Part II: Ensuring Social Security: Employment Status Classification and Innovative Solutions

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Chapter 3
The Sharing Economy in Belgium: Status due to Taxation or Non-Status?

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I. Introduction

During the last couple of decades, the motto was a flexible labour market. The technological development, also known as the Industrial Revolution 4.0, contributed largely to this credo. It gave clients an extreme form of flexibility. The platform economy constitutes a great example of this evolution. With this new technology, it is possible to pay a person a small fee and "get rid" of him/her when they are no longer needed.[1] Clients can use platform workers' services only when needed and pay when the workers carry out a certain activity for them. By setting up a platform, the employer – or rather, the consumer (?) – aims to keep a high level of flexibility and to eliminate downtime to the greatest extent possible, while at the same time trying to control as much as possible the entire process in order to minimise transaction costs.[2] Thanks to his labour (?), the platform worker himself earns an additional reward, which may be low but not always insignificant for the person concerned. Nevertheless, this evolution within the flexible labour market presents the legislator with enormous challenges, both for the economy and for social law. Is it possible to consider the sharing economy as a complement or a substitution to the current economy? Does it give rise to unfair competition? How shall we, incidentally, describe these activities? Is it work? Furthermore, it is noteworthy that the activities carried out via electronic platforms are not described as work but rather as a service rendered, a task, a gig or a ride in the case of transport. Often, terms like work and employee are not used at all. It is as

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1 *Marvit, Moshe Z.*, How Crowdworkers Became the Ghosts in the Digital Machine, The Nation, 5 February 2014, https://www.thenation.com/article/archive/how-crowdworkers-became-ghosts-digital-machine/. Accessed 30 July 2020.

2 *Prassl, Jeremias/Risak, Martin*, Uber, TaskRabbit, & Co: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork, in: Comparative Labour Law and Policy Journal, 37 (2016), p. 625.

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if one tried to indicate that it concerns a very special form of activities, which do not fit within the traditional way of thinking about work and the associated labour and social security protection. The persons carrying out these activities are often not known to their client, who calls on them through a click on a computer or an app.[3] Likewise, the persons concerned often have no idea at all who they are working for and if their clients are, for instance, a private person or a company.[4] However, it is exactly these questions that come with certain risks, because labour law and social security law do assume that work is carried out.

In social security law, contributions are often calculated on the basis of the income from work. And can it be said at all times that the income these persons earn is income from work? Can we therefore consider these activities as work-related activities within the meaning of the social security systems and, if not, is there not a risk that the financial basis of our systems will be compromised? It is, of course, exceptional not to qualify certain activities as work just because they would take place through a platform. If activities are considered to be work in the case of contracted work, they must, of course, also be seen as such if mediated through an app.[5] This chapter describes the reaction of the Belgian legislator to the sharing economy, the reaction of the Constitutional Court and reflects on a new vision for social security.

II. The Sharing Economy under Belgian Social Law

Any work carried out in Belgium takes on one of three forms: work performed in a subordinate capacity for remuneration on the basis of an employment contract (as an employee), work performed in execution of a status determined unilaterally by the public authorities (as a civil servant), and work performed in the context of a self-employed professional activity (as a self-employed person). A person who carries out an activity in Belgium comes under one of these three social statuses. In social security law,

3 See also *De Stefano, Valerio,* The Rise of the "Just-in-Time Workforce": On-Demand Work, Crowdwork and Labour Protection in the "Gig-Economy", in: Conditions of Work and Employment Series, International Labour Office, Geneva, 71 (2016), p. 5, https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_443267.pdf. Accessed 30 July 2020.

4 *Warter, Johannes,* Crowdwork, Wien: OGB Verlag 2016, p. 297.

5 Clearly, this does not imply that some activities could not be excluded from social law as a voluntary activity under national law.

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self-employed persons are all persons carrying out an activity which excludes them from social security for employees or from the status of civil servant.[6] The self-employed person follows the concept of (non-)employee, so that employment contracts are seen under the exact same terms for both groups in labour law and with regard to the status of self-employed persons. In the end, the Belgian Employment Relationship Act, which cites criteria on the basis of which a judgement is made as to whether there is an employment contract,[7] will establish if someone is an employee or a self-employed person. Whether one is an employee or a self-employed person will ultimately have to be judged by the court. Just as in many other countries, the answer to this question is not always unequivocal.[8] However, the impact of the answer to this question is not insignificant. The protection of the platform worker is much more limited under the self-employed status than under the employee status. However, this question is not always considered with the same attention by the platform worker in question. Platform workers are often unaware of their status or of its consequences in the short and long term. They often see platform work as an ancillary activity, a side job which can sometimes lead to the start of their own independent activity.

Therefore, every activity automatically falls under one single social status. That is no different for a platform worker. Activities within the sharing economy consequently fall under the traditional social and fiscal regime. The platform worker will therefore, like any other active person, be covered either by the social security system for employees or by that of the self-employed. In most cases, however, the person concerned will be considered to be self-employed.[9] This is partly due to the self-employed status being a residual category and also to the special tax presumption contained in the social status of self-employed persons. Under this scheme, there is a presumption – albeit a rebuttable one – on the basis of which a person who declares profits, income, remuneration from professional activities for tax purposes is presumed to be engaged in an independent activ-

6 Article 3 (1) of Royal Decree No. 38 of 27 July 1967 establishing the social status of self-employed persons.
7 Article 328-342 of the Programme Law of 27 December 2006.
8 See CAR (Belgian Labour Relations Commission) and tribunal discussions on Deliveroo.
9 See also *Stevens, Yves*, Social Security and Platform Work in Belgium: Dilemma and Paradox, in: Devolder, Bram (ed.), The Platform Economy, Unravelling the Legal Status of Online Intermediaries, Cambridge-Antwerp-Chicago: Intersentia 2019, pp. 262-263.

