Social security coverage for platform workers in Switzerland: A middle way?

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Abstract This article compares social security coverage for the self-employed and for employees on digital platforms in Switzerland. It sheds light on the particularities that have acted to slow down the evolution of Swiss social legislation to the new emerging forms of work, and summarizes the solutions provided by case law. These solutions are still being fine-tuned, but lean towards the reclassification of contracts as salaried work. Finally, despite the hesitance of the Swiss authorities to take political steps to encourage these new forms of work, which offer significant economic potential, and while also seeking to prevent the risk of precarity in work, we discuss the options available.

Keywords social security schemes, atypical work, platform workers, self-employed, employee, employment status, Switzerland

Introduction

In Switzerland as elsewhere, the development of digital intermediation work platforms raises new questions that require to adapt long-standing concepts associated with social insurance systems. Schematically speaking, platforms can be classified into three categories (Conseil fédéral, 2017a, pp. 95–97). First, the "sharing economy", which primarily focuses on relations between individuals, is

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still often considered a form of secondary income rather than an indication of work status. However, as in the case of Airbnb, the tendency is that these relationships are becoming more formalized (Zobrist and Grampp, 2015; Bardet, 2019). Second, "microtasking platforms", which form part of the "gig economy", divide labour into small tasks outsourced via appeals to a crowd as "crowdworking", or transfer the work process to platform users as "crowdsourcing" (Berg, 2019). Such platforms are not yet widespread in Switzerland. Finally, there are the platforms of particular interest to this study, the so-called "collaborative" online service platforms, which facilitate intermediation between service providers and customers via apps. They help to lower prices, increase the flexibility of the service offered and encourage customers to become habitual users of the app. They also rely on crowdworking to a certain extent, as their business model is also based on outsourcing services to a large number of people. On the Swiss market, digital platforms are focused inter alia on home services, such as cleaning (Serado.ch, Batmaid.ch), hairdressing (cut-n-brush.ch), personal assistance (NeedHelp.com) and language courses (Italki.com, Preply.com), as well as home meal delivery (Smood.ch, Eats.ch). Nevertheless, owing to its size, the sector that requires the authorities to arbitrate is that of chauffeur-driven cars, where the Uber platform has almost no competitors. The only other market players in French-speaking Switzerland are Driven-now.com and recently established Lymo.com (Garcia, 2019). The latter, launched in 2019 as a passenger transport booking application, claims to be a trip comparator and does not charge any fee for trips undertaken. While platforms are similar in many respects, there is no single business model; there are as many possibilities as there are platforms. First, while some platforms automatically impose terms and conditions on both clients and service providers, others let clients and service providers opt for an employment or service provision contract, or even permit clients to sign an employment contract with the service provider.[1] Second, the same platform may decide to modify the contractual conditions applicable to all or some of its workers via a simple phone message (Hirsiger, 2020). As a result, patterns are not only diverse but evolving, making it considerably more difficult for authorities and individuals to act in the absence of an easily identifiable legal framework.

In this article, to understand the potential for change of Switzerland's social insurance system in the face of the social challenges posed by the digital economy, we first outline its general structure, a daunting challenge given its complexity. We then set out the position of the administrative and judicial

1. For example, Serado.ch invites its users to declare workers as employees, while Batmaid.ch pays the charges itself and Needhlep.com permits service providers and clients to determine the terms of their agreement. UberEats and Smood.ch hire out services, so workers are employees with no guaranteed minimum hours (see section below, on Compliance with legislation on the hiring of services).

authorities on the classification of platform workers. Finally, we compare the social protection regime for the self-employed (the work status preferred by platforms) with that of employees (the work status claimed by platform workers) to better understand the issue at stake under Swiss law when it comes to classifying the status of platform workers.

A segmented and rigid public insurance system backed by private companies

Historically speaking, social protection in Switzerland has been primarily a private matter (Dupont, 2019a, pp. 193–207). As the Federal Constitution clearly states,[2] "all persons are responsible for themselves". Articles 111 to 117 of the Constitution give the Swiss Confederation the necessary powers to create and implement social security, "in addition to personal responsibility".[3] The 26 cantons (member states) of Switzerland have only residual competence in this area, essentially limited to the implementation of certain specific aspects.[4]

To implement the constitutional mandates, however, there is no social security code, no "integrated" unitary system, but rather various social insurance schemes offering protection against the economic consequences of social risks such as unemployment, old age, sickness, accident, disability or maternity.[5] Numerous different laws may cover any covered contingency. It is therefore very difficult to summarize the functioning of the different schemes without misrepresenting them. Since 2003, a law[6] guarantees the coherence of the system as a whole.

Although it uses a pooling mechanism originally developed for the private insurance business, social insurance is the result of state protection (Brulhart, 2017, p. 11). It was created by law, and the State provides a framework that leaves virtually no room for contractual freedom. Responsibility for implementing social insurance lies either with public law bodies, created by the various laws, or with private law entities delegated by the State with strictly regulated activities. With most schemes,[7] contributions are proportional to income and are set to cover benefits according to an immediate redistribution of

2. See articles 5a and 6 of the Federal Constitution of the Swiss Confederation (*Constitution fédérale de la Confédération suisse* – Cst.), Systematic Compilation of Federal Law (*Recueil systématique du droit fédéral* – RS 101).
3. See art. 41 Cst.
4. The cantons are mainly responsible for supplementary benefits and health insurance.
5. These include unemployment insurance (RS 837.0), pension insurance (RS 831.10 and 831.40), health insurance (RS 832.10), accident insurance (RS 832.20) and disability insurance (RS 831.20). For more details, see Greber et al. (2010, pp. 26–27).
6. Federal Act on the general part of social insurance law (*Loi fédérale sur la partie générale du droit des assurances sociales* – LPGA, RS 830.1).
7. With the exception of health insurance and accident insurance.

