

Don't GIG Up, Never!

Model of Terms and Conditions of Service

June 2023



dontgigup.eu



Don't GIG Up, Never!

Model of Terms and Conditions of Service

WITH THE CONTRIBUTION OF:

Heidi Ann Erbsen, Sabina Trankmann (University of Tartu); Odile Chagny (IRES); Thomas Haipeter, Fabian Hoose (Fondazione Giacomo Brodolini / University of Duisburg-Essen); Dominik Owczarek, Małgorzata Koziarek (Institute of Public Affairs – IPA); Luis Pérez Capitán, Sofía Fernández de Lucas, Rubén Ranz Martín (Unión General de Trabajadoras y Trabajadores); Sirin Celik (Fondazione Giacomo Brodolini / Svenska Transportarbetareförbundet); Michele Faioli (Università Cattolica del Sacro Cuore / Fondazione Giacomo Brodolini); Barbara De Micheli (Fondazione Giacomo Brodolini); Sofia Gualandi (Fondazione Giacomo Brodolini).

JUNE 2023



The research for this report was supported by the European Commission, Directorate-General for Employment, Social Affairs, and Inclusion, receiving funding under the call for proposals VP/2020/004 (Improving expertise in the field of industrial relations). Responsibility for the information, opinions, findings, and conclusions or recommendations expressed in this report lies entirely with the author(s). The European Commission is not responsible for the use which might be made of the following information.

TABLE OF CONTENTS

INTRODUCTION.....	1
OBJECTIVES AND METHODOLOGY.....	2
MODEL OF TERMS AND CONDITIONS OF SERVICE.....	4
1. Applicable legislation	4
2. Type of relationship between platform and worker	5
3. Membership costs for the workers and costumers' fees	6
4. Assignment of tasks/jobs	7
5. Remuneration policy	8
6. Non-competition clauses	9
7. Intellectual rights	10
8. Services for clients and workers	11
9. Dispute resolution mechanisms	12

INTRODUCTION

The Model of Terms and Conditions of Service is part of the Don't GIG Up, Never! project. The project, co-funded by the Directorate-General for Employment, Social Affairs and Inclusion of the European Commission, is aimed at improving expertise and knowledge on the role unions and social dialogue can play with regard to the protection of platform workers, building on the knowledge accrued through the Don't GIG Up! project (2018–2020). The project focuses on working activities and services provided through digital labour platforms. At the onset of the research, in line with the characterization proposed in the Don't GIG Up! project, platforms were divided into four groups according to their core activities, as per the table below.

Table 1. Classification of labour platforms adopted in the projects 'Don't GIG up!' and 'Don't GIG up, Never!'¹

<i>N.</i>	<i>Type of platform</i>	<i>Example</i>
1	Platforms matching passenger transport services	Uber, Lift, others.
2	Platforms matching goods delivery services	Deliveroo, Foodora, etc.
3	Platforms matching 'traditional gigs' (gardening, cleaning, babysitting, etc.) up to 'skilled services' (marketing, advertising, translating, etc.), possibly also by means of auctions	Task Rabbit, Helping, etc.
4	Platforms externalizing micro-tasks , often performed on web, to a 'crowd' of workers (crowd-work platforms)	Amazon Mechanical Turk, etc.

In particular, "Don't Gig Up, Never!" intends to deepen the activities successfully implemented during the 'Don't GIG Up!' project, focusing on labour platforms providing services other than transport and delivery, i.e., falling under categories 3 and 4 of the Table 1.

¹ A very similar classification was adopted for the consultations for the Digital Services Act package, i.e.: (i) Food-delivery; (ii) Ride-hailing; (iii) Online translations, design, software development or micro-tasks; (iv) On-demand cleaning, plumbing or DIY service; (v) other.

OBJECTIVES AND METHODOLOGY

This 'Model of Terms and Conditions of Service' is based on platforms' Terms and Conditions of Service analysed in the framework of the previous phase of the project and collected in the seven Country Case Study Reports².