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ity. Only miscellaneous income that is occasional and falls outside a professional context is not included. If a platform worker declares professional income, he will have to join a social security scheme as a self-employed person. If he declares the income from the sharing economy as miscellaneous income on his tax declaration form, this will be reclassified as professional income as soon as this is done on a regular basis and thus, the suspicion of a self-employed (secondary) activity arises.

1. Indirect Legal Status

Faced with an increasing number of private individuals offering services to other private individuals as mini-entrepreneurs, the Government wanted to strengthen this form of sharing economy and at the same time remove it from the grey zone in order to combat fraud. Therefore, it was decided to establish a special regulation. Through the Programme Law of 1 July 2016, a separate fiscal and social regulation was introduced for certain providers within the sharing economy.[10] Based on the realisation that the sharing economy could constitute an important growth engine for the economy, which therefore needed to be promoted, the legislator considered it important for workers to be able to carry out a limited activity with minimal administrative formalities in the context of the sharing economy.[11] The system consisted of introducing a separate category within miscellaneous income for income generated in the context of the sharing economy. However, the income from occasional services as miscellaneous income was in principle taxable at 33 percent but was often not declared. The Government's aim with the new regulation was not only to take out of its grey zone income that had previously often escaped taxation, but also to encourage entrepreneurship by giving people the opportunity to carry out a limited activity with a minimum of formalities.[12] If a number of condi-

10 Programme Law of 1 July 2016, Articles 35-39, https://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&table_name=wet&cn=2016070101. Accessed 20 August 2020.

11 Explanatory memorandum of the Programme Law of 2 June 2016, Parliamentary Acts of the Belgian House of Representatives 2015-2016, No. 54-1875/001, p. 23.

12 Ibid. It must be mentioned that, in principle, someone who performs with a minimum of regularity or continuity a self-employed activity in addition to the job as employee (self-employed persons in secondary employment) must pay social security contributions to the social insurance fund he/she is affiliated with. The contributions (20.5 percent) are calculated annually on the basis of the net professional income.

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tions were met, this income would henceforth be taxed at a net tax rate of 10 percent. The condition was that this income may not exceed a certain threshold amount (EUR 5,210).[13] In addition, the activities carried out under this regulation could not be closely linked to an activity carried out as a self-employed person or to the activity of the company of which he/she is the manager.[14] Nevertheless, closeness to the activities carried out as an employee did not pose a problem. The reason for this distinction stemmed from its objective. The aim of the regulation was, on the one hand, to encourage employees to try out self-employment and, on the other hand, to give the self-employed the opportunity to try out another professional activity.[15] It would, of course, be a different case if a self-employed person were to bring part of his activities under the cheaper status. In a nutshell, the Government simply aimed to encourage self-employment. Of course, it remains a delicate matter to determine which activities are closely related. Does a sectoral approach suffice?

Another condition is that the sharing platform had to be recognised. Through the recognition, the Federal Public Service Finances is not only able to assess whether the services are eligible for the regulation, but also ensures that the platforms provide the necessary cooperation in the deduction of the tax withheld on professional income and in the reporting of income. This way, income from grey labour can be made visible. The service provider must mention the gross amount of the income in its personal income tax declaration. This is the amount actually paid or granted by or through the platform, plus all amounts withheld by the platform or through its intervention. At the end of the year, the sharing economy platforms report this gross amount to the Federal Public Service Finances, which checks that the exempted limit has not been exceeded.

This tax section was also linked to a social section. Both sections had to be read together.[16] In accordance with the social status regulations for self-employed persons, income from platform work is not subject to Royal Decree No. 38[17] for the activity related to this income, as long as platform work-related income does not exceed the maximum amount provided for in the Income Tax Code. No one can deny that the importance of the shar-

13 Income threshold to be indexed of EUR 3,255, which is set at EUR 5,210 for the tax year 2019.

14 Explanatory memorandum of the Programme Law of 2 June 2016 (fn. 11), p. 24.

15 Ibid., p. 24.

16 Ibid., p. 12.

17 Royal Decree No. 38 of 27 July 1967 establishing the social status of self-employed persons.

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ing economy is increasing. In fact, the Belgian Government set up this regulation to not "miss the boat". Moreover, the system of exemption from fiscal and parafiscal contributions indirectly subsidises the entire sharing economy. If one earns less than the threshold, the income is seen as miscellaneous income that does not give rise to the fiscal presumption of self-employment.[18] Thus, the legislator intervened through an ingenious system of fiscal and parafiscal exemption of income from platform work and regulated aspects of platform work.

With the adoption of the Act on Economic Recovery and the Strengthening of Social Cohesion on 18 July 2018, the legislator went even one step further.[19] Indeed, instead of a reduced rate of 10 percent net tax burden, there is now a total tax and social security contribution exemption for income from certain forms of employment. Natural persons can now carry out activities untaxed and exempt from contributions for a certain amount of income limited to EUR 6,000 per year. This limit is higher than the one set in the law of 2016.[20] Also, the activities are not limited to the sharing economy. There are three possibilities: association work, services from citizen to citizen, and the sharing economy. For the first two categories, a system has been set up that is in line with the existing tax system of the sharing economy through a recognised platform and has also been linked to it (in terms of maximum income limit). The law aimed to support association work which is by its very nature based on voluntary cooperation between citizens without a traditional subordinate relationship and possibly carried out at a legally limited fee.[21] For a specific list of activities,[22] natural persons may provide support to persons organising an activity. In addition,

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18 This is on condition that (a) the services are provided exclusively to natural persons who are not acting in the course of their professional activity; (b) the services are provided solely under contracts established by means of an approved electronic platform; (c) the fees for the services are paid or granted to the service provider solely by the platform referred to or through that platform (Article 36 of the Programme Law).