the capital received,[8] more rarely by capitalization[9] or by distribution of the covered capital.[10] Employees generally contribute more consistently than do the self-employed, but at a lower cost due to a joint contribution system involving the employer.[11]

This system, which was set up after the Second World War, is facing multiple difficulties, including rising health-care costs, declining average birth rate, increasing average life expectancy, and declining capital market returns. As a result, the viability of the main insurance programmes is no longer guaranteed, regardless of their financing mode. This is particularly true of old age and survivors' insurance, health insurance and of pension funds (Dupont, 2019b, pp. 121–140). These problems are compounded by societal developments and structural labour market changes resulting, in particular, from the emergence of digital platforms. On the one hand, these entail greater labour market flexibility, which translates into job splitting and the proliferation of so-called non-standard jobs and atypical work. On the other hand, the digital platform business model aims to escape the constraints of wage employment. Finally, digital platforms shift the notion of gainful employment towards exchange-based activities, which are not considered by law as professional activities and whose income is not subject to social contributions. The end result is an overall weakening of the social protection system, which manifests through a decrease in solidarity, a decrease in the level of protection in terms of coverage (and thus an increase in precarity), and finally a decrease in contributions (Dupont, 2019c). As a result, a major reform seems increasingly inevitable. Nevertheless, the actions taken to date remain limited to ensuring the financial viability of the system in the short term (Pärli, 2019).

In this context, the absence of a specific status for platform workers is understandable. At present, their social protection depends on the classification of their status according to the existing binary system. The question thus arises whether platform workers should be classed as self-employed service providers, as defined by their contract, or should they be reclassified as employees? Several authorities, both administrative and judicial, have already taken up this question.

8. This concerns old-age and survivors' insurance, disability insurance, unemployment insurance, health insurance, military insurance, supplementary benefits, loss-of-earnings allowances, family allowances and accident insurance concerning daily allowances, see Gnaegi (2017, p. 225).
9. See below, section on Social security coverage for employees and the self-employed.
10. System used in the payment of disability and survivors' pensions in accident insurance; see Gnaegi (2017, p. 227).
11. See articles 112 and 113 Cst.

Reclassification of contracts as paid work via case law

The notion of employee in administrative law is not necessarily identical to the one given in civil law. On the one hand, it goes far beyond this and may include persons under an agency or service contract.[12] On the other hand, it is not governed by the idea of protecting a party because he or she is economically weak or was not able to freely negotiate a contract.[13] Nevertheless, as we shall see, the analyses of the administrative and judicial authorities in civil matters converge on the essential points.

Litigation in administrative law

In the context of social insurance, the main concern is to ensure the financing of the various schemes and to provide sufficient and sustainable protection for the population as a whole. In the analysis, the public interest therefore generally takes precedence over contractual freedom. This analysis may be initiated directly by the social insurance bodies or it may result from decisions by other administrative authorities (see below).

Affiliation to old age and survivors' insurance and to accident insurance. In the majority of cases, workers' status is classified by the benefit schemes responsible for implementing the old-age, survivors' and disability insurance (*Assurance vieillesse, survivants et invalidité* – AVS/AI) programme. Their decision is particularly important, as it applies not only to the implementation of the AVS/AI, but also, indirectly, to accident insurance, pension fund schemes and unemployment insurance.[14]

This classification sometimes falls to the National Accident Insurance Fund (SUVA),[15] the main accident insurer. As it is legally obliged to insure high-risk occupations, including communication and transport companies, this body is responsible for determining whether a given company falls into one of the

12. See articles 111 and 112 para 2 let. a. Cst. See Rousselle-Ruffieux (2012, pp. 177–209).

13. It is indicative that regular collaboration is involved, i.e. the employee is regularly required to provide his or her services to the same employer. Federal Court (*Tribunal federal* – TF), 9C_213/2016, 17 October 2016, Recital 3.3. and TF, 9C_1062/2010, 5 July 2011, Recital 7.2. See Perrenoud (2018, pp. 25–42, pp. 27–28).

14. See art. 1 of the Ordinance on accident insurance (*Ordonnance sur l'assurance-accidents* – OLAA), art. 2 of the Federal Law on occupational pensions (*Loi fédérale sur la prévoyance professionnelle* – LPP), art. 2 of the Federal law on unemployment insurance (*Loi fédérale sur l'assurance-chômage* – LACI). Greber et al. (2010, p. 109).

15. Most commonly referred to (in German) as the Schweizerische Unfallversicherung – SUVA; or (in French) *Caisse nationale d'assurance en cas d'accidents* – CNA.

categories for which SUVA affiliation is compulsory.[16] Practically speaking, when an application for affiliation is made by a company for which the question arises, the AVS compensation fund prepares a temporary certificate and forwards the file to the SUVA, which classifies the activity and takes a decision regarding the company's affiliation. Consequently, the funds coordinate their assessments to ensure that their decisions are consistent.

When setting the amount of contributions, the authorities have to determine whether the earnings come from gainful wage employment or self-employment (Dunand, 2018, art. 12, N 7-29; Gächter and Meier, 2018). Their analysis is essentially economic. In practice, the main difficulty is that Swiss law does not provide a precise definition of a self-employed entrepreneur, but rather defines it negatively in relation to dependent employment.[17] However, there is no legal presumption in favour of either employment type.[18] To classify a given situation, the funds refer in particular to the guidelines issued by the Federal Social Insurance Office (*Office fédéral des assurances sociales* – OFAS),[19] which specify the criteria to be implemented.[20] Weighting the criteria according to the circumstances lets the authorities take due account of the different ways in which an activity manifests itself in economic life.[21] Where there is more than one business activity, each income is examined separately. The predominance of one activity does not influence the classification of another. A worker can

16. Art. 66 para 1 let. g of the Federal Law on accident insurance (*Loi fédérale sur l'assurance-accidents* – LAA).

17. Art. 12 LPGA: "A person is considered to be self-employed if his or her income is not derived from an activity as a salaried employee".