Issues of informational equality have surfaced in a variety of algorithmic contexts, but existing law has remained inadequate in addressing this problem. Other obstacles stem from the significant information asymmetry between those who design algorithms and those who are governed by them. The gaping absence of a fully regulatory oversight requires us to turn to two other potential avenues for greater transparency: voluntary self-regulation and collective actions by workers through unions and workplace representatives. In the following sections, we explore the possibilities for addressing algorithmic accountability both from within the industry as well as from within the company itself, discussing the possibility of contractual clauses, codes of conduct, impact statements, to address the issue of algorithmic accountability within the platform types 3 and 4 above mentioned. Effective self-regulation may not always resolve the issues we are facing and the algorithmic fairness problem. There are powerful arguments that can be made about the limited incentives for companies to rigorously examine the implications behind technologies that are both profitable and powerful. However, as we will demonstrate, there may be some room to explore potential alternatives from within the industry. The explosion of AI-related organizations that focus on industry accountability gives some optimism that the industry is aiming to address issues of transparency and accountability.

For the mere purpose of clarity and definition, 'Terms and Conditions of Service' (also known as 'Terms and Conditions', 'Terms of Use', 'Terms of Service', 'General Conditions', etc.) are the legal agreements between a service provider and who wants to use that service. Terms and Conditions are set up by the service provider and detail the rules that apply to fulfilling a particular contract and form an integral part of that contract. Content can vary greatly depending on the service offered by the platform, although there is a core of recurring content. Those who want to use the service must agree to abide by the Terms and Conditions in order to use the offered service. A legitimate Terms and Conditions agreement is legally binding and may be subject to change by the service provider, which must promptly inform users.

² Don't GIG Up, Never! project Country Case Study Reports are accessible here: <http://www.dontgigup.eu/resources/>

Observing digital platform of type 3 and 4, it can be seen that the contractual relationship between the platform (i.e., service provider), the workers (i.e., first category of user, who participates, via their performance for the platform, in guaranteeing the service) and the costumers (i.e., second category of user, who benefit from the service provided) is merely established and formalised through the subscription of Terms and Conditions of Service of the platform, which makes them interesting as an object of analysis for both their texts and how they are implemented in practice.

Starting from the cross-analysis of Terms and Conditions of type 3 and 4 platforms considered for national case studies, this report is aimed at setting out possible models to be respected by digital platforms in their Terms and Conditions of Service, abiding to the existing EU and domestic legal frameworks on the most notable aspects (e.g. terms and conditions of employment, monitoring of workers, privacy - also in the light of the GDPR and related provisions on ratings, applicable legislation for employment and social security purposes, etc.).

The result consists of a short document with an easy-to-read and easy-to-adapt approach, with a variety of possible recipients interested in its contents. This 'Model of Terms and Conditions of Service' can provide a basis to companies managing the platforms that wish to provide their services in a lawful way across the covered countries, as well as to improve the working conditions of workers operating through these platforms. Consequently, this document can be a support tool for social partners (trade unions and employers' associations) as a checklist to verify the practices of the platforms. Finally, this document can be useful for platform users, both workers and customers, to make informed decisions about the digital platforms they use to work, to provide services and to purchase services.

In terms of structure of the document, the 'Model of Terms and Conditions of Service' is divided into nine short sections, which correspond to the nine topics on which the national researchers performing case studies focused when analysing the Terms and Conditions and good/bad practices of the selected platforms. For each of the nine sections, a *box* is provided listing possible improvements to the platforms' Terms and Conditions (henceforth: 'T&Cs'), collecting model proposals with remarks added whenever there are considerable differences in domestic legislation and on aspects which shall be left to collective bargaining or to individual choice by the workers.

