

# REFSA BRIEF

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## Conceptualizing the Gig Economy in Malaysia



## EXECUTIVE SUMMARY

- The gig economy in Malaysia is currently treated as a separate silo of the economy with its **workers facing many social and economic adversaries and often being exploited by platform providers**. This can be shown with workers in the gig economy:
  - ☐ unable to earn a living wage due to the gig economy's ecosystem that was structured by platform providers.
  - ☐ not entitled to any social security benefits, such as the Employees Provident Fund (EPF), social security and insurance benefits such as the Employment Insurance System (EIS) and medical insurance provided by the Social Security Organization (SOCSO).
  - ☐ excluded from regulation protecting fundamental principles and rights at work.
  - ☐ unable to form labour unions and to collective bargaining.
  - ☐ not being identified and recognized by the government, resulting in lacking critical data on them, consequently in possible ineffective policymaking being implemented.
- At present, legal, government and public discourse on **the gig economy has been inconsistent particularly in the use of terminology**, which contribute to widespread confusion in the categorization of different platform types, as well as non-platform types.
  - ☐ *Legal discourse* - as things stand, the Employment Act 1955 considers workers in the gig economy as independent contractors and not employees. This means independent contractors are hired under the *Contract for Service* and are only told "what" to do, and not "how" to do a specific project or task, while employees are hired under the *Contract of Service* and are told "what" and "how" to do a specific project or task by his or her employer.
  - ☐ *Government & Public Discourse* - workers in the gig economy are often taken to include freelancers, own-account workers and self-employed. This is largely due to the fact that the government and media, in particular, use the terms 'gig workers' and 'freelancers/self-employed' interchangeably,

completely disregarding the clear differences between the two groups.

- With this in mind, there is **a need for the categorization of the gig economy into two task-oriented platforms**:
  - 'Cloud work' - is web-based and purely digital form of on-demand labour where tasks are tasks completed behind a computer anywhere.
  - 'Gig work' - is location-based and tasks are mediated to selected individuals and crowd through a platform or work-on-demand apps and the task is completed offline.
- Needless to say, gig economy workers are badly affected by the pandemic, thus, we recommend two short-term measures:
  - **Establish an Income Support Scheme (ISS)** for workers in the gig economy, with its database shared with SOCSO's Self-Employed Social Security Scheme (SESSS) to aid workers to stay financially afloat.
  - **Ramping up programs that facilitate workers in the gig economy to match with diverse platform providers** in line with their respective skills, as well as upskilling, to provide alternative gig-job options to workers that have been opted out due to the nature of their work.
- We also propose a long-term measure that **reclassifies gig economy workers as "independent employees"** instead of "independent contractors" and introduces a regulatory framework that governs the gig economy. This framework:
  - establishes a "*Contract of Agreement*" between workers in the gig economy and platform providers, which workers would consequently be recognized by the government.
  - establishes an automatic enrollment of social security programs such as SOCSO's Self Employed Social Security Scheme and EPF's i-Saraan for workers in the gig economy via a Platform-to-Government (P2G) data sharing system.
  - introduces a tax system via a Platform-to-Government (P2G) data sharing system.
  - requires platform providers to provide a notice of termination for workers and severance pay for constructive discharge.

- ☐ allows the government to take legal action against platform providers if there is evidence of exploitation or discrimination of workers.
- ☐ encourages market competition among platform providers by attracting workers with lucrative benefits, perks and procurement of various types of insurance.
- ☐ grants workers the right to form labour unions and collectively bargain against platform providers.

## INTRODUCTION

Over the past two months, the Malaysian government has introduced three fiscal stimulus packages, totaling RM 260 billion, in order to support the Malaysian economy in the midst of the COVID-19 crisis. While the stimulus packages aim to cushion the impact of the economic downturn on low-income households and small-medium enterprises (SMEs), it doesn't adequately address the self-employed and workers in the gig economy during this pandemic due to their lack of a social safety net. Even though the self-employed are not better-off, the purpose of this paper is to address specifically the challenges workers in the gig economy face as well as the policies recommended to ensure better social protections are put in place.

## DEFINING THE GIG ECONOMY

Gig economy is often termed as '*platform economy*', '*on-demand economy*', and '*sharing economy*' that refers to **"the demand and supply of short-term or task-based working activities that are matched through online labour platforms via mobile work on-demand via apps"**.<sup>1</sup> The wide range of activities that are executed through '*online platforms*' and '*work on-demand via apps*' can be categorized along two task-oriented platforms namely:

(i) '*Cloud work*' - is *web-based* and purely digital form of on-demand labour where tasks are tasks completed behind a computer anywhere. Cloud work can be subdivided into three types of web-based digital labour. The first type of web-based digital labour is freelance marketplaces, where tasks are given to specific individuals. If the task is not given to a specific individual but to an undefined group of people online, it is crowd work. There are two types of crowd work: microtasking crowd work and contest-based creative crowd work.