18. In case of doubt, due to the negative nature of the definition of self-employed, it must first be examined whether wage employment can be confirmed (see Gächter and Meier, 2018, para 39).

19. OFAS, Guidelines on the determining wage in AVS, AI and APG (loss-of-earnings allowances (*assurance perte de gains*) – (*Directives sur le salaire determinant dans l'AVS, AI et APG* – DSD), ch. 1,020, and Guidelines on the contributions of self-employed persons and persons not gainfully employed to the AVS, AI and APG (*Directives sur les cotisations des travailleurs indépendants et des personnes sans activité lucrative dans l'AVS, AI et APG* – DIN), ch. 1,005 and 1,065. In German, the OFAS is called the BSV (*Bundesamt für Sozialversicherungen*).

20. OFAS (DSD (note 19), ch. 1,019–1,038). According to art. 9 of the Federal Law on old-age and survivors' insurance (*Loi fédérale sur l'assurance-vieillesse et survivants* – LAVS), "income from self-employment includes any income from work other than remuneration for work performed in a dependent situation". See also Dunand (2018, art. 12, No. 7–29).

21. If the economic risk is limited to dependency on a given activity, the entrepreneurial risk lies, therefore, in the fact that, if the mandates are revoked, the person is in a situation similar to that of an employee who loses his or her job, which is a typical feature of wage employment (OFAS, DSD (note 19), ch. 1,026). Conversely, the following are not decisive: the legal nature of the relationship between the parties, as well as agreements or arrangements concerning the AVS status of the parties (employee or self-employed) or the legal classification of remuneration. Working hours are not a criterion for social insurance purposes. It is also irrelevant whether an insured person is affiliated to a compensation fund as a self-employed person or whether an employee works simultaneously for several employers (OFAS, DSD (note 19), ch. 1,029-1,038).

therefore be both self-employed and an employee, whether he or she works for different enterprises or even for a single enterprise.

In November 2019, the SUVA ruled in favour of the dependent nature of the activity carried out by drivers on the Uber platform (Badertscher, 2019).[22] Uber is currently appealing against this decision.

According to the SUVA, Uber should be classified as an employer. Indeed, an employer is defined as any person who offers a product or a service and who has an economic interest in the performance of the worker.[23] In order to do so, the employer must create the conditions for the employee to perform the work, whose quality he or she is entitled to measure in return. In the case of Uber, the employee cannot perform the job without the help of the app supplied by Uber B.V., which therefore provides the necessary infrastructure for the job. The driver is not responsible for attracting customers, as designing the offer and advertising are the responsibility of the head office, the sole owner of the brand. Since Uber B.V. collects the fare and pays the driver after deducting the costs incurred, it has an economic interest in the drivers' performance. Uber B.V. decides how the drivers carry out their activity and has the right, in certain cases, to terminate a contract without notice. It is further entitled to disable or restrict access to the driver's app; under Swiss law, this is typically an employer's prerogative (Art. 337 para. 1 of the Code of Obligations (*Code des obligations* – CO)).

The SUVA emphasizes that the classification of the activity does not depend on the nature of the contractual relationship between the parties, but on the factual economic circumstances of the activity actually carried out. Classification of remuneration is analysed, economically speaking, from the perspective of the person receiving it. In this case, it is revealing that regular collaboration is involved, i.e. the employee is regularly required to provide his or her services to the same employer.[24]

The SUVA also assesses the criterion of dependence on the work organization pursuant to the OFAS guidelines. This must be examined in the light of five sub-criteria. The first is the employer's right to give instructions, which is hotly disputed as far as the platform is concerned: in the case at hand, even though drivers are free to hold another job or have considerable leeway in terms of working hours and working time, if turning down orders entails disadvantages, this implies a relationship of dependency. The second sub-criterion is a

22. The SUVA had issued an initial decision, overturned by the Social Security Court *(Sozialversicherungsgericht)* of the canton of Zurich, which doubted the identity of the employing company, without however calling into question the classification of the activity carried out by the drivers (UV.2017.00030, 10 July 2018).

23. Definition deduced by the SUVA from art. 321a CO and art. 7 para 1 LAA.

24. TF, 9C_213/2016, 17 October 2016, Recitals 3.3. and 9C_1062/2010, 5 July 2011, Recital 7.2.

relationship of subordination of the worker. This arises from the guidelines and their implementation, in particular the setting of fares and the possibility for Uber to terminate a contract with immediate effect. The third is integration into a work organization and the existence of an obligation to personally perform the task entrusted: the driver is restricted as far as transmitting orders is concerned and cannot transfer the contract to a third party without Uber's written consent. The fourth sub-criterion is the existence of a non-competition clause, arising from the prohibition on developing a competing service or a similar product. The fifth is the obligation to perform tasks personally: compulsory presence, about which there is no issue since it is inherent to the nature of the service.

In addition, the SUVA assesses the entrepreneurial or economic risk, which is the risk faced by a person who has to bear the risk of losing the economic substance of his or her business. This criterion is subdivided into eight points. The first criterion relates to the fact that the person concerned makes significant investments: in the case at hand, the importance of this criterion is lessened[25] because private use of the car or phone is generally a sufficient reason for their acquisition and therefore cannot be deemed decisive for classification. The second and third criteria cover liability for losses and collection risk: in this case, as the driver cannot influence strategic decisions or the content of marketing measures, he or she does not bear the risk of loss. The fact that no income is guaranteed is irrelevant as it is similar to on-call work, which is a recognized form of employment contract. Payments are mainly made by credit card, and it is therefore up to the credit card issuer to collect the money. Criteria four, five and six deal with acting in one's own name and on one's own behalf, covering the overheads and generating the orders: customer acquisition depends on the reputation of the Uber brand, the driver does not have to find customers, he or she is contacted by users via the app, and they clearly recognize the Uber organization as a service provider. This shows that the driver is not acting in his or her own name, but on behalf of Uber. Finally, criteria seven and eight relate to the absence of staff and business premises and militate in favour of wage employment. The SUVA concluded that the criteria in favour of wage employment predominate.

