-giant-meituan-gets-530-million-antitrust-fine?leadSource=uverify%20wall>.

127 Joan Faus and Toby Sterling, Germany's Delivery Hero, Spanish Unit Glovo Targeted in EU Antitrust Raids, *Reuters*, July 6, 2022. <https://www.reuters.com/business/retail-consumer/eu-antitrust-watchdog-raids-online-food-groceries-delivery-companies-2022-07-06/>

through collective bargaining in accordance with the provisions of laws, rules and regulations.” Again, the legislation does not explicitly state whether the term “employees” is limited to workers with labor relations or not. Some local legislation explicitly limits the workers in collective bargaining to those with labor relations. For example, Article 3 of the *Shanghai Regulations on Collective Labor Contracts* provides that “collective bargaining as referred to in the Regulations refers to the activity of equal consultation between the employees of an enterprise and the enterprise on matters related to labor relations.”

Therefore, some Chinese scholars argue that if workers do not establish labor relations with the enterprise, i.e., they do not meet the conditions of eligibility to join a labor union,¹²⁸ they also cannot enjoy the right of collective bargaining.¹²⁹

(iv) Platform workers’ participation in collective bargaining conflicts with Anti-Monopoly Law

Platform workers who do not have labor relations organize or join trade unions to negotiate with platform enterprises over the terms of work conditions, may be suspected of violating the provisions of the *Anti-Monopoly Law*.

Article 12 of *the Anti-Monopoly Law of China* provides that an operator is a natural person, a legal person or other organization engaged in the production of goods, business or the provision of services. If platform workers are classified as non-workers, they may fall within the scope of the concept of “operator” under *the Anti-Monopoly Law*. In this case, the platform workers are suspected of violating the provisions of *the Anti-monopoly Law* through collective and concerted actions to restrict the trading conditions with the platform companies, such as fixing or reducing the percentage of service fees extracted from the companies, or jointly resisting trading with the companies.

In some countries, the behavior that a person who does not have labor relations participates in collective bargaining has already been in conflict with anti-monopoly rules. In December 2015, the Seattle City Council passed legislation that enables online drivers with Independent Contractor status to bargain collectively with Lyft, Uber and other online transportation companies.¹³⁰ However, the U.S. Chamber of Commerce filed a lawsuit against the Seattle regulations, arguing that it violates Section 1 of the *Sherman Act*. The U.S. Court of Appeals for the Ninth Circuit ruled

128 Wang Xudan and Lin Hui, “Reflections on Some Legal Issues Regarding the Membership of Logistics Freight Drivers”, *Journal of Beijing Trade Union Cadres’ College*, No. 1, 2019, p. 47.

129 Li Gan, “The Identity Positioning of Net-Car Drivers in Collective Labor Law,” *Journal of the China Institute of Labor Relations*, Vol. 1, No. 1, 2017, p. 45.

130 Dmitri Iglitzin, Jennifer L. Robbins, “The City of Seattle’s Ordinance Providing Collective Bargaining Rights to Independent Contractor For-Hire Drivers: An Analysis of The Major Legal Hurdles”, 38 *Berkeley J. Emp. & Lab. L.* 49, 50 (2017) .

that the Seattle-issued regulations were not immune from the application of anti-monopoly laws.¹³¹ In the EU, there is also the potential for unions to be found in violation of anti-monopoly laws when they negotiate with businesses on behalf of self-employed workers. For example, in the Dutch FNV case,¹³² the FNV union entered into a collective agreement with an enterprise on behalf of self-employed orchestral substitutes. The European Court of Justice ruled that the FNV ceased to be a trade union when it negotiated on behalf of the self-employed, and was an association of businesses.¹³³

1.5.2. China's Response Measures

To cope with the challenges brought by the rapid development of platform employment, the Chinese government and the All-China Federation of Trade Unions (ACFTU) have paid special attention to the function of trade union organizations and promoted the protection of platform workers' rights and interests in the following two aspects.

(i) Accelerating the establishment of membership for workers in new employment forms

In 2021, China amended *the Trade Union Law* to emphasize the obligation of trade union organizations to protect the legitimate rights and interests of workers in new employment forms. Article 3 of the Law added a second paragraph, which clearly stipulates that "trade unions shall adapt to changes in the organizational forms of enterprises, the structure of the workforce, labor relations, and employment forms, and safeguard the rights of workers to join and organize trade unions in accordance with the law." In order to promote the establishment and membership of workers in new employment forms, the All-China Federation of Trade Unions (ACFTU) has made efforts to strengthen top-level design and promulgated documents such as the "Opinions on Effectively Safeguarding the Labor Rights and Interests of Workers in New Employment Forms" (Issued by ACFTU [2021] No. 12), which put forward specific requirements for promoting the establishment of trade union organizations in platform enterprises and the membership of workers in new employment forms. Specifically, trade unions should focus on promoting the establishment of trade union organizations in key industry enterprises, especially the head enterprises, their

131 Chamber of Commerce of The USA v. City of Seattle 890 F.3d 769 (9th Cir. 2018).

132 The FNV trade union has reached a collective agreement with the Dutch Musicians' Union and the Dutch Association of Orchestral Alternatives Foundation regarding replacement musicians for orchestral members, which applies not only to replacements in the capacity of employees but also to replacements in the capacity of independent contractors. In particular, Article 5 of the Annex states that self-employed substitutes should be at least 15% more than employed substitutes in terms of fees for rehearsals and concerts. FNV Kunsten Informatie en Media v. Netherlands. Case C-413/13 (2014).

133 FNV Kunsten Informatie en Media v Netherlands. Case C-413/13 (2014), paras.26-28.

subordinate enterprises and affiliated enterprises in accordance with the law, and actively explore the ways of unionization that can adapt to the characteristics of different occupations such as truck drivers, net car drivers, couriers and delivery workers, and expand the coverage of trade union organizations in various ways such as individual, joint, industrial and regional, so as to maximize the attraction of workers in new employment forms to participate.