(ii) '*Gig work*' - is *location-based* and tasks are mediated to selected individuals and crowd through a platform or work-on-demand apps and the task is completed offline. These location-based services are further differentiated into different sectors such as, accommodation, transportation and delivery services, as well as household services and personal services.

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1 De Stefano, V. (2016).

Terms	Definitions
<i>Cloud work (web-based)</i>	
Freelance marketplaces (online outsourcing, outsourcing marketplaces)	Provide marketplaces/online platforms where businesses can find and hire (outsource) freelancers to do some work remotely
Microtasking crowd work	Platforms that assigns masses of tiny, repetitive tasks that are distributed across a large an unspecified group of crowd workers
Contest-based creative crowd work	Platforms that organise work in the form of contests and rewards the worker if he or she wins
<i>Gig work (location-based)</i>	
Accommodation	Provide marketplaces/online platforms for arranging and offering lodging, primarily homestays
Transportation & delivery services	Provide delivery and ride-hailing marketplaces/online platforms for clients
Household services & personal services	Provide marketplaces/online platforms for clients to hire gig workers for household or personal services

(Source: Schmidt (2017)<sup>2</sup>)

Table 1: Definitions of subcategories in Cloud work and Gig work

This categorization suggested by Schmidt (2017) proposed the simplest and most plausible way to differentiate the Gig economy, even with the many hybrid platforms and sub-categories. The order of the six platform types listed above roughly portray the historical succession in which they have emerged. Within the first of three categories, a substantial market consolidation has already happened since the early 21st century and quite a number of researches has already been done.<sup>3</sup> Meanwhile, the last three categories are more recent and not very well understood. More research is needed to acquire data on these relatively new platforms and to deduce the necessary measures to protect workers' rights from being further diminished.

<sup>2</sup> Interpreted from Schmidt, F. A. (2017).

<sup>3</sup> See Crocker, T. D. (2019), for the formation history of the Cloud.

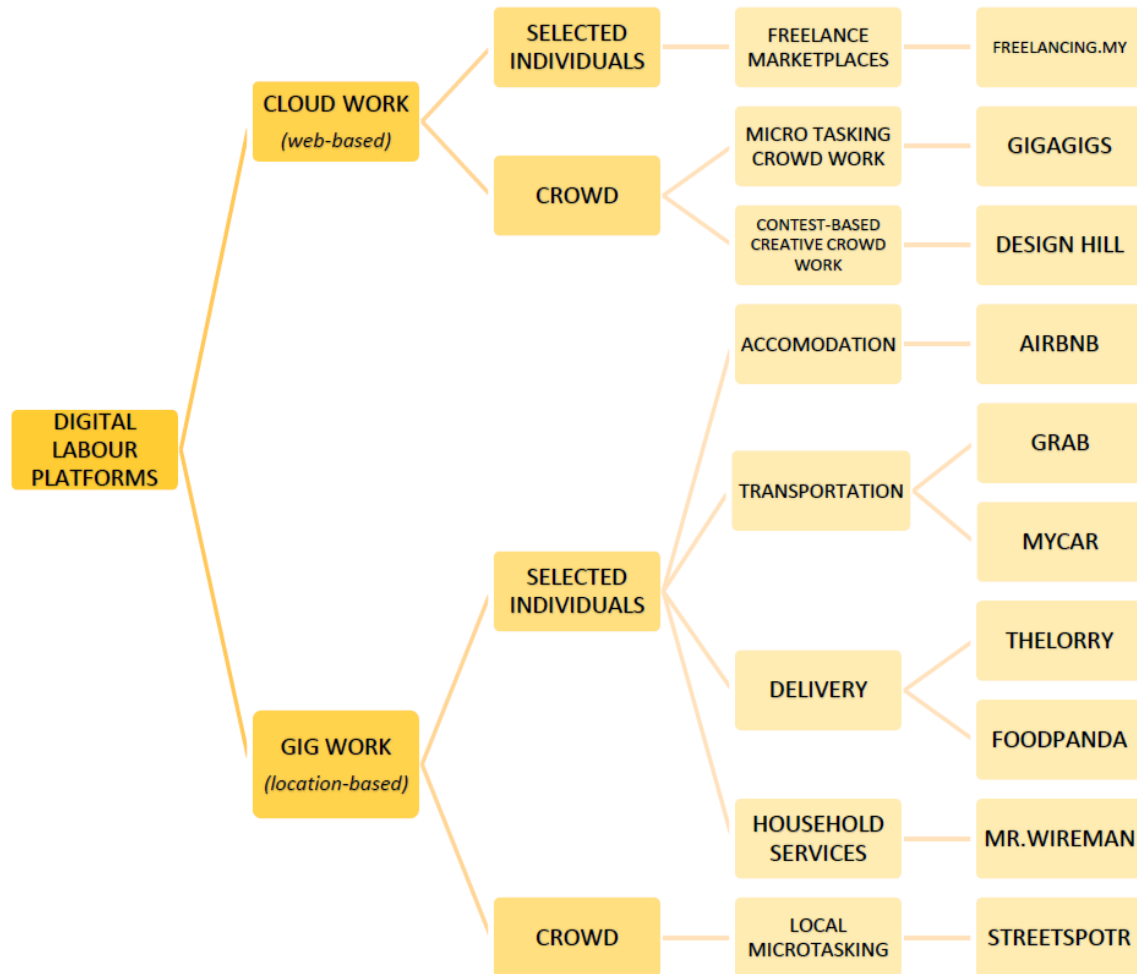
(Source: Schmidt (2017)<sup>45</sup>)