19 Act on Economic Recovery and the Strengthening of Social Cohesion of 18 July 2018, https://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=2018071803&table_name=wet. Accessed 20 August 2020.

20 However, it should be noted that the income from the sharing economy is now added to the income from associations and occasional services between citizens.

21 Explanatory memorandum of the Government Bill on Economic Recovery and the Strengthening of Social Cohesion of 11 December 2017, Parliamentary Acts of the Belgian House of Representatives 2017-2018, No. 54-2839/001, p. 152.

22 As an animator, youth leader or coordinator providing sports initiation and/or sports activities; sports trainer, sports instructor, sports coach, youth sports coordinator; caretaker of youth, sports, cultural and artistic infrastructure; carer in

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and by extension, the legislator also wanted to take into account the limited services performed by citizens among themselves. After all, these services are similar to association work, since they are also primarily carried out during leisure time, but on the other hand, the difference lies in the fact that the services are not performed through an organisation, but directly between citizens. Activities of this sort are occasional and are therefore not carried out on a regular basis. They are also described as a "favour for a friend". Finally, the system of the sharing economy is also mentioned, whereby the system of an untaxed sideline will also be made applicable to additional earnings from the sharing economy through recognised platforms. The difference with the occasional services between citizens is that in the sharing economy, the work is done through a recognised platform.[23] Since an association or citizen does not work through a recognised platform and in order to allow effective control, the performance of the association's work and the occasional performance between citizens must be declared in advance.[24] The application of this law is framed by a number of conditions which are, however, much less stringent as far as the sharing economy is concerned. Nevertheless, the law did not include a separate social section for the sharing economy.

As soon as a person earns more than the maximum threshold, that person cannot be considered as an occasional service provider and the services are by law irrefutably presumed to have been provided under the social status of self-employment.[25] In this sense, activities performed for remuneration but outside the framework of the sharing economy or outside the framework of occasional services will not be covered by this exemption. Therefore, one performs work that falls under the status of either employee or of a self-employed person. This applies both if one exceeds the threshold and if one does not comply with the application conditions. The inten-

childcare before, during and/or after school hours organised at school or during school holidays, as well as during transport to and from the school; providing help and support on an occasional or small-scale basis in the field of administration, management, the organisation of archives or the assumption of logistical responsibility for activities in the socio-cultural, sports, cultural, art education and education sectors. (Article 3 of the Act on Economic Recovery and the Strengthening of Social Cohesion of 18 July 2018).

23 Explanatory memorandum of the Government Bill on Economic Recovery and the Strengthening of Social Cohesion of 11 December 2017 (fn. 21), p. 158.

24 Articles 19 and 25 of the Act on Economic Recovery and the Strengthening of Social Cohesion of 18 July 2018.

25 Article 41 of the Act on Economic Recovery and the Strengthening of Social Cohesion of 18 July 2018.

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tions of the legislator varied in this regard: to create an accessible, comprehensible and easily applicable legal framework with a focus on legal certainty for the provider (in terms of liability and in social, fiscal and administrative terms) and with fair compensation; to avoid the unbridled application of social legislation (fines, criminal liability of directors, etc.); to encourage ancillary activities in leisure time and to discourage and reduce undeclared or illicit work.[26]

The law is known as the "sideline" law or the "untaxed moonlighting" law. As the word itself already indicates, it involves activities carried out "on the side". Furthermore, in Dutch, the word for this phenomenon refers to chores which do not exactly correspond to labour or a secondary profession, precisely in order to highlight the very essence of these activities, namely that they are activities that rather take place in leisure time and as a hobby. Certain restrictions and conditions had to ensure that there was no competition with commercial activities and that an outflow from the professional labour market was avoided. For instance, activities that may be carried out in the context of association work and occasional services between citizens are limited to a defined list of activities. According to the legislator, these activities are of a special nature, which is the very reason for them to be given separate social and fiscal treatment and status. These are activities that mainly have an added social and societal value and therefore have a different purpose. Unlike an employee who wants to earn a living through work, or a self-employed person who wants to make a profit, these activities are purely ancillary and non-remunerative in nature and are therefore limited in their amount and fulfil a social interest.[27] However, this list is long. For example, activities from citizen to citizen can include: childcare, babysitting, family support services, tutoring, music/drawing/craft/technique lessons in the private home of the teacher or in the home of the client, small maintenance works to or around the home, help with administration and punctual help with small IT problems, with the exclusion of professional accounting, supporting persons with occasional or small household tasks in the home of the user, with the exception of regular cleaning.[28]

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26 Explanatory memorandum of the Government Bill on Economic Recovery and the Strengthening of Social Cohesion of 11 December 2017 (fn. 21), p. 156.