Compliance with legislation on the hiring of services. In a field other than social insurance, in May 2020, the Geneva Court of Justice (*Cour de justice de Genève*)[26] confirmed the decision of the Cantonal Employment Office (*Office cantonal de*

25. TF, 8C_571/2017, 9 November 2017, on the independence of taxi drivers; TAS ZH, UV.2015.00106, 11 November 2015 and UV.2008.00159, 30 December 2009.
26. Administrative Chamber of the Court of Justice of the Canton of Geneva, ATA/535/2020, 29 May 2020.

l'emploi) of 11 June 2019 ordering Uber Switzerland GmbH to comply with the provisions of the Federal Act on employment services and the hiring of services (*Loi fédérale sur le service de l'emploi et la location de services* – LSE)[27] in conjunction with the UberEats.com meal delivery business. According to this law, "anyone who intends to carry out, on a regular basis and in return for payment, an activity as an employment agent or who hires workers and makes them available to clients for the purpose of carrying out work assignments, must obtain a permit to engage in the hiring out of services for this purpose".[28] In the Court's view, the Uber Eats couriers are in a subordinate relationship with Uber Switzerland GmbH, despite the fact that they are not obliged to log on to the app or accept assignments. Once the couriers receive delivery instructions from the restaurant owners, Uber Switzerland GmbH acts as an intermediary, which is typical of the provision of personnel inherent to the LSE. As a result, Uber Switzerland GmbH should, as the couriers' employer, have registered this activity in the commercial register, applied for an operating licence and complied with the collective agreements. Uber appealed to the Federal Court on 2 July 2020.[29] As the request for a stay was refused, Uber Switzerland GmbH asked the 500 delivery drivers using the Uber Eats application in Geneva to contact the service hire company Chaskis SA, to register as employees.

The issue of undeclared work. On 29 October 2019, the Geneva Department of Security, Employment and Health (*Département genevois de la sécurité, de l'emploi et de la santé*) issued a prohibition decision against Uber Switzerland GmbH (Leroy, 2019). After investigating, the Cantonal Office of Inspection and Labour Relations (*Office cantonal de l'inspection et des relations du travail*) found that Uber was not a delivery service but rather a transport company, subject to the "*Code d'obligations*" (complementary to the Swiss Civil Code) and Geneva legislation on taxis and chauffeur-driven cars.[30] According to the Department, the drivers are undeclared employees whose social security contributions should have been paid since the end of 2014, when Uber was launched in Geneva. Uber has appealed to the Administrative Chamber of the Geneva Court of Justice but

27. LSE, RS 823.11.

28. See art. 12 LSE. The hiring out of services in Switzerland is an activity that is carried out under the authorization of the Cantonal Employment Office. According to art. 26 of the Federal Ordinance on employment services and the hiring of services (*Ordonnance fédérale sur le service de l'emploi et la location de services* – OSE); RS 823.111), a lessor is deemed to be a person who hires out the services of an employee to a lessee company and gives the latter most of the management powers over the employee. This constitutes an employment contract. The remuneration enables the lessor of services to pay the workers' social security charges and salary.

29. Case No.: 2C_575/2020.

30. See art. 28 of the Geneva law of 13 October 2016 on taxis and chauffeur-driven cars (*Loi genevoise du 13 octobre 2016 sur les taxis et les voitures de transport avec chauffeurs* – LTVTC), RS-GE H 1 31.

the Court rejected the appeal and the decision is now final.[31] The Geneva decisions follow the identification of gaps in the payment of contributions, in particular for people who were refused affiliation as self-employed by the benefit programmes and whom Uber does not consider as employees.[32]

Litigation in private labour law

Although this goes beyond the strict framework of social protection, we felt it necessary, before concluding this study, to take stock of the classification which the civil courts have made in labour law.

The Court of Appeal of the Canton of Vaud ruled on Uber's situation on 23 April 2020.[33] Uber had terminated the contract of one of its drivers following poor customer ratings of his driving skills. After sending the driver messages on his smartphone informing him of the lowered rating, Uber applied the contractual notice period of seven days and deactivated the driver's app. The driver challenged the validity of the reason for termination, the notice period applied as well as the notification. Even though Uber had complied with the contractual notice period, the Court held, after reclassifying the service contract as an employment contract, that the termination was unjustified and wrongful, as it was contrary to the provisions of the *Code d'obligations*. Despite the fact that the complaints were serious, as they concerned customer safety, the termination for valid cause was not justified, as Uber had not terminated the contract immediately after issuing the warnings. Thus, Uber failed to prove that the termination flowed from an irreversible loss of trust in the employee. In the absence of a valid reason for immediate termination, Uber should have respected the statutory notice period. In addition, the judges were of the opinion that Uber drivers had virtually no freedom of association.

One interesting aspect of this decision is the use of the rules of international law. After verifying the international character of the case, which involved the Netherlands and Switzerland, the Court of Appeal applied the Lugano Convention[34] to verify its jurisdiction. As the latter provides for special provisions concerning employment relationships, facilitating the employee's access to justice,

31. Court of justice, Administrative, Chamber ATA/1151 2020, 17 November 2020.

32. Report of the Transport Committee of 16 July 2019 on M 2480-A and M 2571, drawn up following motion 2,480.

33. Commercial Court of the Canton of Vaud (*Tribunal de commerce du canton de Vaud* – TC VD), Civil Court of Appeal (*Cour d'appel civile*), HC/2020/535 No. 380, 11 September 2020 (Rasier Operation B.V.c. A). See Wyler and Zandirad (2020).