Figure 1: A Typology of the Gig Economy

As shown in Figure 1, the categorization of the gig economy can be distinguished with two questions: are the services and tasks coordinated via the platform bound to a specific location? And are these services and tasks bound to a specific person? If it can be done from everywhere and anywhere, it is cloud work. If it can be done by anyone and is given to an unspecified group it is crowd work. If the work has to be done at a specific location and is given to one selected individual, it is gig work. Local microtasking is the only form of gig work given to a crowd. Both aspects have extensive implications for how the platforms operate, the situation of the contractors, the legal framework that applies and potential regulatory measures.

4 Modeled from Schmidt, F. A. (2017), Figure 2: Categorization of digital labour markets in the platform economy 2/2

5 Examples of platforms are obtained from Malaysia Digital Economy Corporation (MDEC)'s eRezeki.

## PRESENT STATUS OF THE GIG ECONOMY IN MALAYSIA

Unfortunately, at present, legal, government and public discourse on the gig economy has been inconsistent particularly in the use of terminology, which contribute to widespread confusion in the categorization of different platform types, as well as non-platform types.

### Legal Discourse: Employees vs. Independent Contractors

As things stand, the Employment Act 1955 considers workers in the gig economy as independent contractors and not employees. An “independent contractor” is, in essence, an individual who is hired or appointed under a *Contract for Service* solely to work on a specific project or task for purposes of the principal’s trade or business.<sup>6</sup> On the other hand, according to the Act’s First Schedule, an “employee” is an individual who is engaged under a *Contract of Service* with an employer based on the amount of wages and on the type of occupation of the employee.<sup>7</sup> In other words, **independent contractors are hired under the *Contract for Service* and are only told “what” to do, and not “how” to do a specific project or task, while employees are hired under the *Contract of Service* and are told “what” and “how” to do a specific project or task by his or her employer.** This also essentially means that independent contractors are not protected under the Employment Act.

### Government & Public Discourse: Freelancers vs. Workers in the Gig Economy

“Workers in the gig economy” are often taken to include freelancers, own-account workers and self-employed. This is largely due to the fact that the government and media, in particular, use the terms ‘gig workers’<sup>8</sup> and ‘freelancers/self-employed’ interchangeably, completely disregarding the clear differences between the two groups. Media outlets, for example, refer to gig workers the same as the freelancers/self-employed or regard workers in the gig economy are only workers in gig work, neglecting workers in the cloud work. The Department of Statistics Malaysia, on the other hand, considers “own-account workers” as potential gig workers, and does not provide any data or information on the gig economy. Malaysians, in essence, are clueless on who is in the gig economy and who is not. Thus, it is important to clarify here that freelancers are “own-account workers”, and are considered as self-employed. **Freelancers have a primary income that comes from independent client-based work and do not actively make use of online intermediaries to find work, unlike workers in the gig**

6 Employment Act 1955, Pt.1, s.2

7 Employment (Amendment of First Schedule) Order 2012

8 Gig workers are workers that work in ‘gig work’ types of jobs

**economy, even though they may have an online self-marketing presence.** In other words, these estimated 1.5 to 4 million Malaysians are not assigned with jobs through an online platform.<sup>9</sup>