27 Ibid., pp. 151-152.

28 Article 20 of the Act on Economic Recovery and the Strengthening of Social Cohesion of 18 July 2018.

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The problem, however, is that all these activities can also be provided for in the regular labour market[29] and are not simply regarded as non-committal by those involved. To what extent can one still say that this is only about favours for a friend? These are activities that can also be perfectly carried out by the self-employed or companies. As a result, there is a competitive position vis-à-vis the regular labour market. Precisely in order to avoid this risk of competition, the legislator imposed a number of conditions for the application of this favourable financial and social system. In addition to the nature of the activity (limited list), it should also concern occasional services. These are additional services among other activities performed. The system is only accessible to persons who are already engaged in a main professional activity (i.e. working four-fifths) and who derive a social security status from it.[30] It surely seems that certain forms of labour are being transferred to the sphere of spare-time work. An employee who works four fifths as an IT specialist for an employer could, for instance, easily offer similar work the other day of the week, untaxed and exempt from contributions. A full-time worker could certainly consider this option with a view to part-time employment. In certain cases, the Belgian legislation provides for an allowance for a person who reduces his/her employment by 1/5 to 4/5, with a view to thematic leave (e.g. bringing up young children) or a career break, end-of-career jobs, time credit, etc.[31] The person involved then receives an allowance for unemployment and can still supplement this with an untaxed amount of income via the sideline law.

For a self-employed person, however, the condition applies that the activity must be different from the normally exercised professional activity.[32] But the requirement that it should be an additional activity is not entirely correct. Whereas this requirement does apply to the regulation of associations and occasional services between citizens, it does not apply to the sharing economy. In the latter case, it is not required to perform another main activity. Furthermore, the nature of activities does not play any role in the case of the sharing economy. All possible services may be performed. It should not necessarily be activities with added value for society. Only services that are an extension of the professional activity are excluded.

29 These activities can also be carried out by a (non-remunerated) volunteer.

30 Articles 4 and 21 of the Act on Economic Recovery and the Strengthening of Social Cohesion of 18 July 2018.

31 CLA No. 103 of 27 June 2012 introducing a scheme for time credit, career reductions and end-of-career jobs and the Royal Decree of 12 December 2001.

32 Article 20 of the Act on Economic Recovery and the Strengthening of Social Cohesion of 18 July 2018.

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For the legislator, the individual purpose of these activities was the reason to proceed with a separate treatment of these activities with a complete exemption of fiscal and parafiscal contributions. Activities of this sort are not seen to constitute productive labour, which is the very basis of the social security system. It is not professional work, but more like a compensated favour for a friend. Therefore, these activities do not constitute labour and are excluded from the scope of the Belgian social security system. The solution the legislator had in mind was ambivalent, because although this labour became visible, the legislator did not consider it to be labour. The difficulty of making the traditional distinction between employees and self-employed persons, necessary within a professional social security system, enticed the legislator to look for a third “non-status” somewhere between professional work and voluntary work. The Government introduced, as it were, a new category of “reimbursed spare-time work” that moves between pure volunteering and work within the regular labour market as an employee, a civil servant or a self-employed person. Thus, although the person concerned may carry out these activities in a professional capacity, he/she is given the possibility to carry out the same activity under the status of an “untaxed side job”. Therefore, as long as one stays below the foreseen threshold, the status does not play a role. As these persons are engaged in activities which do not constitute employment within the meaning of social law, they therefore do not enjoy protection under social legislation (e.g. no maximum working hours, no social security protection).

2. Non-Status

However, one may question whether this far-reaching fiscal and parafiscal exemption of income associated with the mentioned activities can be objectively and reasonably justified. Both legislations on the sharing economy demonstrate that for the legislator, different objectives were central to provide for a separate status: to make a major part of “grey” or “black labour” visible again; to find a solution to the difficulty of making the traditional distinction between employees and the self-employed, necessary within a professional social security system; to promote free enterprise and encourage additional activities without too many administrative formali-

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ties, not least because these activities are often of a marginal and ancillary nature and seek to offer added social value.[33]

The big fear was of course that this regulation would lead to unfair competition with the regular labour market. For example, the Belgian National Labour Council (CNT), which brings together the social partners in its opinion on this law, pointed out that it should not be the aim to discourage activities through recognised platforms, but that this activity should either generate additional income or be seen as a stepping stone to regular self-employment. However, such an activity should not aim to circumvent social legislation and thus create unfair competition between sectors or workers.[34]

The CNT points out that the introduction of the tax and social security contributions exemption for sharing platforms would have the consequence that, depending on the way in which these services are offered, the respective exemptions would apply purely and exclusively in function of the way in which the services are made known to the public and the way in which supply and demand are brought into contact with each other.[35] Therefore, the CNT was extremely critical of this law. For many, this law could therefore lead to new systems, in which regular entrepreneurs would have to compete with very cheap temporary labour. Consequently, the law quickly gave rise to joint action by many interest groups and trade unions before the Constitutional Court for annulment of this law.[36]

3. Is the Sharing Economy not Labour?

Before examining the various arguments put forward before the Constitutional Court, we should first examine which labour is covered by the Belgian social security system and which labour is excluded from it. After all, this is what the whole discussion is about. There is no doubt about activities carried out within the sharing economy being labour. Of course, this is

33 Explanatory memorandum of the Programme Law of 2 June 2016 (fn. 11), pp. 12-13; Explanatory Memorandum of the Government Bill on Economic Recovery and the Strengthening of Social Cohesion of 11 December 2017 (fn. 21), pp. 180-181.

34 National Labour Council (CNT), Opinion No. 2065, 29 November 2017, p. 22, http://www.cnt-nar.be/ADVIES/advies-2065.pdf. Accessed 20 August 2020.

35 Ibid., p. 23.

36 See Constitutional Court, Judgement No. 53/2020 of 23 April 2020, https://www.const-court.be/public/n/2020/2020-053n.pdf. Accessed 20 August 2020.