MODEL OF TERMS AND CONDITIONS OF SERVICE

1. *Applicable legislation*

Focus on legislation applicable to the platforms' activities and competent jurisdiction; application of specific sectoral regulations and provisions to platform users; sectoral perimeters of platform activity.

BOX 1 – Model T&Cs

T&Cs should apply the legislation in compliance with Sections 8 and 9 of the Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I) and, in any case, the legal national regimes arising from the Directive (EU) 2019/1152 on transparent and predictable working conditions in the European Union;

T&Cs should make explicit which are the activities conducted through the platform by indicating, in addition to the registered NACE Sector(s)³, often related to information and communication, the specific NACE Sector(s) of the actual services provided via the platform. This would facilitate: (1) the identification of sectoral national collective bargaining agreements; (2) the identification of national regulations relating to specific professional sectors or regulations of professional bodies/associations (where present);

T&Cs should ensure the platform's compliance with the EU AI legal regimes, also related to General Data Protection Regulation and clarify the policy applied to the protection and governance of workers data, the strategies and tools in place to guarantee the right to privacy, including the portability of digital reputation;

T&Cs should make explicit which Court is competent to settle disputes between the platform and the users;

T&Cs should be drafted with the support of legal experts in the field, and not just based on automatic generators of Terms and Conditions available online;

T&Cs should make explicit which regulations and specific normative provisions are applied in the relationship with the customer, e.g., civil law, commercial law, etc., and should provide the most up-to-date regulatory references.

³ <https://nacev2.com/en>

2. *Type of relationship between platform and worker*

Focus on the relationship between platforms and workers; on which contract(s) is/are used by the platform (if any) and related consequences in terms of labour rights and social protection; on the bipartite or tripartite relation between the platform, the platform worker and the customer.

BOX 2 – Model T&Cs

T&Cs of type 3 platforms should clarify what is the legal relationship between the company managing the platform (service provider), the user acting as worker via the platform (platform workers) and the customer (service beneficiary);

When the platform acts as an intermediary (online marketplace of labour force and service provider) between the platform workers and the customers, the type 3 platform should clarify under which legislation it may provide the employment intermediation service;

In case that various contractual arrangement models are envisaged by the platform, T&Cs should be specified under which circumstances particular model shall apply;

T&Cs determining model of contractual relations should be in line with the national legislation, with the (forthcoming) EU Directive on improving working conditions in platform work and with Court rulings, in order to avoid potential conflict between the T&Cs and respective legal provisions.

3. *Membership costs for the workers and costumers' fees*

Focus on platforms services' costs, membership costs, fees or commissions charged to workers and/or costumers for the use of the platform.

BOX 3 - Model T&Cs

T&Cs should clarify whether a subscription is required to operate on the platform, either as a worker or as a customer, and define the amount, method and frequency of payment, any additional fees, and the fiscal regime applying;

When T&Cs requires the worker and/or the client to have a membership to use the platform, T&Cs should also clarify the amount, method and frequency of payment, the applicable fiscal regime, as well as detail the services dedicated to (premium) subscribers;

In the case of commissions/fees charged on individual transactions taking place on the platform, T&Cs should clarify the amount of the expenditure (in absolute or percentage terms), the party on whom the expenditure is charged (the worker or the costumer or both), the time when the expenditure is charged, and the applicable fiscal regime;

In the case of commissions/fees charged on individual transactions taking place on the platform, T&Cs should clarify which services this expenditure is imposed for and how the amount is established.

4. Assignment of tasks/jobs

Focus on the modality of assignment of tasks/jobs via the platforms, with particular reference to the role of skills assessment, artificial intelligence technology and rating/ranking mechanisms.