There are certainly steps taken to identify and safeguard the welfare of workers in the gig economy. Former Prime Minister Tun Dr Mahathir Mohamad remarked that the gig economy has been identified as a new source of economic growth and will be made part of the 12th Malaysia Plan during the Prime Minister's Question Time (PMQT) in the Dewan Rakyat on October 22, 2019. He stated that plans to regulate the gig economy to ensure that the welfare of workers is protected has been under review by his administration. Since then, a special committee, "*Jawatankuasa Khas Bagi Membincangkan Isu Pekerja Gig Ekonomi*" was set up, comprising the Ministry of Youth and Sports (KBS), the Ministry of Domestic Trade and Consumer Affairs (KPDNHEP), and led by the Ministry of Human Resource (MOHR).<sup>10</sup> The special committee met once last December. The initial work of the committee has already begun with engagement with Malaysia Digital Economy Corporation (MDEC) to inquire on the general ecosystem of the digital labour platforms and the work-on-demand apps available out there and being by Malaysians who partake on casual, short-term 'tasks' or 'gigs'. Additionally, the Ministry of Transport (MOT) plays a large role in regulating the gig economy, particularly in terms of the e-hailing and delivery services community. A 6 months trial period for ride-hailing services, which was approved by the government in November last year has already started on January 1, 2020, with a local motorcycle e-hailing service Dego Ride taking the first leap.<sup>11</sup> Followed by Grab with its GrabBike.

## THE RISE OF THE GIG ECONOMY

The rise of the gig economy over the past decade can be attributed to the confluence of two major trends. Firstly, **it is estimated that about 1.1 billion young jobseekers are expected to enter the labour market between 2012 and 2020**, many of them in South Asia and Sub-Saharan Africa.<sup>12</sup> Meanwhile, 2.64 million young Malaysians has entered the labour market between February 2012<sup>13</sup> and February 2020.<sup>14</sup> Under a tight market, unemployment and under-employment became a major social and economic concern for policymakers, employed population and job seekers. Secondly, **the increasing spread of**

9 An estimation is provided because figures from the Department of Statistics Malaysia (DOSM), Labour Force Survey, and the World Bank Group varies from 1.5 to 4 million Malaysians.

10 See Special committee on gig economy looking ways to prevent mistreatment of workers. (2019).

11 See Loheswar, R. (2020).

12 See Human Development Report 2015. (2015).

13 See Labour Force Statistics Malaysia. (2013).

14 See Key Statistics of Labour Force in Malaysia. (2020).

**digital connectivity.** 57% of the world's population are connected to the internet and 67% of the world's population is already using the mobile phone.<sup>15</sup> In response to the confluence of more jobs demand from places with large pool of new labour market entrants and where jobs are often limited or might not exist; and the high internet and mobile penetration of the world's populations, "online platforms" and "work-on-demand apps" are cropping up in various industries to enable a new wave of online outsourcing in these sectors and entails employment growth and poverty reduction.<sup>16</sup> Moreover, the flexibility and casualization of work has attracted many, especially younger jobseekers.

The World Bank estimates that the global gig economy is growing by about 33% annually in 2015,<sup>17</sup> while Malaysia's Employees Provident Fund (EPF) reported that the gig economy workforce in Malaysia had grown by 31% in 2017, surpassing the growth in the conventional workforce.<sup>18</sup> By 2019, 26% of the total 15.3 million Malaysian workforce form part of the growing gig economy as reported by the World Bank.<sup>19</sup> These statistics, however, are doubtful due to the vagueness in the classification and definition of the gig economy. On the bright side, Malaysia has some definite figures on gig workers and crowd workers. In terms of transportation and delivery services (gig work), there are currently about 90,000 drivers<sup>20</sup> (with Public Service Vehicle (PSV) license<sup>21</sup>) or about 200,000 drivers<sup>22</sup> (with and without PSV license) across 46 e-hailing companies.<sup>23</sup> While the market size of the Malaysian crowd economy is estimated to be valued at RM949 million in 2018. Moreover, there are nearly 158,000 trained digital workers under Malaysia's Digital Economy Corporation (MDEC)'s flagship platforms, eRezeki and the Global Online Workforce (GLOW) in the same year.<sup>24</sup> These statistics have clearly supported the argument that the gig economy is on a meteoric rise by its contribution to the economy. Hence, the gig economy should not be conceived as a separate silo in the Malaysian economy.

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15 See Global Digital Report 2019. (2020).