Since 2021, the ACFTU has concentrated on promoting 12 head platform enterprises such as Meituan, Didi, Jingdong, etc. to take the lead in achieving workers in new employment forms to organize unions, and continue to promote the top 100 Internet enterprises in 2021 to build unions, and actively promote online application for union membership and other convenient ways to join the unions.¹³⁴ At the same time, grass-roots unions also promote the participation and organization of unions for workers in new employment forms according to the actual situation in each region. In Shanghai, the construction of trade unions in new industries was launched earlier, and representatives of government supervisory departments were introduced in the firstly-established trade unions in new industries such as online couriers and online food delivery workers, and relevant benefits were provided to the workers who committed to join the trade unions in order to attract the workers in new employment forms to join the unions.¹³⁵ According to the characteristics of different occupations, Anhui Huaibei City Federation of Trade Unions has explored the tailored ways to build the unions, constantly expanded the effective coverage of trade unions, and has now built the unions and completed joining membership work of the freight drivers, couriers, net car drivers and other groups.¹³⁶ According to statistics, in 2021, more than 3.5 million new members of workers in new employment forms have joined China's workforce.¹³⁷

Some scholars believe that the current practice of trade union reform in the context of "Internet+" has reflected the expansion of the concept of workers in the context of *Trade Union Law*, and the trade unions are no longer limited to accepting only workers with the "traditional"

134 Workers' Daily: "The All-China Federation of Trade Unions (ACFTU) held a press conference on the achievements and experiences of trade union's work since the 18th Party Congress --- the "achievement book" of ten years of trade union's work", on the website of ACFTU.

https://www.acftu.org/xwdt/ghyw/202208/t20220810_813422.html?sdiOEta=qqrSEAV3n603ofCic1S10AMCvRI9bgGuT7SnluoG5CmdS_9LEQvMsvmkcFmbmqh0goLvivf5q7ZBGVNkUOfEtaeXYpfI8kv7qKb1J2X4kuuoMUSfpc.ylV4pTqgCzsjwlO4J464oqG0LXPrmS7bAKj, last accessed on September 16, 2022.)

135 Jin Shiyu, "Trade Union Construction in Shanghai's New Industry: Practices, Dilemmas and Path Innovation", *Trade Union Theory Research (Journal of Shanghai Trade Union Management Vocational College)*, No. 5, 2021, pp. 24-25.

136 "Huaibei City, Anhui Province Achieves Full Union Coverage of New Employment Pattern Industries", in CIG, <https://www.workercn.cn/c/2022-06-13/6977074.shtml>, last accessed September 16, 2022.

137 Workers' Daily: "The All-China Federation of Trade Unions (ACFTU) held a press conference on the achievements and experiences of trade union's work since the 18th Party Congress --- the "achievement book" of ten years of trade union's work", on the website of ACFTU.

https://www.acftu.org/xwdt/ghyw/202208/t20220810_813422.html?sdiOEta=qqrSEAV3n603ofCic1S10AMCvRI9bgGuT7Snl_uoG5CmdS_9LEQvMsvmkcFmbmqh0goLvivf5q7ZBGVNkUOfEtaeXYpfI8kv7qKb1J2X_4kuuoMUSfpc.ylV4pTqgCzsjwlO4J464oqG0LXPrmS7bAKj, last accessed on September 16, 2022.

employee status , but also from new forms of employment into membership.¹³⁸

(ii) Actively safeguarding the legitimate rights and interests of workers in new employment forms

The All-China Federation of Trade Unions (ACFTU) also puts forward the requirement of effectively safeguarding the legitimate rights and interests of workers in new employment forms, and makes requirements for relevant initiatives as follows:

Trade unions at all levels should play the role of industrial unions and actively negotiate with industry associations, head enterprises or enterprise representative organizations on piece-rate unit prices, order distribution, commission fee ratios, labor quotas, payment methods, rules for entering and exiting platforms, working hours, rest and leave, labor protection, reward and punishment systems, etc. to safeguard the labor and economic rights and interests of workers in new employment forms. Unions should supervise the platform enterprises to strictly comply with the requirements of laws and regulations in the formulation of regulations and algorithms and other important matters, listen to the opinions and demands of workers through democratic management forms such as workers' congresses and labor-management seminars, and protect the democratic rights of workers such as the right to know, the right to participate, the right to express opinions and the right to supervise operations. Unions should supervise the platform enterprises to fulfill their social responsibilities and promote decent work, comfortable work and comprehensive development of the workers in new employment forms. Unions should strengthen labor law supervision, cooperate with the government and its relevant departments to monitor and enforce the law, and speak out in a timely manner to major typical violations.¹³⁹

At present, labor unions at all levels are actively carrying out collective bargaining work for workers in new employment forms and taking actions to care for workers in new employment forms, effectively safeguarding the legitimate rights and interests of workers in new employment forms. For example, in Anhui Province, Chuzhou City and Anqing City, labor unions have organized collective bargaining around new industries and listened to the opinions and suggestions of workers in new forms of employment.¹⁴⁰ In Guangdong Province, couriers, food delivery workers,

138 Wang Quanxing and Wang Xi, "Identification of Labor Relations and Protection of Rights and Interests of "Net Contract Workers" in China", *Law Science*, Vol. 4, No. 4, 2018, p. 72.

139 See "Opinions on Effectively Safeguarding the Labor Rights and Interests of Workers in New Employment Forms" (Issued by All-China Federation of Trade Unions [2021] No. 12.

140 Yang Tao: "'Three Initiatives" of Yingjiang District Federation of Trade Unions Safeguard the Rights and Interests of Newly Employed Workers", on the website of Anqing City Federation of Trade Unions, <https://aqszgh.org.cn/control/view.php?aid=6056>, last accessed on September 16, 2022; Wang Jing "The Blue Riders' "Safety Belts" --- Dingyuan County Federation of Trade Unions' Collective Bargaining for Newly Employed Workers," Chuzhou City Federation of Trade Unions website, <https://czszgh.ahghw.org/xwzx/jcgh/10531651.html>, last accessed September 16, 2022.)

truck drivers, online taxi drivers and other platform employment groups who join the provincial trade union organizations and register in their real names on the “Guangdong Workers’ Welfare” website can enjoy an exclusive accidental medical mutual protection plan.¹⁴¹ The Gansu Provincial Federation of Trade Unions has invested 12 million yuan to provide special mutual protection for 100,000 newly employed workers, and the city and state federations of Lanzhou and Qingyang have widely carried out inclusive service programs with the themes of sending, giving and helping, so as to precisely put the care and concern for newly employed workers into practice.¹⁴²

Particularly noteworthy is that in July 2022, jointly promoted by the Shanghai Federation of Trade Union and Putuo District Federation of Trade Union, the Ele.me platform and takeaway delivery workers held a consultation forum. The platform signed an agreement on labor compensation, algorithm optimization, labor protection, career development, care and concern, dispute handling and other issues. But the effectiveness of the agreement is limited to the workers of Ele.me platform in Shanghai engaged in take-away food delivery work. This consultation is not part of the traditional scope of collective bargaining in China, but local trade unions in China have given full play to the specificity of Chinese trade unions in response to the diversified legal relationships between platform companies and workers, and actively promote dialogue and rights negotiation between the two sides.

1.5.3. Germany’s Response Measures

German trade unions have adopted a variety of approaches to respond to the challenges posed by digital technology, including initiatives to recruit new members, use enterprise workers’ councils, and promote broader participation of existing members and employees. Combined with Germany’s legislation and practice, the initiatives mainly include the following four measures.

(i) Actively organizing platform workers to join unions

German platform workers enjoy a clear right to join trade unions. Article 9(3) of the *German Basic Law* stipulates that freedom of labor association is enjoyed by anyone and belongs to the

141 Guangdong Workers’ Protection Mutual Aid Association: “Guangdong Trade Union Members’ Exclusive Accidental Medical Mutual Aid Protection Plan (New Employment Form Workers 2022 Version)”, in All China Federation of Trade Unions website, https://www.acftu.org/fwzd/zghzbzfwd/gzjl/202110/t20211020_795242.html?70keOa4k=qAcJqGci.DboWXBtQ5Act9MfjfcUU9jG42FIRPZwOA0qq1MhIKkqAqja, last accessed September 16, 2022.