BOX 4 – Model T&Cs

T&Cs should clarify which kind of hard and soft skills are required to work through the platform;

T&Cs should ensure an internal system of skills verification/certification of workers, prior to their eligibility to work via the platform, in order to ensure both worker and client safety and satisfaction;

T&Cs should clarify what is the role of human intervention and/or artificial intelligence in relation to the declarations of skills, verification/certification of skills, and possible rating and/or ranking of workers with respect to these processes;

T&Cs should detail the role of artificial intelligence in relation to the assignment of tasks/jobs via the platform, explaining the functioning of the algorithms used in a clear and comprehensible way and, as a consequence, be in compliance with the national laws concerning legitimate job rotation schemes, variations of tasks, discrimination;

T&Cs should ensure transparency, explaining the details of the algorithmic management (e.g. of task assignment and pricing), in compliance with the (forthcoming) EU Directive on improving working conditions in platform work;

T&Cs should make explicit if contents of the algorithm might be a subject of negotiations with workers and trade unions;

T&Cs should make explicit if a rating system via costumers' feedbacks with respect to workers performance is in place on the platform, should explain its functioning and criteria, and should specify if/how this rating system impact on the assignment of tasks/jobs (both in terms of profile-raising and in terms of impact on the algorithm, if any) and, as a consequence, be in compliance with the national laws concerning legitimate supervision;

T&Cs should make explicit if a ranking system is in place on the platform, should explain its functioning and criteria, and should specify if/how this ranking system impact on the assignment of tasks/jobs (both in terms of profile-raising and in terms of impact on the algorithm, if any) and, as a consequence, be in compliance with the national laws concerning legitimate supervision;

T&Cs should clarify the impact of worker's acceptance or refusal to execute a task/job on the future task assignment process and, as a consequence, be in compliance with the national laws concerning legitimate supervision;

T&Cs should explain whether and how supervision by the platform of the execution of the task/job carried out by the workers by electronic means and artificial intelligence takes place and, as a consequence, be in compliance with the national laws concerning legitimate supervision.

5. Remuneration policy

Focus on platform workers' remuneration policy; reference to statutory/collectively agreed minimum wages; involvement of algorithms, rating/ranking systems in remuneration definition; definition of thresholds or exact figures by the platform, the client, the worker, or room for negotiation between the parties.

BOX 5 – Model T&Cs

T&Cs should detail the remuneration policy applied to the platform worker according to the applicable national legislation;

T&Cs should clarify if platform workers are remunerated in a monetary form (economic transaction) or non-monetary form (barter transaction, e.g., via shopping vouchers or discount coupons or other forms);

T&Cs should clarify to what extent remuneration is defined by the platform;

T&Cs should state whether there is maximum (monthly and/or annually based) income thresholds/ceilings that workers can earn through the platform, detailing the figures (i.e., units and currency) and explaining the reasons for this;

For countries without a statutory minimum wage, T&Cs should clarify whether the minimum wages defined by sectoral collective bargaining agreements apply. In this case, the sector(s) and the related collective agreement(s) should be identified on the basis of the actual work activity carried out through the platform and the dedicated NACE Sector(s);

6. *Non-competition clauses*

Focus on the role of non-competition clauses in place; incentive or disincentive to work through other platforms (e.g., due to the functioning of rating/ranking systems) or other traditional forms of work.

BOX 6 – Model T&Cs

T&Cs should apply national and EU regulations governing the use of non-competition clauses, in order to protect both the interest of the platform and the freedom of the platform worker;

T&Cs should clarify the rules and penalties applied in the event that the platform worker bypasses the platform and enters into a contractual relationship directly with the customer;

In the event of non-competition clauses for platform workers are contained in the T&Cs, these must specify the reasons for this limitation, the subjects with respect to whom these limitations exist, the geographical limitation, the duration of the limitations, and any penalties in the event of non-compliance with these limitations;

7. Intellectual rights

Focus on limitations applied to the intellectual property of contents sold via the platforms analysed, and the possibilities and limits to their reuse by the creator (if applicable).