16 Kuek, S. C., Paradi-Guilford, C. M., Fayomi, T., Imaizumi, S. & Ipeiros, P. (2015).

17 *ibid.*

18 See Zainul, E. (2017). EPF calls for higher government contribution in retirement schemes.

19 See Schmitten, A. D., Tan, M. L., Abdur Rahman, A. A., Lnu, S. N. B. H., & Weimann Sandig, N. (2019).

20 See 91,978 e-hailing drivers have obtained PSV license: Loke. (2019).

21 PSV license is a type of vocational driving license in Malaysia that allows the holder to drive any type of vehicle used to transport paying passengers.

22 See Lai, A. & Hendawy, S. (2019).

23 See E-Perkhidmatan Pengusaha Kendaraan | Syarikat E-hailing. (2020).

24 See Sharing Economy Initiative in Malaysia. (2019).

## CHALLENGES OF WORKERS IN THE GIG ECONOMY IN MALAYSIA

The gig economy, needless to say, has its advantage for being flexible and being your own 'boss'. However, the gig economy has its pitfalls and perils, and face many social and economic adversaries. And this is largely due to the misclassification (or no classification) of the gig economy.

Workers in the gig economy are bound to be exploited by platform providers, as they are not considered as 'employees' under the Employment Act, subsequently they are not protected by it. To understand the matter, we have to understand the role of platform providers. The gig economy is often known as the platform economy because it comprises online platforms that require at least three parties: platform provider, independent contractors, and platform clients. The platform provider acts as an intermediary that coordinates the supply and demand sides of the other two parties, which ultimately allow the provider to shift most of the cost, risk and liabilities to the other two parties. **Platform providers, in essence, can grow exponentially without having to face production costs growing proportionally, and have full access to and control over the data, processes and rules of the platform.** As the platform economy is driven by venture capitals, it is increasingly prone to foster the advent of monopolies or at least oligarchies. Platform providers would essentially achieve economies of scales.

With that, the misclassification of the gig economy allows platform providers to structure an ecosystem where workers in the gig economy are unable to earn a living wage. Moreover, less scrupulous platform providers do not offer reasonable and fair wages. This leads to some gig workers working more than 10 hours a day just to earn a decent income to support their family. Besides that, if workers face any form of legal matters, the platform providers are not responsible for it either. Workers in the gig economy are also not entitled to any social security benefits. This includes access to retirement benefits, such as the Employees Provident Fund (EPF), social security and insurance benefits such as the Employment Insurance System (EIS) and medical insurance provided by the Social Security Organization (SOCSO). They are also not entitled to public holidays and maternity leave. The likelihood of being terminated without notice or a severance pay is very unsettling as well.

Workers in the gig economy are not only excluded from the Employment Act, but they might also find themselves excluded from regulation protecting fundamental principles and rights at work. As a consequence, workers may find themselves excluded or limited in their right to freedom of association and to collective bargaining, as

well as finding themselves in breach of regulation such as competition and antitrust law.<sup>25</sup> Moreover, they could be not included in the scope of regulation against child labour<sup>26</sup> and discrimination.<sup>27</sup> This renders the question of employment status all the more significant in terms of workers protection as not only issues concerning minimum wages and employment benefits but also access to fundamental labour and human rights are at stake.

Furthermore, as workers in the gig economy are not clearly defined, policymakers lack critical data about them. This means that the lack of data makes it hard to track how many workers are there, their demographics, or their household incomes. This lack of data can cause an inability to accurately assess the needs of the workers in the gig economy, which then creates the possibility of ineffective and wasteful policies being implemented. This poses a serious concern especially during this crisis, where financial assistance and social support are unable to be channeled correctly to the in-need sectors. A one-size-fits-all approach to provide assistance will be ineffective and may even lead to unintended consequences.

With all that being said, the benefits of workers in the gig economy, such as higher autonomy and flexibility, as well as the opportunity to work on multiple platforms, can be vastly outweighed by the costs. These include the possibilities of not getting a paycheck, facing legal challenges, paying hefty medical bills, and being exploited and oppressed by platform providers. Thus, **when new working models leave the sandbox stage and become so widespread that it affects the lives of millions of people, the government must put the interests of society before the business interest of individual entrepreneurs.** Regulation is necessary to protect social security, worker's rights and consumer rights also in the digital realm, especially during the ongoing pandemic.

## CURRENT POLICIES SUPPORTING THE GIG ECONOMY

Presently, two programs have been implemented by the government to provide some support to the gig economy. The first is SOCSO's Self-Employment Social Security Scheme (SESSS), under the Self-Employment Social Security Act 2017, a compulsory scheme for the self-employed that explicitly includes e-hailing drivers.<sup>28</sup> The

<sup>25</sup> See De Stefano, V. (2015).