34. See art. 18 and art. 19 of the Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (*Convention du 30 octobre 2007 concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale*), RS 0.275.12.

the Court began by classifying the contract. It concluded that the contract in question was, in fact, an employment contract and that Uber B.V., established in the Netherlands, was the driver's employer. The choice of law clause was deemed invalid, as it was intended to improperly deprive the employee of the effective possibility of asserting his rights. Finally, the arbitration clause could only be valid under Swiss law[35] if the dispute was arbitrable. However, art. 341 of the *Code d'obligations* stipulates that, during the employment relationship and for one month after its termination, the employee may not waive claims arising from the mandatory legal provisions of art. 361 and art. 362 of the *Code d'obligations*, such as wages, holiday pay or compensation for dismissal. The waiver arising from the choice of an arbitration clause before the aforementioned deadline is therefore null and void. Thus, the arbitration clause could not prevent the employee from acting before the Swiss courts. The Court therefore invalidated the clause.

As Uber B.V. did not appeal against this decision, it has now become final. Consequently, in Switzerland, the relationship of Uber drivers should be considered as wage employment. This is probably a new form of on-call work, a form of precarious employment whose legality was recognized by the Federal Court in 1998,[36] as the law is not in principle opposed to labour market flexibility. In this form of work, the employer calls on the services of the worker when he or she needs them, while the worker undertakes to remain permanently available to the employer. He or she cannot, therefore, refuse a call.[37] The working time during which the worker is on standby, which is the connection time, is remunerated. However, the remuneration may be lower, even if the waiting is done within the company, and the remuneration may be agreed on a flat-rate basis, taking into account the average number of interventions. In the absence of an agreement, this remuneration may be set by an equity court judge, based on the intensity of the work required and the freedom enjoyed by the worker. Even though this classification maintains the platform worker in a precarious situation, it may be more advantageous than self-employed status in terms of social insurance affiliation, provided that the work is truly regular.

Pending a ruling by the Federal Court, the decisions handed down in both administrative and private labour law tend to classify the activity carried out on

35. Federal Law of 18 December 1987 on private international law (*Loi fédérale du 18 décembre 1987 sur le droit international privé* – LDIP), RS 291.

36. Main decisions of the Federal Court (*Arrêts principaux du Tribunal fédéral* – ATF) 125 III 65 and 124 III 249.

37. State Secretariat for Economic Affairs (*Secrétariat d'État à l'Économie* – SECO), Bulletin LACI IC No. 95 ff: "Workers shall suffer neither loss of work nor loss of earnings to be taken into account during periods when they are not called upon to work (art. 11, para. 1, LACI). They are in fact a party to an employment relationship where irregular working hours are considered normal ATF 107 V 59."

behalf of Uber as wage employment. Following the rulings against Uber, the French company Kapten, Uber's main competitor, stopped operating in Switzerland, leaving 350 people without work or compensation, as there is no collective dismissal procedure for self-employed workers (Le Matin, 2019). By way of contrast, the recently established start-up Lymo was launched in April 2019 as a transport booking app. It styles itself as a trip comparator and does not charge fees.[38] It is therefore a new model, which raises new questions, to which the answers given in the Uber cases will not necessarily apply. It is therefore not possible to settle, once and for all, the classification of the activity carried out on behalf of all platforms. This depends to a large extent on the distribution of roles between the platform and the worker, as the former acts as an intermediary who loosens the link between service provider and client to varying degrees. This loosening weakens the case for self-employed contractor status for platform workers, in favour of reclassification as an employment contract. To understand the practical implications of this debate in Swiss social security law, we need to compare the protection offered, respectively, to employees and the self-employed.

Social security coverage for employees and the self-employed

In this section, we will start by analysing the main schemes offering public universal protection, then examine those that are more specifically linked to occupational activity. We will leave aside secondary schemes such as family allowances, supplementary benefits or military service allowances, for which professional status is not decisive.

Schemes offering public universal protection: A feigned neutrality

Old-age and Survivors' Insurance/Disability Insurance (AVS/AI). The AVS/AI, the first pillar of the provision of old-age, survivors' and disability insurance, is aimed at guaranteeing a minimum standard of living for everyone living in Switzerland with regard to old age or disability, or for their survivors in the event of death.[39] It is a pay-as-you-go system where the economically active population pays for current pensioners. Economically active insured persons are obliged to pay

38. For more information on Lymo.

39. See art. 4 para 1, 8 and 9 of the Federal Law on old-age and survivors' insurance (*Loi fédérale sur l'assurance-vieillesse et survivants* – LAVS), art. 17–21 and 27 of the Regulation on old-age and survivors' insurance (*Règlement sur l'assurance-vieillesse et survivants* – RAVS) and art. 1b of the Federal Law on disability insurance (*Loi fédérale sur l'assurance-invalidité* – LAI). See also Greber et al. (2010, p. 263).

contributions as long as they are gainfully employed; non-active persons from age 20 until they reach age 64 for women or age 65 for men.[40] Contributions for employees amount to 10.10 per cent of salary,[41] while those of self-employed persons amount in principle to 9.50 per cent of the determining income,[42] with incomes below 57,400 Swiss francs (CHF) benefiting from a sliding scale.[43] A voluntary contribution system exists for self-employed persons whose monthly income does not exceed CHF 2,300.[44] Insurance is more expensive for the self-employed than for employees, as they must contribute on their own behalf without an employer's joint contribution. However, the self-employed contribute less overall to the financing of such insurance, a factor that could negatively affect the financial equilibrium of the programme if self-employment were to become more widespread.[45]

The minimum AVS pension is CHF 1,195 per month, provided that the person has paid contributions without interruption since age 20. The maximum pension is CHF 2,390 per month for those with an average annual income of at least CHF 86,040 per year over the entire contribution period.[46] In the event of disability, insured persons may be entitled to daily allowances while they are undergoing rehabilitation, then to a disability pension depending on the assessment of the degree of disability.[47] For persons who were gainfully employed full-time without a health impairment, the degree of disability is in principle assessed using the so-called income comparison method,[48] which has the merit of referring to objective data. When assessing the degree of disability of a self-employed person with variable income, the reduction of which, in all likelihood, can be attributed to the health impairment, the so-called extraordinary method is used. This involves comparing the time spent on different activities before and after the health impairment, and is thus a more arbitrary method.