BOX 7 – Model T&Cs

T&Cs should apply national and EU regulations governing the intellectual property;

T&Cs should clarify if the intellectual property of the platform is protected by copyright, trademark and business secrecy, and which are the specific national regulations applied;

T&Cs should detail if and to what extent platform workers can use logos, trademark, and contents of the platform, and if, how and what extent platform workers can distribute, reproduce, publish, circulate or otherwise commercially exploit materials covered by intellectual property of the platform;

T&Cs should make explicit if and to what extent the intellectual property and authorship of the platform workers is granted, how intellectual property rights relating to content generated by platform workers are managed (applicable only to type 3 platforms providing for 'skilled services', e.g., marketing, advertising, translating, design, etc.);

T&Cs should make explicit if customers receive an unlimited and exclusive right/licence of use to the content delivered by the platform workers, or if limitations are introduced in terms of non-exclusiveness, duration, space, and other criteria (applicable only to type 3 platforms providing for 'skilled services', e.g., marketing, advertising, translating, design, etc.).

8. Services for clients and workers

Focus on features and effectiveness of platform services provided to the client, as well as platform (support) services provided to the platform workers.

BOX 8 – Model T&Cs

T&Cs should clearly list the services provided to the platform worker and to the customer, highlighting whether they are free or paid services, and outlining the costs where appropriate;

T&Cs should clarify if the platform is responsible towards the customer for the quality assurance of the service provided by the platform workers, and should clarify if the platform guarantees a new service (paid or for free) if the delivered work/service is considered unsatisfactory;

T&Cs should clarify if the worker is responsible towards the customer for the quality assurance of the service provided via the platform;

T&Cs should clarify if accounts of platform workers and customers available on the platform are verified or not, and how the system of evaluation and verification of profiles works;

T&Cs should make explicit the reasons and notice periods in the event of a decision to close a worker's or customer's account by the platform, and should allow users to appeal this decision;

T&Cs should clarify if training and/or insurance is provided to platform workers, especially if the platform is responsible towards the customer for the quality assurance of the service provided, and if this is the case, whether the workers' training and/or insurance is a free or paid service;

T&Cs should clarify whether the means of production or work-related tools needed to provide the service are made available and in charge of the platform, or if they are borne by the platform worker or customer, and shall make explicit any applicable costs and reimbursements;

T&Cs should clarify if and how the platform manages transactions and invoices payments, explaining which payment channels are available and their timing;

T&Cs should clarify if and how the platform secures payments to workers providing services via the platform, in the event of non-payment by the customer;

T&Cs should provide a link to detailed information on the use of the platform and FAQs, in case these are not covered by the T&Cs themselves, to ensure further support for the use of the platform;

T&Cs should detail the scope, the features, the functioning, and the timing of the Users Support Service, and shall allow customers and workers to receive human-based support (e.g., via email, phone, etc.) in the event of dissatisfaction with the support provided by algorithm-based tools;

T&Cs should clarify which business entity operates the platform and publish contact information;

T&Cs should be published both in the language of the country of registration and in the language of the country of operation.

9. *Dispute resolution mechanisms*

Focus on platforms' provision of internal dispute resolution mechanisms; referral to the jurisdiction of national tribunals and alternative dispute resolution mechanisms.

BOX 9 – Model T&Cs

T&Cs should clarify whether there is an internal dispute resolution system provided by the platform, in the event of a conflict between a platform worker and a platform customer.

If an internal dispute resolution mechanism is in place, T&Cs should clarify the scope, the parties involved, the contact person, the features of the procedure, the means of communication, the means to ensure impartiality, the estimated waiting times, the possible outcomes of the mediation/conciliation, and the mechanism for appealing;

If the internal dispute resolution mechanism is algorithm-based, T&Cs shall grant the right to challenge automated decisions;

If an internal dispute resolution mechanism is not in place, T&Cs should clarify the competent tribunal or the alternative dispute resolution mechanisms available (e.g., in Germany, the Crowdsourcing Code of Conduct provides the opportunity to turn to the Ombudsman's Office).



DON'T GIG UP
NEVER!