142 Workers’ Daily: “A truck driver was awarded \$75,000 in accident claims --- Gansu Provincial Federation builds a “health line of defense” for workers with new employment forms”, on the website of the All-China Federation of Trade Unions, https://www.acftu.org/fwzd/zghzbzfwd/gzjl/202206/t20220608_810579.html?70keOa4k=qAcMqGqKJHljvJQ_T3J_RoGZX6A33.SY1kKCi3sKP0qq1MhIKkqAqWa, September 2022 16 Last accessed.)

category of human rights, and members of all occupational classes can enjoy this basic right.¹⁴³ Therefore, in Germany, the platform workers have the right to join a trade union even if they are self-employed.¹⁴⁴ For example, trade unions in Germany are not only open to employees, but also to freelancers and self-employed workers. In order to further facilitate the integration of platform workers and other self-employed persons who do not have a labor relation into trade unions, the German Metal Industry Trade Union (IG Metall) has also amended its constitution in recent years so that self-employed persons who do not have employee status and who are engaged in commercial or freelance activities can become union members of IG Metall.¹⁴⁵

(ii) The possibility of participating in collective bargaining

If platform workers are considered to be self-employed, their rights through collective bargaining are somewhat limited. However, according to Section 12a of the German *Collective Agreement Act*, if the working conditions are that of “employee-like persons”, they can be protected by a collective agreement. There are two main criteria for identifying employee-like persons: first, the work must be performed by them personally; second, they work primarily for the same company or institution or derive more than half of their income from the same company or institution. Therefore, if a platform worker is judged to have employee-like person status, it is legally possible to participate in collective bargaining and be protected by a collective contract. This approach provides a path to resolve the conflict between expanding the scope of collective bargaining and anti-monopoly laws.

(iii) Promoting joint decision of labor and management

The enterprise workers’ committee is an important way to realize the co-determination of labor-management, and the already established trade unions of platform enterprises are actively promoting the establishment of enterprise workers’ committees. In the German online food delivery industry, for example, the two main delivery platforms Deliveroo and Foodora have adopted differentiated employment models. Foodora has adopted an approach of hiring employees, while Deliveroo workers have the option of being self-employed or employees. Riders on the Cologne-based Foodora platform, with the support of the Food, Beverage and Catering Union (NGG), elected the first Staff Council in 2017, ensuring the right of riders to participate in joint decisions on the platform and effectively preventing the local union from introducing a system

143 Manfred Weiss and Marlene Schmidt, *Labour Law and Industrial Relations in Germany*, Kluwer Law International, 4th edition 2008, p.164.

144 See Lionel Fulton, *Trade Unions Protecting Self-Employed Workers*, ETUC, Brussels, 2018, p.62.

145 §3 Beitritt, *Satzung Der Ig Metall*, 2020.

that establishes shift assignments based on the differentiated work performance of the riders.

(iv) Promoting platform workers' rights defense activities

Large German unions are active in defending the rights and interests of platform workers. Take IG Metall as an example, its advocacy activities are mainly in the following two aspects.

First, it participates in the development of standards for the protection of platform workers' rights and interests. IG Metall, the Austrian Chamber of Labor and the Austrian Trade Union Confederation have launched the "Fair Crowd Work" campaign. In April 2016, the project held the first seminar on the strategy of the Platform Economy Union in Frankfurt, and issued The Frankfurt Declaration on Platform-Based Work, making recommendations to safeguard the rights and interests of platform workers. IG Metall, together with eight German labor platforms, has also launched the *Crowdsourcing Code of Conduct*, which serves as a guideline for companies to crowdsource their workforce.

Second, it participates in the advocacy action of rights and interests of the platform workers. IG Metall and the eight platform companies have established a special Ombuds Office to resolve disputes between crowdsourcing workers, customers and platforms and to monitor the implementation of the *Crowdsourcing Code of Conduct*. IG Metall and YouTubers established the FairTube e. V. association in 2020 with the goal of improving working conditions on Internet platforms such as YouTube, and have initiated a dialogue with YouTube on rights issues. In 2020, a crowdsourcing worker filed a lawsuit for legal status with the support of the IG Metall union, and the German Federal Court ruled that he had the status of employee.

1.5.4. Summary

Due to the Internet-based nature of platform work and the unclear legal status of platform workers, the organization rights of platform workers are affected and may even conflict with the Anti-Monopoly Law when they engage in collective bargaining. Both China and Germany have responded positively, mainly by adopting more inclusive union organizing measures, promoting the democratic rights of the workers, exploring the possibility of collective bargaining, and actively campaigning for the rights and interests of the workers. It should be noted that China's current trade unions focus on promoting platform workers' unionization, and the development of related collective bargaining is mainly pushed by the local federations. But due to the limited participation of head platform enterprises, the formal significance of such collective bargaining may be greater than its substantive effect.

2. Recommendations

The laws has been improving with the progress of the times, which is one of the signs of civilization of human society. Obviously, the labor law and social security law should be improved with the changes of the employment market. When improving them, what we should keep in mind is that the original intention of labor law it to protect the basic rights and interests of the workers, and the original intention of social insurance law is to maintain the social harmony. Based on the above introduction and analysis, we make the following suggestions.

2.1. Algorithms: Digital Social Rights

Based on the challenges of platform algorithms on workers' rights protection and the responses and practices of China and Germany on this issue, the following three recommendations can be summarized.

2.1.1. Further Clarifying the Standard of Algorithmic Transparency

Both Chinese and German legislation have made requirements for algorithmic transparency, but in the field of platform employment, further rules are needed to ensure the implementation of algorithmic transparency. Specifically, how platform workers can request platform enterprises to disclose their algorithms, the specific content of platform disclosure, how to judge that platform enterprises have effectively fulfilled their obligations of algorithm disclosure and how to provide remedies when algorithms are unreasonable. For these issues, legislation should be introduced

For example, Chapter 3 of the European Commission's Draft Recommendations on Improving the Working Conditions of Persons Working through Digital Labour Platforms (hereinafter referred to as "the Draft") regulates the issue of "algorithmic management" and proposes relatively operable rules.¹⁴⁶

First, it clarifies the specific notification matters. For example, Article 6(2) of the Draft provides that, with respect to automated decision-making systems, digital labor platforms shall inform about: the fact that an automated decision-making system is in use or has been introduced into use; the classification of decisions taken by the system, the main parameters used for decision-making and their importance, including how the workers' personal data or behavior affects the

¹⁴⁶ A Proposal for A Directive of The European Parliament and of The Council on Improving Working Conditions in Platform Work.

decision; the decision to restrict, suspend or terminate the platform worker's account, the refusal to pay the platform worker compensation, the contractual status of a platform worker, or similarly influencing decisions.