40. See art. 3 LAVS.
41. Representing the combined employee and employer contributions for AVS and AI contributions. The total percentage amounts to 10.6 per cent if the APG (*Loi fédérale sur les allocations pour perte de gain en cas de service, de maternité et de paternité (Loi sur les allocations pour perte de gain* – LAPG, RS 834.1) contribution is added. The APG covers insured workers in the event of an incapacity for work as the result of military service or maternity leave.
42. For the self-employed, 10 per cent if the APG contribution is added.
43. See art. 8 LAVS and art. 21 RAVS; art. 3 LAI and article 1 bis of the Regulation on disability insurance (*Règlement sur l'assurance-invalidité* – RAI).
44. See art. 19 RAVS.
45. See Pärli (2019, § 39–44).
46. See art. 34 para 5 LAVS.
47. See art. 22, 28 and 28a LAI.
48. See art. 28a para 2 LAI, which refers to art. 16 LPGA. See also Greber et al. (2010, pp. 245–246).

Thus, while the AVS/AI seems a priori neutral in terms of benefits, certain aspects of the assessment of benefits actually lead to unequal treatment, to the disadvantage of the self-employed. It should also be borne in mind that the contributions paid by the self-employed depend on their taxable income, which they may be tempted to keep as low as possible for tax reasons. Of course, this type of provision also influences the amount of contributions, hence the subsequent benefits. Another factor is that the income from AVS/AI pensions is insufficient to live on in Switzerland. Consequently, it is necessary to also closely scrutinize occupational pension schemes to arrive at a realistic picture of a person's coverage.[49]

Excursus: The loss of earnings in case of illness. Compulsory health insurance is linked to residence in Switzerland rather than employment. Instead of depending on income, the premiums paid by insured persons are calculated in relation to total health-care costs, broken down on a per capita basis.[50] Thus, no distinction is made between employees and the self-employed as regards health-care coverage, in terms of either costs or coverage.

However, coverage for loss of income in the event of incapacity for work due to illness is not included in compulsory health insurance, but is optional.[51] Moreover, as the law does not impose minimum coverage, the daily allowances offered by providers of health insurance are very low (in French, health insurance is referred to by the acronym LAMal; *Loi sur l'assurance-maladie*). In practice, employers tend to take out private group insurance,[52] i.e. for all their employees, as this frees them from the obligation to pay wages under the *Code des obligations*.[53] This type of private insurance is also available to the self-employed at their own expense. Consequently, the self-employed can take out daily allowance insurance in the event of illness and maternity, either with a LAMal insurer or with an individual insurance company. Such insurance may also offer daily allowances in case of accident. As a result, liability for the loss of earnings coverage lies, in one case, with the employer and, in the other case, with the self-employed.

49. See below, section on Occupational pension schemes.

50. See art. 3 of the Federal Law on health insurance (*Loi fédérale sur l'assurance-maladie* – LAMal). See Dupont (2019b, pp. 127–128).

51. See art. 67–77 LAMal. See Greber et al. (2010, pp. 26–27).

52. Subject to the Federal Law of 2 April 1908 on insurance contracts (*Loi fédérale du 2 avril 1908 sur le contrat d'assurance* – LCA), RS 221.229.1.

53. Art. 324a *Code des obligations*.

Occupational schemes

The social insurance programmes primarily intended for persons in employment are the pension scheme, accident insurance, unemployment insurance,[54] and maternity and paternity leave.[55]

Occupational pension schemes: The problem of non-standard workers. Occupational pension schemes, also known as the second pillar, are supplementary to the AVS/AI and designed to maintain a person's prior standard of living in the event of old age or disability, or the standard of living of their survivors in the event of death.[56] Schematically speaking, the sum of the first and second pillar benefits is supposed to provide an alternative income of about 60 per cent of the person's last salary. The second pillar is based on a capitalization system (Gnaegi, 2017, p. 227); the amount of the pension depends on the contributions paid, which in turn depends on the insured salary.

The second pillar is compulsory for employees and is available on an optional basis to self-employed persons.[57] For example, the self-employed can affiliate with the pension fund of a professional association, affiliate with the Supplementary Institution Foundation *(Fondation institution supplétive)* or affiliate with a traditional insurance company.[58] If a self-employed person employs paid workers, it is possible to affiliate with the same institution as that of their workers.

Regardless of the employee's status and working hours, the threshold for compulsory pension coverage is CHF 21,510 per year, from a single employer. Once this threshold is reached, only a part of the salary, called the coordinated salary and ranging from CHF 25,095 to CHF 86,040, is compulsorily insured. The aim of this regulation is to avoid having to pay contributions on the amounts corresponding to the benefits insured by the first pillar. However, the effect of these provisions is to exclude from this protection "non-standard" jobs or atypical work, such as low-paid work, multiple jobs, on-call work or part-time work, for which income is generally below the threshold for accessing

54. Although it is possible for people who are not in gainful employment or who are self-employed, under certain defined circumstances, to receive unemployment insurance benefits, these are primarily intended for employed persons.

55. See art. 16a-16 g of the Federal Law of 25 September 1952 on allowances for loss of earnings in case of service, maternity and paternity (*Loi fédérale sur les allocations pour perte de gain en cas de service, de maternité et de paternité* – LAPG, RS 834.1). See also footnote 41.

56. See art. 1 of the Federal Law on occupational retirement, survivors' and disability pension plans (*Loi fédérale sur la prévoyance professionnelle vieillesse, survivants et invalidité* – LPP).

57. See art. 4 LPP (it should be noted that Art. 3 LPP has not been implemented to date).

58. See art. 44 LPP.

the second pillar. The rate of contributions applied to this coordinated salary varies from 7 per cent to 18 per cent, depending on the person's age.[59] In principle, this contribution is split equally between the employee and the employer. If the self-employed decide to insure themselves, they must pay the entire contribution.