<sup>26</sup> Minimum Age Convention, 1973 (No.138). (2019). International Labour Organization.

<sup>27</sup> Discrimination (Employment and Occupation) Convention, 1958 (No.111). (2017). International Labour Organization.

<sup>28</sup> In the beginning, this scheme is compulsory for the self-employed in the Passenger Transportation Sector which are taxi, e-hailing and bus drivers under the same Act, which took effect on 1 June 2017.

Scheme provides protection for self-employed insured persons against employment injuries including occupational diseases and accidents during work-related activities. The second is EPF's Voluntary Contribution with Retirement Incentive (i-Saraan), which allows the self-employed and those who do not earn a regular income to make voluntary contributions towards their retirement, and at the same time receive additional contribution from the government.

## **POLICIES RECOMMENDATION: WHICH WAY FORWARD?**

As the COVID-19 pandemic looms, the vulnerability of workers in the gig economy has been exposed further. For instance, the lack of social protection and the absence of a straightforward transmission mechanism for stimulus payments, as well as the big drop-in activity due to the Movement Control Order (MCO). With that, this section of the paper will provide short-and long-term policy recommendations aimed at safeguarding the welfare of gig workers.

### **Short-term policy recommendations**

1. *Establish an Income Support Scheme (ISS) for workers in the gig economy, with its database shared with SOCSO's Self-Employed Social Security Scheme (SESSS).*

In the PRIHATIN stimulus package announced by the Prime Minister Muhyiddin Yassin on 27 March 2020, full-time e-hailing drivers were entitled to a one-off cash handout amounting RM500. Although the cash handout was welcome, it is insufficient for e-hailing drivers who will not have an income for more than two months (should the Movement Control Order (MCO)<sup>29</sup> end on June 9). Even if we take into account PRIHATIN's Bantuan Prihatin National (BPN) cash handouts for low-income households, the maximum e-hailing drivers may only receive is up to RM2,900<sup>30</sup>, provided that his or her household income is below RM4,000, and if they are unmarried and earn under RM2,000. Even this higher figure of RM2,900 may be insufficient to support an entire household.

On 5th June, more than two months after the announcement of the PRIHATIN stimulus package, Prime Minister Muhyiddin Yassin announced a matching grant of up to RM50 million for platform providers which contribute towards SOCSO's Self-Employed Social

29 MCO - a measure implemented by the government to contain COVID-19, was imposed on March 18.

30 An e-hailing driver receives RM500, if his or her household income is below RM4,000 and is single, earning below RM2,000, they'll receive RM1,600 and RM800, totaling RM2,900

Security Scheme and EPF's i-Saraan under the Pelan Jana Semula Ekonomi Negara (PENJANA) Short-Term Economic Recovery Plan.<sup>31</sup> This is a positive and recommended policy approach, however, it is still unsustainable for workers to weather this crisis.

It is proposed that a temporary Income Support Scheme (ISS) be enacted for workers in the gig economy, with its database shared with SOCSO's Self-Employed Social Security Scheme (SESSS). This means that workers in the gig economy (and the self-employed) who have registered under SESSS will automatically receive financial assistance from the ISS, while those who have not can apply independently through the ISS. The ISS will serve a similar purpose as cash handouts, which will help workers in the gig economy and the self-employed to stay afloat throughout this economic downturn. However, instead of a one-off cash handout, a monthly grant should be offered until the pandemic has subsided. This will be a more sustainable option for them compared to the former. Also, by sharing ISS's database with SESSS, it helps to facilitate the registration process for recipients who already have signed up for SESSS. This speeds up the process of injecting money into the economy.

2. *Ramping up programs that facilitate workers in the gig economy to match with diverse platform providers in line with their respective skills, as well as upskilling, to provide alternative gig-job options.*

MCO has driven many full-time e-hailing drivers out of jobs. In response, many platform providers now encourage their e-hailing drivers to become delivery drivers.<sup>32</sup> This trend may continue until a COVID-19 vaccine is deployed *en masse*, as we prepare for a "new normal" after the MCO is lifted. Social distancing will be a priority, which means e-hailing drivers may be apprehensive about picking up passengers. In a worse-case scenario this might drive them out of the e-hailing industry entirely. Passengers too might face similar apprehension. Such supply and demand shocks within the industry may last for some time.