Second, the form of notification is clarified. For example, Article 6(3) of the Draft requires that the digital labor platform notice should be provided in the form of a document (which may be electronic) and that the obligation should be fulfilled no later than the first business day, or when a significant change occurs, and when requested by the platform worker. The information provided should be in clear language and presented in a concise, transparent, understandable and easily accessible form.

Therefore, drawing on the relevant contents of the Draft, the C-GD legislation should also further clarify the operational rules of algorithmic transparency to provide clear guidelines for platform companies and platform workers.

2.1.2. Further Strengthening Human Intervention Mechanism

Since algorithmic systems are not perfect in data collection, training and automatic decision-making processes, and even unreasonable operating results occur, it is necessary to incorporate human intervention mechanisms.¹⁴⁷ The Chinese legislation and policy system reflects a certain human intervention mechanism by avoiding unreasonable algorithm rules with the help of union participation and listening to employees' opinions, but the specific rules are not perfect.

Article 8 of the EU Draft establishes further refined requirements for manual review rules for major decisions. One, it gives platform workers the right to receive an explanation from the digital labor platform when the automated decision making system makes or drives any decision that significantly affects their working conditions; two, it requires that the digital labor platform should have a contact person to communicate with platform workers on relevant issues; three, if the automated decision involves restricting, suspending or terminating a worker's account, refusing to pay wages, a decision on platform worker's contractual status or any decision with similar effect, a written explanation should be provided to the platform worker; fourth, the platform workers should be given the right to seek review, correction or compensation from the digital labor platform if they are not satisfied with the above decisions. It now appears urgent to pass the Draft and implement it into national legislation within in the EU.

Drawing on the experience of the EU Draft, Chinese legislators need to put the algorithm's manual intervention mechanism further into practice, not only to give platform workers the right to feedback, but also to further clarify how to carry out communication with platform workers and

¹⁴⁷ Peter K. Yu, *Beyond Transparency and Accountability: Three Additional Features Algorithm Designers Should Build into Intelligent Platforms*, 13Ne. U. L. Rev. 285,286 (2021).

how to ensure the right to relief for the platform workers, when the platform enterprises refuse to accept their opinions.

2.1.3. Playing More Active Roles by Labor unions and the Government

In the face of a complicated algorithm system, the platform workers have difficulties in realizing their right to know and advocating algorithm transparency, so it is particularly important to for labor unions and governments to supervise and intervene.

For example, Article 6(4) of the EU Draft obliges digital labor platforms to provide information about automated decision-making systems within the prescribed limits, as requested by the platform workers' representatives and national labor authorities. The second amendment made to *the Workers Statute* concerning the transparency of the algorithm is the addition of a new Article 64(4)(iv) to the chapter on "Collective representation".¹⁴⁸ This provision provides that the unions have the right to be regularly informed of the parameters and rules underlying algorithms or artificial intelligence systems that influence working conditions and decisions to obtain and maintain employment. The scope of this provision is not limited to platform companies, but all companies that use the technology to make these decisions should be included, with the intention of strengthening the transparency of algorithmic technology through collective representation, guaranteeing workers' right to know about the algorithmic technology and preventing its discrimination against them.

China has made it clear that trade union organizations should play a more active role in regulating algorithmic techniques. However, limited by the current institutional underdevelopment of the collective labor relations system, China should also further strengthen the supervisory function of the labor administrative departments. Especially for the complex terminology of algorithms and the problem of judging the reasonableness of public transparency, trade union organizations or labor administrative supervisory departments can hire members of expert groups to objectively and impartially come out to deal with relevant technical issues.

2.2. Definition of the "Employee"

In summary, we conclude that the management of platform employment should be strengthened, especially, in the identification of labor relation.

2.2.1. Taking Liability by Jointed Subjects

It is suggested to stipulate that all subjects involved in cooperative employment (including

148 <https://www.lexology.com/library/detail.aspx?g=3b24274c-5ff1-491f-842e-7d3af082a6b2>

legal or non-corporate entities, or even individuals) should take joint and individual liability. In the Labor Contract Law of China an individual labor relationship is between a single employer and a single worker, even in the case of labor dispatch employment, it is the employer and the agency company that establish labor relationship with the workers. However, in reality, the employment of Chinese platforms breaks through this pattern. Therefore, only by stipulating joint and individual liability could we break the relativity of the contract and protect the legitimate rights and interests of workers.

2.2.2. Establishing Legal Criteria for Determining Labor Relations

The legal criteria for determining labor relations should be established through legislation. Based on this, there also need to be interpretations from the supreme court.

In addition to the essential features of personal subordination and economic subordination of labor relations, some countries have established comprehensive and refined criteria, such as the aforementioned judgment criteria in Germany, and the “six-element tests” in the United States, consisting of the criteria of control, investment, opportunity for profit or damage, continuity, skill and business as a whole, etc.¹⁴⁹

On the basis of the subordination criteria, in the judicial practice of common law, the UK has even summarized a number of auxiliary criteria, such as: whether employees need to follow orders, receive training, are members of the overall employee corps, serve personally, the amount of working hours, whether they need to report for work, how wages are paid, profits and risks, the use of tools, the workplace, the right to resign, etc.¹⁵⁰ All of those are worthy for reference in China when formulating the criteria for determining labor relations.

Also, the existing standard of “workers’ labor is an integral part of the employer’s business” in China should be emphasized and applied. 2005 Notice puts forward an important but often overlooked standard in judicial practice which states if the labor provided by the worker is an integral part of the employer’s business, then the labor relation should exist. In the case of platform employers organize resources outside the platform companies in an attempt to push the workers out of the platform and deny the labor relationship, such a standard should become an important reference factor. It should be a principle that whoever derives profits from organizing the workers’ labor shall bear the responsibilities of the labor law and social insurance law to the workers.

Above on the long existing standards, the decision of the BAG on 1 December 2020 in a case

149 Wang Tianyu: On the Identification of Labor Relations Based on the Internet Platform to Provide Labor Services-Based on the Judgments of the Courts of “e-Driving” in Beijing, Shanghai and Guangzhou, Law Science, No.6, 2016.

150 Wang Tianyu: On the Identification of Labor Relations Based on the Internet Platform to Provide Labor Services -- Based on the Judgments of the Courts of “e-Driving” in Beijing, Shanghai and Guangzhou, Law Science, No.6, 2016.

concerning the platform economy has provided a new perspective to the identification of labour relations that is capable of dealing with the specificities of platform employment. In that case the BAG ruled that a crowdworker could be identified as an employee under certain conditions.