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labour, it is simply not professional labour in the sense of social security legislation. The social security legislation in Belgium, as a professional system, is based on the requirement to exercise a professional activity. This is literally a consequence of the social status of self-employed persons: a self-employed person is any natural person who carries out a professional activity in Belgium by virtue of which he is not bound by an employment contract or by a status.[37]

In the self-employed professions, there is a special scheme for those who "in addition to the activity giving rise to submission to this Royal Decree, habitually and principally – that is to say, a person whose working hours are at least equal to those of a full-time employed worker" – so simultaneously – are employed as employees or civil servants. This is better known as self-employment in secondary activity.[38] In order to be self-employed, one must be engaged in a professional activity, which means an activity that is usually carried out and with the aim of making a profit. Thus, on the one hand, a minimum of regularity or continuity is required and, on the other hand, occasional work does not constitute a professional activity.[39] The requirement for a certain regularity often gives rise to interpretation problems and discussions, whereas in the past it was claimed that this required at least 18 days of activity per year. As early as 1976, this 18-day rule was abolished as the minimum threshold for work requiring insurance[40] and was replaced by the requirement of a certain regularity and continuity. Indeed, it was unfair that persons with significant professional income from a single occupation of less than 18 days would be treated more favourably than persons who, although working over a longer period of time, acquired a lower income.[41] On the other hand, a self-employed worker has to strive for profit even if he might not actually make any profit.[42] The profit motive excludes voluntary help from family members or

37 Article 3 (1) of Royal Decree No. 38 of 27 July 1967 establishing the social status of self-employed persons.

38 Article 12 of Royal Decree No. 38 of 27 July 1967 establishing the social status of self-employed persons.

39 Labour Court Brussels, 22 June 1984, TSR, 1985, 228; Labour Court Brussels, 13 January 2012, JTT, 2012, 462.

40 By law of 6 February 1976.

41 *Reyniers, Kelly/Van Regenmortel, Anne*, Bijklussen in de sociale zekerheid: de juridische omkadering kritisch belicht?, in: Janvier, Ria/Van Regenmortel, Anne/Vervliet, Valérie (eds.), Actuele problemen van het socialezekerheidsrecht, Bruges: die Keure 2011, p. 340.

42 Court of Cassation of 2 June 1980, JTT, 1982, 76; Court of Cassation of 26 January 1987, JTT, 1987, 254.

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friends.[43] It is quite remarkable, however, that every self-employed person whose business is his/her primary occupation is expected to pay a contribution anyway, even when no profits are made. Indeed, the calculation of the contributions is based on the fiction that a certain minimum amount of professional income is reached, even if this is not the case. Therefore, this income is not exempted from contributions. It is only in the system of self-employment as a secondary occupation that contributions are only due if the professional income has reached a certain minimum amount, which is approximately 1/4 of the threshold amount in the sideline law. It is important in this context that self-employed persons in secondary employment also pay contributions under their self-employed status – with an exemption if the reference income is below a certain amount – even if no profits have been made and without this granting them additional benefits. This is, therefore, a form of solidarity: contributions paid must support the balance of the scheme for self-employed workers, while enabling them to enjoy the social advantages of the scheme to which they are subject due to their main activity.

In the employee system, it is somewhat less clear whether a professional activity is also required, but this is an indirect consequence of the fact that the National Social Security Office (NSSO) Law applies to employees and employers who are bound by an employment contract.[44] Labour law further defines what an employment contract is. In addition, this requirement also stems from the notion of solidarity that only those who pay contributions and wish to belong to the system and to a particular professional category[45] can have access to benefits. The concept of employment contract refers to an agreement under which work is carried out under the authority of an employer in return for remuneration. This is the basis for the obligation to contribute. Does this also require a professional activity? Or does every work we do, including e.g. babysitting and garden work, give rise to insurance if this were done through an agreement and under the authority of someone? The answer is not always clear. Legal doctrine points out that

43 Labour Court Brussels, 6 April 1981, TSR, 1981, 577.

44 Article 1 of the Law of 27 June 1969 revising the Legislative Decree of 28 December 1944 on social security for workers; Articles 1 and 2 of the Law of 29 June 1981 defining the general principles of social security for employees.

45 *Reyniers, Kelly/Van Regenmortel, Anne*, Bijklussen in de sociale zekerheid: de juridische omkadering kritisch belicht? (fn. 41), p. 351.

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labour can be approached in two ways[46]: the first way examines whether the labour is for the benefit of the employer and whether the labour is the object of the performance or whether it can only be regarded as incidental to the main purpose of the contract. A typical example of this is a traineeship contract. If the sole purpose of the labour is to acquire the necessary professional skills and it forms part of a training programme, it will not be considered as work. On the other hand, labour can be considered as the objective to obtain an income to provide for living. This vision is also cited by the legislator as an objective in the sideline law. Labour means activities taking place on the paid labour market.

But this means that any activity, even if it is occasional, can be a professional activity as long as it provides a living.[47] Similarly, the limited fee obtained or the time or amount spent on such an activity does not constitute a criterion. The specificity of labour is not the nature of the activity, but rather the objective with which it is carried out, i.e. the acquisition of income.[48] What is a leisure activity for one person (e.g. football, working in the garden) is professional work for somebody else (professional footballer, gardener). Therefore, remunerated leisure activities can also constitute work performances. It is precisely due to the fact that remuneration is paid which exceeds the real costs and that it is not generosity that it can be considered to be a wage and therefore, in principle, the one receiving it is also subject to social security. Thus, everything one does to earn money is professional labour, even if it is a rather everyday activity. However, the legislation provides that certain work may be excluded from the scope of social security legislation (NSSO legislation).