The second pillar encompasses, on the one hand, compulsory pension provision, i.e. the statutory minimum benefits,[60] and, on the other hand, supplementary pension provision. This allows the employer to opt for a system that goes beyond the statutory minimum benefits and to derogate from a certain number of regulations,[61] in particular by paying more than half of the contributions.

It is in the area of pension provision that legislators offer the most incentives. Indeed, the law allows for insurance of up to ten times the coordinated salary,[62] and the self-employed may deduct their second pillar contributions from their taxable income[63] and those of their employees from their taxable income as a business expense.[64] In this context, it is worth mentioning that the pension savings acquired during the period of employment can be withdrawn in cash during the first year of self-employment.[65] This facility has a number of perverse effects, such as reducing provision in the event of disability.

Occupational pension schemes have been designed for workers with a linear career, whether they are classified as employees or self-employed. However, they constitute an ill-adapted and relatively incomplete system for non-standard jobs. This generally includes platform workers, whose income is low and fragmented; this prevents such workers from building up sufficient entitlements or even accessing them, which remain fragmented overall.

Accident insurance: The privilege of the traditional workforce. The biggest difference in treatment between the self-employed and employees is in the area of accident insurance. For employees, accident insurance is compulsory and automatic. The employer pays the premium for occupational accidents and illnesses in full, whereas employees can only be required to pay premiums

59. See Art. 16 LPP.
60. See art 7 ff LPP.
61. See art. 49 LPP by contrast.
62. See art. 79c LPP. This represents an amount of CHF 609,450.
63. Up to 25 per cent of insurable AVS income.
64. See art. 79c LPP, which refers to art. 8 para 1 and art. 81 of the Federal Law of 11 April 1889 on debt collection and bankruptcy (*Loi fédérale du 11 avril 1889 sur la poursuite pour dettes et la faillite* – LP), RS 281.1; art. 1 para 2 let. b of the Ordinance on Occupational Retirement, Survivors' and Disability Pension Plans (*Ordonnance sur la prévoyance professionnelle vieillesse, survivants et invalidité* – OPP 2).
65. See art. 5 para 1 let. b of the Federal Act of 17 December 1993 on vesting in old-age, survivors' and disability pension plans (*Loi fédérale du 17 décembre 1993 sur le libre passage dans la prévoyance vieillesse, survivants et invalidité* – LFLP), RS 831.42. See Oberson (2013, p. 63).

for non-occupational accidents, if these are covered.[66] Coverage encompasses payment of the costs of treatment arising from an accident and the provision of replacement income, in the form of daily allowances or pensions in the event of disability resulting from the accident.[67]

Non-occupational accident coverage is reserved for employees who work at least eight hours per week for the same employer.[68] For those who do not meet this condition, protection is therefore only partial, and the health insurance will only cover the treatment arising from the accident.

Another weakness of the system is the fragmentation of work into several employment relationships, as it may be difficult to determine which accident insurer is liable. This is especially true for occupational accidents, which would be the case for Uber drivers working for several platforms.

For platform workers, several difficult issues arise in this context, particularly if they work for several platforms. In addition to the question of determining whether the waiting time or the trip to pick up a client should be considered as working time, the fragmented employment relationship is likely to create uncertainty as to the identity of the accident insurer required to provide coverage. This will lead inevitably to, at least, a temporary gap in the worker's social security coverage.

Accident insurance is optional for the self-employed. They pay the full premium, which, like cash benefits, is calculated on the basis of the insured earnings agreed between the insurer and the insured, in principle the actual earnings, but at least CHF 66,690.[69] This amount represents a significant constraint for people with lower incomes.

Unemployment insurance: Lack of coverage. Unemployment insurance provides daily allowances of 70 per cent to 80 per cent of insured earnings for a maximum of 24 months, and allows insured persons to contribute to AVS/AI/APG[70] and be insured against the risk of accident.[71] Although coverage is relatively generous, it is particularly difficult to implement in case of irregular income or on-call work. One form of flexible work was recognized by the Federal Court in 1998, whereby the employer calls on the worker as need be, and

66. See art. 91 LAA.
67. See art. 10 ff LAA.
68. See art. 8 para 2 LAA and art. 13 OLAA.
69. Which represents 45 per cent of the maximum amount of insured earnings, an amount fixed at CHF 148,200 since 1 January 2016 (Frésard-Fellay, Kahil-Wolff and Perrenoud, 2015, p. 332).
70. APG – *Allocations pour perte de gain* (Benefits for loss of income).
71. See art. 22 and 22a, art. 27 LACI; art. 1a para 1 let. b LAA.

the worker undertakes to be permanently available to the employer and cannot refuse the call.[72]

Unemployment insurance is primarily for employees.[73] There is provision in the Constitution for voluntary unemployment insurance,[74] but the self-employed are currently not able to contribute to it.[75] Consequently, the self-employed do not in principle have the option of compensation for the loss of income resulting from the lack of activity due to economic reasons. Tacitly, this means that a self-employed person cannot be out of work, unless he or she is voluntarily – and therefore culpably – out of work or is unfit for work, a situation not covered by unemployment insurance. It is this assumption that is challenged in the case of platform workers because they do not have their own clientele and are economically dependent on the platform(s) for which they work. As a result, they do not appear in unemployment statistics[76] and their economic inactivity is not officially recognized. Moreover, if the independent business activity of the platform worker were to end, the choice of independent status by a former employee who has reached the end of his or her unemployment benefits does not allow, in principle, for social and economic reintegration with the help of unemployment insurance.[77]

Furthermore, it should be noted that this lack of coverage is particularly unjust if a platform ceases to operate, as those concerned cannot be covered by a social plan or collective redundancy. Thus, the self-employed who lose their jobs are left with neither income nor coverage.