In the case, the defendant was the operator of a platform, which offered its customers, among other things, to control the presentation of branded products in retail outlets and petrol stations. In doing so, it divided the control orders placed with it into micro-orders, which it then awarded to crowdworkers.¹⁵¹

The defendant had previously concluded a framework agreement with the plaintiff, which stipulated, among other things: (1) the company offers contracts which will be remunerated at the agreed level if they are carried out correctly. The company is not obliged to make such an offer; (2) the crowdworker, as a contractor, is not obliged to accept an offered assignment; (3) the Contractor is entitled to use its own employees or to subcontract for the fulfilment of the order; (4) the contract can be terminated by either side at any time.¹⁵²

In addition to the framework agreement, the assumption of the control activities required that the plaintiff install an app on his smartphone through which practically all communication with the defendant ran. The orders were described in detail. With their acceptance, a contract with the operator of the platform (but not with its customers) came into being. In this way, no employment relationship was established; there was also no obligation to give instructions.¹⁵³

In addition, the crowdworker received so-called experience points, which were credited to his user account. This allowed them to improve their individual user status. For this purpose, different "levels" were set up; the more experience points there were and the higher the level derived from them, the greater the number of jobs that could be "booked" at the same time. The plaintiff had most recently reached level 15, which meant that he could accept 15 orders at the same time.¹⁵⁴

In a period of 11 months, the plaintiff completed a total of 2,978 jobs, which made him one of the so-called power users; he was therefore awarded a certificate as the "most active microjobber of the year" in autumn 2017. His weekly working time was about 20 hours; he earned about 1,750 euros per month. From this, however, all expenses, especially for travel, had to be met; as a non-employee, i.e. as a self-employed person, the plaintiff also had to bear the full costs for pension and health insurance.¹⁵⁵

151 Die folgenden Angaben sind dem Urteil des LAG München vom 4.12.2019 – 8 Sa 146/19 (Urteilsausfertigung) und dem Urteil des BAG (Fn.28) entnommen.

152 Wolfgang Däubler, Crowdworker als Arbeitnehmer? p. 6.

<https://www.daeubler.de/wp-content/uploads/2022/10/2204Crowdworker-als-Arbeitnehmer.pdf>, accessed 12th April 2023.

153 Ibid.

154 LAG München (Fn.29), Urteilsausfertigung, S. 9, from Wolfgang Däubler, Crowdworker als Arbeitnehmer? p. 7.

<https://www.daeubler.de/wp-content/uploads/2022/10/2204Crowdworker-als-Arbeitnehmer.pdf>, accessed 12th April 2023.

155 Wolfgang Däubler, Crowdworker als Arbeitnehmer? p. 8.

The BAG took into account of overall assesment of all circumstances required by Paragraph 611 (1) sentence 5 BGB, as well as the recognition of the actual performance of the contract required by Paragraph 611 (1) sentence 6 BGB and applied the law in a way that is appropriate to the special organisational strucure of platform work.¹⁵⁶

The BAG found that the plaintiff no longer had any significant scope for decision-making in the already established legal relationship. The work steps were predetermined and the time frame was also very limited. The plaintiff had therefore worked in personal absence within the framework of a uniform employment relationship.¹⁵⁷

The BAG held that the personal dependence followed from the fact that the control orders had to be carried out personally. Contrary to what was stipulated in the framework agreement, the plaintiff could not involve third parties because all orders were to be processed via the app and the individual user account, which were not transferable and in which third parties could not participate.¹⁵⁸

The BAG also held that the long-term and continuous employment of the plaintiff led to an "amalgamation" of the individual orders into a uniform employment relationship for an indefinite period of time¹⁵⁹ There had already been implied employment relationships based on a long-term practice. In this respect, there was an implied agreement of the partie¹⁶⁰ and the instructions from the employer was replaced by detailed obligations laid down in the agreement and the incentive policies, according to which, the more orders the plaitiff took, the higher level he would be raised, the more orders he would get.¹⁶¹

Some critics think that such an opinion is unacceptable,¹⁶² because the incentive was also not to be equated with a "means of pressure" because the level once attained would be maintained if no orders were taken for some time.¹⁶³ The pressure to accept an order was therefore very low

<https://www.daeubler.de/wp-content/uploads/2022/10/2204Crowdworker-als-Arbeitnehmer.pdf>, accessed 12th April 2023.

156 Rüdiger Krause, 'APP-BASED WORK' ---- The German Case, p. 40.

157 BAG (Fn.28) Tz. 44, from Wolfgang Däubler, Crowdworker als Arbeitnehmer? p. 15.

<https://www.daeubler.de/wp-content/uploads/2022/10/2204Crowdworker-als-Arbeitnehmer.pdf>, accessed 12th April 2023.

158 Wolfgang Däubler, Crowdworker als Arbeitnehmer? p. 15 <https://www.daeubler.de/wp-content/uploads/2022/10/2204Crowdworker-als-Arbeitnehmer.pdf>, accessed 12th April 2023.

159 [BAG (Fn.28) para.52 et seq. In this direction also Schneider-Dörr (Fn.9) p. 252, from Wolfgang Däubler, Crowdworker als Arbeitnehmer? p. 15. <https://www.daeubler.de/wp-content/uploads/2022/10/2204Crowdworker-als-Arbeitnehmer.pdf>, accessed 12th April 2023.

160 Verwiesen wurde auf BAG 9.4.2014 – 10 AZR 590/13, NZA-RR 2014, 522; BAG 17.4.2013 – 10 AZR 272/12, NZA 2013, 903 from Wolfgang Däubler, Crowdworker als Arbeitnehmer? p. 15. <https://www.daeubler.de/wp-content/uploads/2022/10/2204Crowdworker-als-Arbeitnehmer.pdf>, accessed 12th April 2023.

161 Wolfgang Däubler, Crowdworker als Arbeitnehmer? p. 15

<https://www.daeubler.de/wp-content/uploads/2022/10/2204Crowdworker-als-Arbeitnehmer.pdf>, accessed 12th April 2023.

162 *Thüsing/Hütter-Brungs*, NZA-RR 2021, 251 ff., auch zum Folgenden. P. 17

163 *Kreßel*, DB 2021, 1671, 1678. p.17

and did not justify being treated in the same way as an instruction.¹⁶⁴

Professor Wolfgang Däubler holds different opinions to such critical opinions and think that legally existing "freedom" (of not to take orders for some time) had a highly fictitious character for all those who depended on the earnings from crowd-work. The fact that the plaintiff's account was deactivated because of a dispute over 10 euros could be understood as an indication that any non-performance would be considered a minus point and thus put the work as a whole in jeopardy.¹⁶⁵ In essence, it was subordinate work and had to be governed by labour law. On the face of it, the plaintiff entered into 10 to 12 individual contracts per working day, however, in the long term, it is undisputed that the plaintiff performed subordinate work.¹⁶⁶

The decision of the BAG is inspiring. As a Taiwan scholar points out that regarding the recognition of the subordination of platform work, although platform workers have the freedom to decide the time to receive orders, if the operation mechanism set by the platform, such as the evaluation and assignment mode and standard, has formed an "indirect coercive force" that affects the platform workers' freedom of decision, then the platform workers are not truly independent and do not have the true right to refuse labor services. In terms of enforcement, we should examine whether the platform's operation mechanism has an impact on the behavior of platform workers, e.g., if the platform restricts the scope of the locations where cases can be received, it is location-bound. For example, if the platform restricts the scope of the location where a case can be received, it is location-bound. As for the instruction, if the platform company clearly describe the work to be delivered in advance and no further instructions are required for the execution of the work, i.e., the platform company must not have the instruction to the workers. If the instructions given in advance are so detailed that the platform worker has no freedom of decision, there is still subordination of personality.¹⁶⁷

2.2.3. Improving Regulations on Part-time Employment

Legal regulations for part-time employment should be improved. With the development of different forms of employment, part-time employment in various developed countries has grown considerably in the past two decades. In Germany in 2021, the whole standard employment is 26,274,000 people, of which the part-time employment working more than 20 hours a week is 4,584,000, plus the part-time employment of 4,259,000 people in atypical employment, the part-

164 *Wisskirchen/Haupt*, RdA 2021, 355, 357. p. 17.