It is of interest to us to know in which cases and for what reasons certain work is excluded from the scope of social security. Labour is only excluded if it is too marginal to be liable for insurance. The legislator hereby provides that the King (Government) may, under the conditions he determines, exclude from the application of this law those categories of workers who are employed in a job which is ancillary to their employment or which is essentially of short duration.[49] This confirms that, in principle,

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46 *De Vos, Marc*, Loon naar Belgisch Arbeidsovereenkomstenrecht, Antwerp: Maklu 2001, p. 62; *Reyniers, Kelly/Van Regenmortel, Anne*, Bijklussen in de sociale zekerheid: de juridische omkadering kritisch belicht? (fn. 41), p. 353.

47 *Van Langendonck, Jef/Jorens, Yves/Louckx, Freek/Stevens, Yves*, Handboek Socialezekerheidsrecht, Antwerp: Intersentia 2020, pp. 139-140.

48 Ibid., pp. 138-139.

49 Point 4 of Article 2 (1) of the Law of 27 June 1969 revising the Legislative Decree of 28 December 1944 on social security for workers.

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any work can be subject to insurance. The King has made use of this by excluding a number of categories. Nevertheless, the reason for the exclusion is not always explained.[50] Short-term work as a ground for exclusion is rare today, especially since the past rules excluding workers who did not normally work more than two hours a day have been abolished and replaced by the concept of occasional work.[51] Nonetheless, the latter notion is interpreted in a very restrictive way as an activity or several activities carried out for the household of the employer or his/her family, with the exception of manual household activities – think of intellectual labour such as performed by a governess, private teacher, babysitter – and manual non-household activities (driver, gardener), insofar as the employee does not perform these occasional activities in the household professionally and regularly and insofar as the activities do not exceed eight hours a week for one or several employers.[52] In this, the nature of the activities occupies centre stage. Whether 8 hours is still essentially of short duration is doubtful.

In addition, there are some activities that are excluded because they are ancillary to the job. But what is ancillary?[53] This includes in the first place, for example, a number of people who provide services for public services or activities of public utility, such as sports camps. It could be argued that "ancillary" implies that it is complementary to a job considered to be principal. This was also the original wording, but it was subsequently changed to an activity carried out for a maximum of 25 days. As a result, the exclusion refers more to short-term than secondary jobs. In addition, the following are also excluded: students for a particular number of hours (475 hours), some temporary workers in agriculture and horticulture as long as they do not work more than 25 days, temporary workers engaged by organisers of sports events for the day of those events. In essence, all these exceptions concern people who are exempted on the basis of the number of days' work and for a specific type of activity. One might, however, wonder if these are all services of a short duration. Moreover, "ancillary" does not indicate that the person concerned works in addition to a main activity. There are, furthermore, a few special arrangements for categories of

50 Articles 16 and 17 of the Royal Decree of 28 November 1969 implementing the Law of 27 June 1969.

51 Article 16 of the Royal Decree of 28 November 1969 implementing the Law of 27 June 1969 as modified by Royal Decree of 24 August 1987.

52 Ibid.

53 See Article 17c of the Royal Decree of 28 November 1969 implementing the Law of 27 June1969 and see also *Van Langendonck, Jef/Jorens, Yves/Louckx, Freek/Stevens, Yves*, Handboek Socialezekerheidsrecht (fn. 47), pp. 171-175.

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staff who actually already pay full contributions in another system.[54] It is only exceptional that it is not an hour or day limit that is considered, but the "income" earned. This is the case for volunteer firefighters and the context of the "untaxed moonlighting" law that we are discussing here.

But even if we do not subject persons involved to social security, they are certainly not completely excluded from social protection. For example, most of them are covered by industrial accidents and occupational illness schemes[55]; or a solidarity contribution is paid by the employer, as is done for students (and by themselves) and in the case of flexi-jobs, so these workers also build up rights for e.g. unemployment and pensions.

4. *Back to the Drawing Board*

Consequently, the total exclusion of side jobs from the social legislation gave rise to a situation in which persons who carry out the same activities as self-employed persons or as service providers through a recognised electronic platform are treated differently. Is this therefore a breach of the principle of equal treatment or are there grounds for justification, and is this distinction based on an objective criterion which is reasonably justified? Discrimination occurs when equal categories are treated differently or different categories of persons are treated equally. Is there a difference in treatment?

To what extent are service providers through recognised electronic platforms comparable to employees and self-employed persons? According to the Belgian legislator, these groups are not comparable. After all, this law does not aim to replace the employment type of employee or self-employed person by a new employment type, but rather to avoid undeclared work. The same persons may fall within both categories. It is therefore not a comparison between groups of persons, but a comparison between different types of activities. The Constitutional Court does not follow this

54 It concerns doctors employed in hospitals who have a practice outside the hospital and pay full contributions on a self-employed basis. But in fact, it is not so much a question of short-term work or a secondary job, but of finding a solution to the difficulty of distinguishing between doctors who work in an institution as self-employed persons or as employees, or with regard to flexi-jobs in the catering industry: persons who, in addition to a main occupation for which they pay contributions, work to a limited extent in the catering industry.

55 With the exception of doctors, temporary support staff at sports events and civil servants providing performances during sports camps.

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position at all. The Court points out that the introduction of the new status aimed, among other things, to remedy the lack of clarity about the classification as employee or as self-employed person. This lack of clarity was caused precisely by the fact that it is possible to carry out these activities both as an employee and as a self-employed person, depending on the concrete circumstances. Therefore, the compared categories are indeed comparable.[56] Are there any justifications for the different treatment?