Allowances for loss of earnings in case of maternity or paternity. From the perspective of the personal scope of protection, the system of allowances for loss of earnings in the event of maternity is governed by the same conditions as the AVS. As a result, the self-employed are subject thereto in the same way as employees. However, a self-employed woman who becomes a mother must be considered as economically active at the time of childbirth in order to be entitled to maternity benefits. This condition is only met if the mother is self-employed and receives income from this activity for at least five months during the

72. See ATF *(Arrêts principaux du Tribunal federal)* 125 III 65 14 December 2018 and ATF 124 III 249 6 May 1998.

73. Employer-employee contributions are joint and the contributions are 2.2 per cent in total up to an income of CHF 148,200, then 0.5 per cent for higher incomes (see art. 3 LACI).

74. See 114 para 2 let. c. Cst. The legislator's mandate is therefore not yet fulfilled (see Greber et al*.*, 2010*,* p. 80).

75. See art. 2 LACI determining who is subject to contributions.

76. In Switzerland, only people receiving unemployment benefits are counted as unemployed, not all registered jobseekers.

77. See art. 9a LACI on the maximum duration of the extension of the framework periods.

pregnancy.[78] Failing such income, in particular in case of loss of activity before childbirth due to an accident, pregnancy-related complications or illness, the self-employed woman must have taken out an individual loss of earnings insurance policy providing her with replacement income if she then wants to be entitled to maternity allowance.[79] In addition, the mother must still be considered economically active at the time of giving birth.[80] In the case of transient self-employment, this condition may be more difficult to prove. To some extent, the same difficulties apply to self-employed fathers who are entitled to a paternity allowance as from 1 January 2021.

Conclusion: A middle way?

Overall, coverage in Switzerland for the self-employed is less extensive than for employees. It is also more expensive for the self-employed as the principle of joint contributions is not applicable, and insurance is generally linked to the activity and therefore to the presence of income (Perrenoud, 2018, pp. 39 ff; Witzig, 2016). For employees, the bulk of social protection is provided by accident insurance and occupational pension schemes, which are optional for the self-employed. In this area, freedom of choice and economic freedom are paramount, which corresponds closely to the traditional notion of "self-employed". However, this schema does not meet the needs of platform workers, whose income remains precarious and largely dependent on their own working capacity. It is therefore questionable to include platform workers in the social security system for the self-employed.

Thus far, in the absence of legislative change, the reaction of the authorities has tended towards the inclusion of platform workers in the employees' regime. Yet, if new forms of self-employment were to become more widespread, this could put into question the system's equilibrium from the perspective of both its operation and the cost to society. Moreover, the protection arising from the reclassification of platform workers as employees is hardly satisfactory. Consequently, such inclusion does not necessarily meet the needs of workers or employers, as it does not really allow platform workers to escape from a certain precariousness and will remove the organizational flexibility that is often sought.

Some voices have called for the creation of a specific status,[81] and the government is studying the issue. A third status, in between that of employee and independent, like that available for workers in the United Kingdom, could

78. See art. 16b para 1 let. b and c ch. 2 LAPG.
79. See art. 30 para 1 let. a RAPG.
80. See art. 16b para 1 let. c ch. 2 LAPG.
81. For example, postulates17.4087, 15.3854 and 17.3222 or Doffey (2018).

enable economically dependent workers to benefit from part of the social protection of employees.[82] The Federal Court has opened up this possibility by applying the mandatory provisions of labour law, without however reclassifying contracts, in conjunction with so-called subordination franchises for franchised workers.[83] In this case, the extent of the franchisee's independence is examined according to three criteria. First, legal autonomy to sign contracts. Second, financial autonomy: despite the levying of a fee, the profits must remain with the franchisee. Third, autonomy to manage the business: the instructions on appearance, the content and the quality of the products or services must not influence the way the business is managed, its work is organized and its employees are chosen (Pichonnaz, 2012, pp. 54–57). If, on the contrary, the franchisor has such a hold that the franchisee is deprived of autonomy, the result is subordination, which requires the application by analogy of the imperative rules of labour law. Another avenue has been opened up by the development of *portage salarial* (wage portage) companies, which allow someone covered by such a scheme to be an employee of a wage portage company while retaining his or her independent status vis-à-vis the client company for which he or she works. Technically and legally speaking, a wage portage employee is therefore an employee of the wage portage company while at the same time providing services to the client company. The client is invoiced by the wage portage company, which then pays a salary to the employee and covers the employee and employer's contributions. The wage portage company handles the administrative procedures on behalf of the employee. The activity is carried out under cantonal authorization (issued by the Cantonal Employment Office), or federal authorization (issued by the State Secretariat for Economic Affairs) and regulated by the LSE.[84] However, we need to be particularly cautious at this stage regarding the validity of this legal organization in private law (Magoga-Sabatier, 2019, pp. 73–75; Fuld and Michel, 2012).

The Federal Council has commissioned four of its Departments to prepare a joint report on the need for, and advantages and disadvantages of, greater flexibility in social insurance, and to put forward possible solutions. The aim is to present concrete prospects for flexibility in the field of social insurance by developing a legal framework that preserves the advantages of the distinction between self-employment and wage employment and to create framework conditions that allow innovative business models to emerge. The mandate also includes the establishment of mechanisms to prevent the risk of precarity and the transfer of costs to the community. Finally, it calls for an examination of the

82. Cf. United Kingdom Supreme Court [2021] UKSC 5, 19 February 2021, *Uber B.V. & others* v. *Aslam & others*.
83. ATF 118 II 157, recital 4. and TF 4A_148/2001 of 8 September 2011 recitals 4.2 to 4.4.
84. LSE, RS 823.11.

consequences of an open-ended approach for the parties or the option of introducing protection regulated by an agreement (Conseil fédéral, 2017b, p. 106; Conseil national, 2018). This report, which was due at the end of 2019, is still in preparation. It is therefore still too early to know whether such a statute would offer a satisfactory solution.

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