165 Wolfgang Däubler, *Crowdworker als Arbeitnehmer?* p. 18

<https://www.daeubler.de/wp-content/uploads/2022/10/2204Crowdworker-als-Arbeitnehmer.pdf>, accessed 12th April 2023.

166 In diese Richtung neigend auch *Bayreuther*, RdA 2020, 241, 242, from Wolfgang Däubler, *Crowdworker als Arbeitnehmer?* p. 19. <https://www.daeubler.de/wp-content/uploads/2022/10/2204Crowdworker-als-Arbeitnehmer.pdf>, accessed 12th April 2023.

167 Qiu Yufan, *The Development and Review of Subordinate Test in Labor Contract: Also a Discussion on Platform Workers' Character of Employee*, Taipei University Law Series, Issue 119, p. 78.

time employment accounts for 33.52% of the whole receiving wages employed population.¹⁶⁸ Part-time employment has also been widely used in countries such as the United States, the United Kingdom and Japan, where the percentage exceeds 15%.¹⁶⁹

In the platform economy, the number of part-time workers is also relatively high, but the current labor protection for part-time employment in China is inadequate, which not only provides suitable protections for platform workers, but also hinders the development of part-time employment. It is suggested to improve it in the following two aspects: (1) Revise the definition of part-time workers and determine that the workers who work less than normal working hours are part-time workers; (2) Clearly stipulate that part-time workers are also protected by labor law.¹⁷⁰

2.2.4. Reversing the Burden of Proof

The system of reversing the burden of proof should be adopted in the determination of labor relations. The provisions of the EU Draft on the reversal of the burden of proof can be used to actually reverse the burden of proof in labor arbitration proceedings, civil litigation proceedings, administrative confirmation and administrative proceedings involving labor relation identification. The shift of the proof burden to the digital labor platforms is justified, because they have complete knowledge of all the factual elements that determine the relationship and, in particular, the algorithms by which they manage their operations. Legal and administrative proceedings initiated by digital labor platforms to rebut the legal presumption should not have a suspensive effect on the application of the legal presumption. Successful rebuttal of the presumption in an administrative proceeding should not preclude its application in a subsequent judicial proceeding. When a person working on a platform who is the subject of a presumption of labor relations seeks to rebut the legal presumption, the digital labor platform should be required to assist that person, in particular by providing all relevant information held by the platform in relation to that person.¹⁷¹ The reversal of the burden of proof, combined with the above-mentioned determination of labor relations considering the characteristics of platform work, will be more conducive to clarifying the nature of platform employment, so as to protect platform workers better.

2.2.5. Exploring Improvements Suitable to Platform Employment

Since platform employment has its own characteristics, while giving platform employees the

168 Atypical employment - German Federal Statistical Office (destatis.de). <https://www.destatis.de/EN/Themes/Labour/Labour-Market/Employment/Tables/atypical-employment-zr.html;jsessionid=DCCD4AEA2FCDE02BD780AA7008867E12.live721>

169 Li Zhikai: Dilemma and Countermeasures of Regulations on Part-time Employment in China: from the Perspective of Flexible Employment, *Social Scientist*, No.4, 2022.

170 Li Kungang, Qiao Anli: A Research on the Improvement of China's Part-Time Employment System, *Jianghuai Forum*, 3rd Issue, 2015.

171 See *A Directive of the European Parliament and of the Council in on Improving Working Conditions in Platform Work*.

basic protection of labor law, the characteristics of platform employment could also be considered, and new systems could be appropriately explored in terms of overtime payment standards, recognition and regulation of termination of labor relations, etc.

Finally, we would like to emphasize that the determination whether a worker employed on a platform is in a labor relationship, or a partial labor relationship, a labor service relationship is essentially an important choice that will profoundly influence the labor relations in the future. We believe that if we choose to identify them as labor relations, it will be beneficial not only to the platform workers, but also to the state and society, because, only in this way will a benign ecology of the platform economy be formed, which is conducive to the healthy, harmonious and sustainable development of the platform economy.

2.3. Social Security

With the new standards of labor relations recognition (see chapter 2.2.2), the basic problems of social insurance payment for full-time workers employed on the platform will be solved, and the recognition of labor relations will clear the obstacle of social insurance payment. However, still there are two issues that need to be focused on: one is the social insurance of the workers except full-time employees; the other is the supervision mechanism and compulsory nature of social insurance collection.

Before discussing the two issues, it is important to realize that platform labor is part of the overall socialized labor. In modern society, the labor provided by each individual, except for a very small amount of family labor, is socialized labor. Work for the operation of society under labor relations is characterized by paying social insurance premiums. However, objectively, socialized labor in non-labor relations also needs to have social insurance in order to bring the providers of social labor into the protection mechanism. There are only two paths to solve this problem: one is to withdraw social insurance contributions in the process of social labor; the other is to solve it through state tax subsidies. The first of these makes the most sense, as it balances the cost of employment across different forms of employment. With the worldwide trend of flexible employment, we should strengthen the construction of social insurance system that is compatible with various flexible employment.

2.3.1. Improving the Social Insurance Payment System

First, it is necessary to include every kind of part time employee into the social insurance system. It should be stipulated that part-time employee shall pay social insurance according to the actual employment time with reference to the ratio of social insurance premium payment for full-time employed workers.

Second, there is a need to connect part-time social insurance with full-time social insurance and the medical, pension and living security guaranty benefits for urban and rural residents. The advantages of improving part-time employment also include, firstly, balancing the employment cost expenditure of employers, and secondly, making it possible for employees engaged in more than two part-time jobs to obtain one complete social insurance, instead of currently losing social insurance if they are engaged in part-time employment, and thirdly, the social security guaranty system for urban and rural residents could be used as a supplement to the insufficient social insurance for part-time employees.