One of the main objectives for the Government to establish this regime was to combat undeclared work. This objective is certainly pertinent, but is this the right way to go? Will this objective be attained by completely exempting someone from all contributions? Is it not aberrant to note that a measure aimed at avoiding undeclared work now, on the contrary, makes it possible to switch from a status subject to social security and tax obligations to a status exempting the person concerned from all those obligations?[57] It is almost as if the legislator wanted to encourage people to try another professional activity. Avoiding undeclared work through an exemption and by giving someone no status seems like values turned upside down. The name of the law in which this legislation was included speaks volumes: Act on Economic Recovery and the Strengthening of Social Cohesion. Social cohesion is thus "strengthened" by not granting a social security status!

For the legislator, the activities referred to are activities that take place in leisure time and are therefore carried out on an occasional basis. They are thus considered as ancillary activities. After all, their purpose is not so much to make a living. Of course, "ancillary" is a relative and very subjective notion. Moreover, in the sharing economy, there is no limited monthly amount, only a maximum annual threshold amount. Supposing that someone earns, for example, EUR 1,000 a month, it can hardly be said that this is incidental. This looks more and more like an alternative to part-time employment. It is not even required that the person concerned has a main activity in addition. Furthermore, the Constitutional Court points out that there is a contradiction between this assumption and the legislator's objective of stimulating entrepreneurship and providing a stepping stone to self-

56 See Constitutional Court, Judgement No. 53/2020 of 23 April 2020, recital A.12 and B.7.3, https://www.const-court.be/public/n/2020/2020-053n.pdf. Accessed 20 August 2020.

57 See Constitutional Court, Judgement No. 53/2020 of 23 April 2020, recital B. 6.10 and 7.5, https://www.const-court.be/public/n/2020/2020-053n.pdf. Accessed 20 August 2020.

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employment through the creation of this status.[58] And rightly so! For many people it is more than a marginal activity, but it is an important, if not a necessary, addition to their income that supports them in their daily needs and intentions. For some, this work is necessary, not only in order to earn a living, but even to survive.

The idea is that this work is often carried out for reasons other than profit-seeking and at the service of others or of society.[59] But can professional work not also be carried out at the service of others or society? Moreover, if the same activities are carried out by an employee or a self-employed person, do they no longer have any special added social value? Quite rightly, the Constitutional Court also points out that the fact that it would concern a limited number of activities offering particular added value for society, whereas there is no such restriction in terms of permitted activities under the status of employee or self-employed person, does not justify the significant difference in treatment where identical activities are involved. Moreover, it does not appear that the activities listed in the law would all have a greater social added value than other possible activities.[60] Furthermore, the nature of the activities does not play any role in the sharing economy and therefore, the argument of the special added social value does not hold true.[61] Consequently, it has not been demonstrated that the difference in treatment has the objective of supporting activities with an added social value.[62]

The various arguments put forward by the Government are, to say the least, highly debatable and it should therefore come as no surprise that the Constitutional Court – more than rightly so – has overturned this regulation. At the same time, however, this also shows that the approach adopted to regulate platform work is debatable. Nevertheless, the potential im-

58 See Constitutional Court, Judgement No. 53/2020 of 23 April 2020, recital B. 7.6, https://www.const-court.be/public/n/2020/2020-053n.pdf. Accessed 20 August 2020.

59 The exclusion of volunteer firefighters from social security contributions can be partly explained by the idea that this is labour with a special social role.

60 See Constitutional Court, Judgement No. 53/2020 of 23 April 2020, recital B. 6.9, https://www.const-court.be/public/n/2020/2020-053n.pdf. Accessed 20 August 2020.

61 See Constitutional Court, Judgement No. 53/2020 of 23 April 2020, recital B. 7.6, https://www.const-court.be/public/n/2020/2020-053n.pdf. Accessed 20 August 2020.

62 See Constitutional Court, Judgement No. 53/2020 of 23 April 2020, recital B. 5.7, https://www.const-court.be/public/n/2020/2020-053n.pdf. Accessed 20 August 2020.

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pact of this law could be so big for all parties concerned that the Constitutional Court did not proceed with the retroactive effect of the annulment of this law, which would have been as if the law had never existed. Precisely in order to avoid that persons carrying out side jobs could get into trouble and face all kinds of after-claims and fines, the annulment only applies as from the next tax year. This should also allow the sharing platforms to revise their entire business plan which was based on the sideline law.

III. Towards New Protection for Platform Workers?

In which direction should we now go regarding the protection of platform workers? No one can deny that the importance of the sharing economy is increasing. In fact, the Belgian Government set up the Recovery Act[63] to keep pace with developments. Moreover, the system of exemption from fiscal and parafiscal contributions indirectly subsidises the entire sharing economy.

The Government has already clarified the direct consequences of the annulment of this Act. It is only with the adoption of the Recovery Act of 2018 that an appeal was lodged with the Constitutional Court for the annulment of this Act. However, after the promulgation of any law, one has only 6 months to lodge an appeal for annulment before the Constitutional Court. No appeal had been lodged against the old separate status introduced in 2016. The Minister has already stated that from 2021, the old law granting a reduced tax rate will enter into force again. The question then arises as to whether this forthcoming Act could not be appealed against? The fact that the old law would be reinstated does not, in principle, oppose this. After all, the Council of Ministers had defended this argument in the case before the Constitutional Court. Thus, the Council of Ministers contested the admissibility of the pleas relating to the status of service provider through a recognised electronic platform, since that status was already introduced by the Programme Law of 1 July 2016, against which the applicants did not bring an action for annulment. An action brought against a difference in treatment which does not derive from the contested law but is already contained in a previous law is inadmissible. However, the Constitutional Court points out that when the legislator adopts an old provi-

63 Act on Economic Recovery and the Strengthening of Social Cohesion of 18 July 2018, https://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=2018071803&table_name=wet. Accessed 20 August 2020.