It is consequently proposed that programs are launched which are able to facilitate workers in the gig economy to match with diverse platforms providers in line with their respective skills, as well as upskilling, to provide alternative gig-jobs options. These programs should be designed to keep workers in the gig economy, especially e-hailing drivers, to continue to have a job and an income throughout this crisis. For instance, programs

31 Pelan Jana Semula Ekonomi Negara (PENJANA) Short-Term Economic Recovery Plan (2020).

32 See Grab driver shares what it's like for e-hailing drivers during the MCO in Malaysia. (2020).

such as MDEC's eRezeki and Go-eCommerce should be promoted aggressively and be implemented effectively, with higher levels of funding. The eRezeki program allows gig workers to match with gig-platforms in line with their respective skills. This program has three categories, digital micro task, digital works, and digitally-enable task, which are able to provide an alternative for gig workers that will be badly affected by MCO and the pandemic itself. The Go-eCommerce program is an online entrepreneurial platform with the tools to help gig workers to build their very own businesses. This program provides an opportunity for gig workers to upskill themselves and even build their own businesses.

These types of programs are important to provide support for badly affected workers in the gig economy by temporarily providing an alternative for them, while also helping enhance and diversify their skill sets. The recent announcement under the PENJANA stimulus package undertook a similar approach by allocating MDEC RM25 million for the Global Online Workforce (GLOW) program which aims to upskill Malaysian to earn income from serving international clients while working online from home.<sup>33</sup>

## Long-term policy recommendations

### 1. *Establish a new category of workers: "independent employees"*

As the gig economy continues to grow exponentially, defying traditional means of employment as well as revolutionizing the concept of freelancing and self-employment, it is evident that a solution is required to safeguard the long-term welfare of gig workers. However, the legal concepts of *Employees vs. Independent contractors* persistently pose a conundrum to the gig economy, as the option is presented as binary. The lack of a clear definition of who and what gig workers are creates additional confusion and unintended consequences as highlighted above.

#### 1.1. *Reclassification of gig economy workers*

In response to the widespread confusion and the lack of a social safety net for workers in the gig economy about how they should be classified, it is proposed that a new category of workers be created: "independent employee". This third category will be **a hybrid of an "employee" and an "independent contractor"**, specifically catered to workers in the gig economy. In other words, this model focuses solely on the amount of control exercised over a worker, defining

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33      *ibid.*

independent employment as an intermediate category of work for those who are not as autonomous as independent contractors but who are also not subject to the same degree of instruction and supervision as traditional employees.<sup>34</sup> This proposed legal entity would be entitled to many of the same protections granted to traditional employees, but who trade a degree of economic assurance for greater flexibility in setting the terms and conditions of their work.

### *1.2. Arguments against classifying workers in the gig economy as employees or dependent contractors*

Firstly, arguments made for workers in the gig economy to be considered as employees, may risk cannibalizing the business model of many platform providers by drastically increasing their cost structure, likely leading to a decrease in consumer welfare as those costs are passed on to platform clients. Far more importantly, it would likely be a pyrrhic victory for workers because it would also endanger the very flexibility that has drawn many of them to the gig economy in the first place, as their putative “employers” would have every incentive to exert the maximum level of control for which they would be paying. In other words, if a company is “made to give its workers all the benefits, protections, and entitlements of employment, then that company will expect the worker to behave like an employee. While this trade-off may sound ideal, testimonials from Malaysians have showed otherwise<sup>35</sup>. Malaysians stated that they prefer to control their own schedule.

In addition, suggestions for a hybrid classification between employees and independent contractors, known as “dependent contractors”. This name is inapt because there is good reason to believe that the majority of workers in the gig economy are not dependent on the platforms for which they work. This suggestion essentially fails to account for the most important and valued characteristics of gig economy work: the flexibility and autonomy that such work provides.

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34 Nadler, M. L. (2018)

35 See Lee, C. H. (2019), for examples.

### 1.3. Proposal of regulatory framework governing the gig economy

#### 1.3.1. Establishing a “Contract of Agreement” between a worker in the gig economy and the platform provider



A Contract of Agreement is a legally binding agreement which establishes the relationship between an independent employee and a platform provider. This contract stipulates a degree of flexibility and autonomy for independent employees, as independent employees are not obliged to work for a set amount of hours and can take leave the hours they want. Additionally, this contract entitles independent employees to some statutory rights, but are much lesser as compared to an employee’s contract of service. This also means the independent employee under this contract is not exclusive to only one company.