Third, a system of withdrawing social insurance premiums according to orders could be explored. Even if the workers do not provide labor service under the labor relationship, social insurance premiums can be calculated according to a certain percentage for their social labor volume. In platform employment, the algorithm is so powerful that the social labor of workers can be precisely recorded and measured. In the context of increasingly flexible and changeable employment, we should explore to withdraw social insurance premiums on a per-order basis in order to include all providers of social labor in social insurance and thus reduce the financial pressure on social security subsidies. In this way, the social insurance problems of some employed people on platform that could not be included in labor relations, such as dependent operators, independent contractors, and self-employed people, will be solved to some extent. Such a system would make the social insurance system more scientific and more helpful to meet the trends and challenges of flexible employment.

2.3.2. Improving the Monitoring and Responsibility System

A survey sample of those employed in the new sector shows that about 75% of flexibly employed workers are migrant workers, and most of these people are excluded from social insurance for employees and can only participate in resident social insurance.¹⁷² Only 16% of workers who have signed standard labor contracts are not equally entitled to social insurance. The problem of inadequate social security for the flexibly employed needs to be addressed.¹⁷³ As mentioned above, the localized social insurance system has created a certain contradiction between the collection of social insurance and the development of the local economy, which has diminished the enthusiasm of local social insurance enforcement. For this reason, a social insurance enforcement and monitoring mechanism that transcends the local interests should be

172 Resident social insurance includes medical insurance and old-age insurance, which is paid annually and voluntary by local residents, with no mandatory requirements. The premiums and payments are lower compared with the social insurance of the employees,

173 Zheng Gongcheng: Weaving a Safety Net for 200 Million Flexible Employees, Outlook News Weekly, May 30, 2022, by reporter Chen Yan.

established to better ensure that the social insurance system is effectively implemented. Therefore, there is a need to improve the monitoring and responsibility system.

First, the administrative liabilities shall be strictly enforced. In accordance with the current law, where an employer fails to register for social insurance, the social insurance administrative department shall order him to make corrections within a time limit. If the employer fails to make corrections within the time limit, it shall be imposed a heavy fine and a fine of 500 to 3,000 yuan to the person who is directly responsible shall also be imposed.¹⁷⁴

Second, a labor and social security inspection system that transcends the interests of local governments should be established. Based on the institutional background of fragmented power structure, it is recommended to adopt a vertical management system.¹⁷⁵ A labor and social security supervision institution directly under the Ministry of Human Resources and Social Security should be established, and a national unified premium collection institution that transcends local economic interests should be established. Only in this way can the social insurance premiums be collected according to the law, can the coverage of social insurances be extended, can workers be given better and more reliable protection, and can the construction of a harmonious society and the sustainable and healthy economic development of China be promoted.¹⁷⁶

Third, a criminal liability system for failure to pay social insurance should be established. Social insurance involves the basic protection of workers and social security, and its legal benefits are undoubtedly important and worth guarding with the deterrent effect of criminal liability. From the reality of China, there is a certain prevalence of social insurance evasion by employers who do not pay social insurance, or adopt agreements with workers to evade social insurance through the issuance of social insurance subsidies. Therefore, it is necessary to institutionalize the relevant criminal legal norms to ensure that employers take the initiative to fulfill their legal obligations to pay social insurance.

2.4. Reputation

2.4.1. Broadening the Scope of Application

With regards to the discrimination arising from consumer-driven ratings systems, the first

174 See Article 84 of *Social Insurance Law of the People's Republic of China*.

175 Huang Guoqin and Jiang Ying: Dilemma, Challenge and Development of Fragmented Labor Inspection Mode in China, *China Labor*, No.9, 2016.

176 Li Kungang: A Study on the Compulsory Issues of China's Social Insurance System, *Journal of Henan University of Political Science and Law Management*, No.2, 2010.

legal hurdle is still the employment status: many platform workers are taken as independent contractors. In China, the existing legal protections against employment discrimination are attached to the status of recruited employees (or candidates under the recruitment process), not including the self-employed. EU anti-discrimination legislation, which stipulates its broad scope of application with no exception, covering “conditions for access to employment, to self-employment or to occupation”¹⁷⁷ goes further and might be useful for China, too. Secondly, it is also challenging to get access to the needed data to effectively identify discrimination. It is necessary to mitigate this information asymmetry by obliging platforms to establish baseline statistics.¹⁷⁸ Platforms should collect data (including workers’ demographic characteristics, the consumers’ ratings, and employment decisions), and release evaluation reports regarding disparities in consumers’ ratings and related employment decisions.

2.4.2. Strengthen democratic management

The above-mentioned practices of “strictest algorithm” and “penalty-based management”, are to some extent specific to China’s context and rooted in the serious imbalance of power between platforms and workers. The groundbreaking policy issued by China’s authorities, *Guiding Opinions on Protecting the Labor Rights and Interests of Workers Employed in New Forms*,¹⁷⁹ has proposed measures to strengthen democratic management, ensuring workers to have their voices heard. Platform enterprises are required to listen to opinions and suggestions from representatives of trade unions or workers when formulating rules and algorithms directly related to workers’ interests and rights like entry or exit conditions, order distribution, service fee, commission rate, etc. Platforms are instructed to establish workers’ complaint mechanisms to ensure that workers’ request to platforms to review decisions and obtain replies in a timely manner. Even with those constructive proposals, the *Guiding Opinions* is a non-binding guidance in China, leaving it to local governments to work out to the implementation. In this respect, China’s policy-making could refer to the proposed EU legislation, *A Proposed Directive on Improving Working Conditions in*

177 The EU’s equal treatment provisions are contained in Article 14 of Directive 2006/ 54, and Article 3(1) of Directives 2000/ 43 and 2000/ 78.

178 Alex Rosenblat, Karen E.C. Levy, Solon Barocas & Tim Hwang, “Discriminating tastes: Uber’s customer ratings as vehicles for workplace discrimination,” *Policy and Internet*, no.3 (2017): 256-279, <https://doi.org/10.1002/poi3.153>, accessed on 6th September 2022.

179 Ministry of Human Resources and Social Security, the National Development and Reform Commission, the Ministry of Transport, the Ministry of Emergency Management, the State Administration for Market Regulation, the National Healthcare Security Administration, the Supreme People’s Court, and the All-China Federation of Trade Unions “Guiding Opinions on Protecting the Labor Rights and Interests of Workers Employed in New Forms”, http://www.mohrss.gov.cn/xgk2020/fdzdgknr/zcfg/gfxwj/ldgx/202107/t20210722_419091.html, accessed on 6th September 2022.

Platform Work.¹⁸⁰ The Directive obliges platforms to regularly monitor and evaluate its automated decision-making systems on work conditions. The workers have the right to contest any decision negatively affecting their working conditions, the detailed procedure is stipulated: to obtain an explanation, to discuss and clarify the facts and reasons, to get a written statement, to request to review the decision and to obtain a substantiate reply (with adequate compensation if any).