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sion in a new legislation and thus appropriates its content, an appeal may be lodged against the provision within six months of its publication. Does this argument now backfire? The Constitutional Court already gives a certain indication: "Although the uncertainty about the correct classification may justify the need for a separate status, such a status was already created by the Programme Law of 1 July 2016. Moreover, the lack of clarity as to the classification does not justify the fact that the contested provisions attach to that status a total exemption from labour law, the social security system and tax obligations"[64].

In tax law, there is no longer a full exemption and the 10 percent net tax burden can be considered justified, but as far as the social aspect is concerned, it seems that this is not really justified. Furthermore, it is time to go down a different path, not only for the benefit of the platform worker but for the sake of our entire social security system.

Platform workers do not need a third separate status. In Belgium, social law is based on the traditional dichotomy between employees and self-employed persons, and creating a third group will certainly not help to avoid the traditional difficulties in distinguishing between the two categories. On the contrary, one may even expect that in this case, a heated discussion will emerge about who can be defined as a platform worker.[65] It is, in any case, very questionable to use a separate status for a special category of persons as a solution to the ever-increasing flexibility on the labour market. Are these persons really special? After all, do they not carry out the same activities as other people on the regular labour market?

IV. Conclusion

Platform workers do not need a third status, but they certainly do not need a non-status either. Is it also justified, on the basis of the marginal character and added value for society, to withdraw someone completely from social legislation, as is the case for platform workers? This is particular in times when social security also pays attention to work that can at least be considered socially useful. Thus, we see that the (Belgian) legislator pro-

64 See Constitutional Court, Judgement No. 53/2020 of 23 April 2020, recital B. 7.7, https://www.const-court.be/public/n/2020/2020-053n.pdf. Accessed 20 August 2020.

65 See also *Nerinckx, Stefan*, De "Uberisering" van de Arbeidsmarkt: Enkele Bedenkingen bij het Sociaal Statuut van de Actoren in de Platformeconomie, in: TSR 2018, p. 49.

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vides for an increasing number of measures granting protection to those who do not perform "paid" work but still perform activities that are considered useful: people who take a career break to take care of a sick parent or sick child, or even just to pursue a dream, are – often even while receiving benefits – protected under the social security system. Even volunteering, the area par excellence where unpaid but useful work is provided, is economically encouraged by providing social protection. Work on the periphery or outside the traditional labour market is to a great extent recognised within social security.[66] So why exclude platform workers from social security? This creates a dilemma: the greater the number of people doing such work and the more important it is for these people, the more incomprehensible it is that these people would be deprived of any social protection and at the same time, however, the more difficult it is to carry out work that does not support the financial capacity of the social security system. The fundamental starting point of the Belgian social security system is that regular or productive labour constitutes the basis for the development of our welfare system. The looser the link with professional employment becomes, the more questions arise about the financing of social security, certainly in a professional system.

However, today's flexible workforce consists of people who not only switch between employers, but who also alternate between periods of professional activity and voluntary work. Individuals may no longer only carry out one secondary activity alongside a main activity, but rather different (secondary) activities, whereby the distinction between main and secondary activities fades. In addition, many platform workers also perform work that may not be considered professional work today, but which is of great use. It is not because this work is not carried out on the labour market that these activities should be considered as inferior, as chores, as a second-class activity.[67] It is not up to our social security system to exclude people who perform useful work and work in the platform sector. On the contrary, we should embrace them. This is not done by giving them a non-status, but by including them in the current system of social protection. It is not a question of robbing the platform worker of any social protection. In fact, he needs adequate protection precisely because of his precarious work situation.

66 *Van Steenberge, Josse*, Arbeid en Sociale Bescherming: Een LAT-relatie?, in: Ministerie van Sociale Voorzorg, 50 Jaar Sociale Zekerheid…en Daarna?, Brussels: Bruylant 1995, p. 97.

67 *Van Steenberge, Josse/Delanote, Liliane*, Maak er Werk van, Bruges: die Keure 1998, p. 37.

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However, as long as our social security system only focuses on regular employment, the sharing economy will pose a threat to our welfare state.[68] Perhaps it is time to put forward a new concept of labour. Labour is more than earning an income; it is also the right to usefulness: to be given, acquire and earn a useful place in society.[69] Social security should therefore also be opened up for activities that do not or not always follow the normal scope of employment. The big advantage would be that precisely those activities floating between the commercial and non-commercial labour market, often in a grey zone, are made visible again. Labour then becomes not so much the basis of social security, but rather its purpose.[70] May platform work act as a trigger for this development!

68 See also *De Vos, Marc*, De Toekomst van Arbeidsrecht, in: De Corte, Rogier/De Vos, Marc/Humblet, Patrick/Kefer, Fabienne/Van Hoorde, Eva (eds.), De Taal is gans het Recht: Liber Amicorum Willy van Eeckhoutte, Mechelen: Wolters Kluwer 2018, p. 31.

69 *Van Steenberge, Josse/Delanote, Liliane*, Maak er Werk van (fn. 67), p. 37.

70 *Van Steenberge, Josse*, Arbeid en Sociale Bescherming: een LAT-relatie? (fn. 66), p. 89.

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