2.4.3. Regulating the Transfer of Reputation Data

The portability of reputation data is a much neglected issue in China's policy-making, which is also controversial in the EU. The first question is who actually owns the reputation data. Article 20 of *EU's General Data Protection Regulation* has introduced the right of data portability: "have the right to transmit those data to another controller without hindrance from the controller to which the personal data have been provided". However, the reputation data such as ratings and comments are given by the consumers rather than by workers themselves, which makes it unclear whether the reputation data is covered by *EU's GDPR* or not. In consideration of the significance of reputations for workers' earnings, thus concerning their fundamental economic and social rights, it is suggested that the workers should be explicitly granted the right to transfer the reputation data across platforms. Secondly, as to how to make reputation data compatible and portable across platforms, there are already market initiatives, such as Traity¹⁸¹ and Deemly¹⁸². Deemly compiles a user's reputation data on different platforms and convert it into a score which can be used across platforms as indicator of reliability and reputation.¹⁸³ Establishing a cross-platforms reputation system would contribute to the activation of the reputation capital and the construction of the trust in the whole economy of "transacting with strangers", which would ultimately enhance the infrastructure of internet economy.

2.5. Self-Organisation

Integrating the legislative trends and practical strategies in China and Germany, the issues of trade union rights of platform workers should continue to be promoted in the following aspects.

180 Proposal for a Directive of the European Parliament and of the Council on Improving Working Conditions in Platform Work (COM/2021/762 final), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0762&qid=1662487117538>, accessed on 6th September 2022.

181 Deemly is a reputation site which gathers users' reviews and ratings from P2P marketplaces, help them build trust for their community, ultimately allow them to take their reputation with them across all online activities. Refer to <https://thehub.io/startups/deemly>, accessed on 5th November 2022.

182 Traity, a Spanish startup, has made trust between strangers online possible by integrating profiles and feedback from various different online platforms. Refer to <https://digital-strategy.ec.europa.eu/en/news/success-story-spanish-startup-traity>, accessed on 5th November 2022.

183 European Commission, "Exploratory study of consumer issues in online peer-to-peer platform markets : final report," Publications Office, 2019, <https://data.europa.eu/doi/10.2838/779064>, accessed on 6th September 2022.

2.5.1. Adopting More Inclusive Union Membership Policies

The Trade Union Law of China and relevant norms should further clarify that trade unions can include new industry practitioners who are not in labor relations, and provide clearer support for platform workers' right of association from the legal level. The All-China Federation of Trade Unions (ACFTU) and local federations should play an active leading role in guiding large labor platform enterprises and local subcontractors or cooperators to establish union organizations and absorb platform workers into unions.

2.5.2. Creating Organizational Models Suitable to Platform Workers

It is necessary to actively promote the construction of an industry trade union federation for platform workers. In view of the fact that some large Internet platforms often cooperate with local franchisees to "outsource" labor relations with platform workers in actual employment, the government should promote the formation of industry trade union federations to overcome the fragmentation of employment relations and create a more appropriate dialogue platform for platform workers with platform enterprises and subcontractors. For example, trade unions in Shanghai's new industry established trade union groups with stores and franchises as the smallest units, then joint trade unions within local neighborhoods, and then formed district-wide industry trade union federations these, so that the service scope of industry trade union federations can achieve coverage from outlets to regions.

Secondly, using the network labor characteristics of platform workers, the organization activities can be carried out online. In China, platform workers use modern social networks such as QQ groups and WeChat groups to interact and communicate with each other through text, voice and video, even though they cannot communicate face to face. Organizing through social media and other online platforms has become an important feature of new generation labor groups, and these online spaces are also effective tools for organizing workers in unions and other organizations.¹⁸⁴ In some previous processes of spontaneous group rights advocacy, Internet car drivers have in fact used social networking platforms to communicate and take action, and some Meituan delivery workers have formed a "Riders Union WeChat Group" to provide a platform for delivery workers to help each other.

184 Hannah Johnston, Chris Land-Kazlauskas, *Organizing On-Demand: Representation, Voice, and Collective Bargaining in the Gig Economy*, Conditions of Work and Employment Series No. 94, ILO, 2018, p.31.

2.5.3. Expanding the Coverage of Collective Bargaining

In order to effectively solve the difficult problem of expanding the scope of collective bargaining subjects in relation to the anti-monopoly law, the legislation should allow self-employed persons who have similar situations as workers to participate in collective bargaining. For example, according to the interpretative notes of the European Commission "*Guidelines On The Application of Union Competition Law to Collective Agreements Regarding the Working Conditions of Solo Self-Employed Persons*",¹⁸⁵ solo self-employed persons have comparable situations as workers, who may not be able to individually negotiate good working terms. Digital labour platforms are usually able to unilaterally impose the terms and conditions of the relationship, without previously informing or consulting solo self-employed persons.¹⁸⁶ Therefore, the Commission will not enforce EU competition rules against collective agreements regarding with work conditions made by solo self-employed people.¹⁸⁷

2.5.4. Promoting Cross-regional Industrial Collective Bargaining

Although some local labor unions in China have actively promoted platform workers' membership and collective bargaining, the core challenge is that platform companies, not platform companies' partners in various localities, are controlling algorithms and labor conditions,. Thus it is important to promote dialogue between platform workers and the headquarters of platform companies. The case of the Shanghai Ele.Me platform plea mentioned above reflects a more flexible approach to communicate. However, because platform headquarters are registered in specific cities, China should consider promoting cross-regional industry-specific collective bargaining to build bridges of dialogue between platforms and platform workers, and the relevant collective agreements can be effectively applied to platform workers in all regions.

3. Conclusion

Labor and social security laws are important legal guarantees in the harmonious operation of modern industrialized countries. The rapid economic development of some platforms in recent years has been achieved on the premise that a large number of workers are excluded from the labor protection and social security system. In the long run, this will undermine the harmony of labor relations and social security. In this situation, the government, as the leading authority in

¹⁸⁵ Guidelines On The Application of Union Competition Law to Collective Agreements Regarding the Working Conditions of Solo Self-Employed Persons(2022/C 374/02).

¹⁸⁶ Article 3.3 (28) of 2022/C 374/02.

¹⁸⁷ Article 3 of 2022/C 374/02

coordinating labor relations and the main body responsible for the social insurance system, must take the initiative and act proactively.

Compared with the traditional industries, platform companies are not burdened with the costs of labour law and social security law at present. By virtue of this unfair competitive advantages, platform companies have been developing fast. Some platform companies have obtained dominant market position, even abusing their power to unilaterally impose unfair work conditions on workers, such as changing pricing criteria, prohibiting reputation data transfer and work on multiple platforms simultaneously. Therefore, strengthening the protection for platform workers is the fundamental solution to address the unfair competition in the labour market, curb the market monopolies in platform economy, and maintain the social security system.

Undoubtedly, the platform economy and platform employment have new features. Although these new features are not an excuse for the avoidance of the application of labor and social insurance laws, we cannot simply incorporate them into the existing labor and social insurance laws in a rigid manner. We should constantly explore on the new developments and requirements of the platform economy and platform employment, and improve the labor and social insurance legal system correspondingly. It is essential to promote the harmony of labor relations and social security.