This new contract and classification indefinitely require a “right to control” employment test for platform providers to use in the determination of if a worker is considered as an independent employee. While it is difficult to propose an actual test for it due to the lack of data on the gig economy and its workers, there are certainly few criteria and considerations needed to fulfill. Firstly, proving that the independent employee is hired for short-term or task-based working activities that are matched through online labour platforms via mobile work on-demand via apps. Secondly, it must encompass both gig work and crowd work. Thirdly, provide service for platform providers and not only to platform clients. This is obvious that a complex multi factor test is required to determine an independent employee. However, if it is well designed, it would empower workers in the gig economy, as well as ensuring that platform providers are not overly burdened by this contract.

The Ministry of Human Resource (MOHR) oversees this framework and has jurisdiction over the contracts between platform providers and independent employees. Furthermore, a Platform-to-Government (P2G) data sharing<sup>36</sup> ecosystem must be established

<sup>36</sup> Modeled from European Union’s Business-to-Government (B2G) data sharing. A collaboration in which a company or other private organization makes available its data to the public sector for a public interest purpose.

to ensure this framework holds in place. P2G data sharing is a mandatory collaboration between platform providers and the Ministry to allow automatic enrollment of social security programs for independent employees, taxing the gig economy, as well as providing insights on economic development and statistical data on the gig economy. With a national centralized database, P2G data sharing allows the government to access these data and provide necessary financial assistance when needed, particularly during a crisis. While there will certainly be concerns on the privacy and confidentiality over these data being shared across multiple institutions, it is thus utmost important to ensure these data are consented and encrypted.

### 1.3.2. Automatic enrollment of social security programs for workers in the gig economy



An independent employee would be automatically enrolled into SOCSO's Self Employed Social Security Scheme and EPF's i-Saraan once he or she has a Contract of Agreement with a platform provider, with the aid of the Platform-to-Government (P2G) data sharing. P2G data sharing is essential here, because independent employees may work multiple platform. Thus, each platform provider is required to provide the data on the amount of income each independent employee earned via P2G data sharing, and the database will work out the insurance deductions and retirement contributions. Independent employees that earn below the national minimum wage can opt out of the deductions and contributions as they are assumed to be working in the gig economy as a side job. Platform providers are undoubtedly required to provide minimal retirement contribution for independent employees. Insurance deductions, on the other hand, will be mostly designed for occupational disease and injury, and platform providers are not required to contribute.<sup>37</sup> Further benefits on insurance will be explained below.

This mechanism is justifiable, as a survey conducted

<sup>37</sup> The current SOCSO's Self Employed Social Security Scheme only requires only workers to voluntarily contribute.

by The Centre has shown that 64% of workers in the gig economy are willing to have under RM200 a month aside for social security benefits. In addition, the survey has also shown that workers are more willing to contribute for employment injury insurance as well as retirement savings. Hence, an automatic enrollment is necessary to cover all independent employees and provide a more robust social safety net.

#### 1.3.3. Taxing the gig economy



As the gig economy continues to grow exponentially, the government would inevitably lose a substantial amount of revenue due to the reduction of taxable communities. Similar to the mechanism used for automatic enrollment for social security programs as mentioned above, independent employees can be taxed via P2G data sharing. The gross income of an independent employee across platform providers can be measured and taxed. Subsequently, generating more revenue for the government and creating a level playing field in terms of taxation. However, it is important to ensure that the tax rate is logical and not overly burdening independent employees.

#### 1.3.4. Termination of agreement and exploitation of workers



Under this new regulatory framework, platform providers have to provide a notice of termination of independent employees, particularly when it comes to layoffs and downsizing. This may require platform providers to compensate a severance pay to independent employees and a notice of termination for a week. While independent employees can be fired due to unsatisfactory work performance, poor behavior towards platform clients, or unethical conduct that violates the platform's policies, it is fair to at least give a reason for why the independent employee is being terminated. However, an independent employee cannot be fired when he or she reports an incident or a person to the Ministry of Human Resource or whistle blows to industry regulators.

This framework is also designed to prevent exploitation or at the very least reduce exploitation of independent employees. Here, platform providers' business model has to not only care for the creation of an efficient or well-functioning market that can increase the platform's share but also empower independent employees. As mentioned above, the Ministry of Human Resource have jurisdiction over this framework, which means legal actions will be taken against platform providers if there is evidence of exploitation or discrimination of independent employees. With a regulatory body in charge, platform providers must provide a decent working condition and profitable labour, as well as preventing child labour. In addition, platform providers cannot discriminate against independent employees based on various personal traits, such as their sex, race, color, national origin, religion, age or disabilities. This ultimately decentralizes platform providers and brings more balance to the power asymmetry of the gig economy.

#### 1.3.5. Market competition



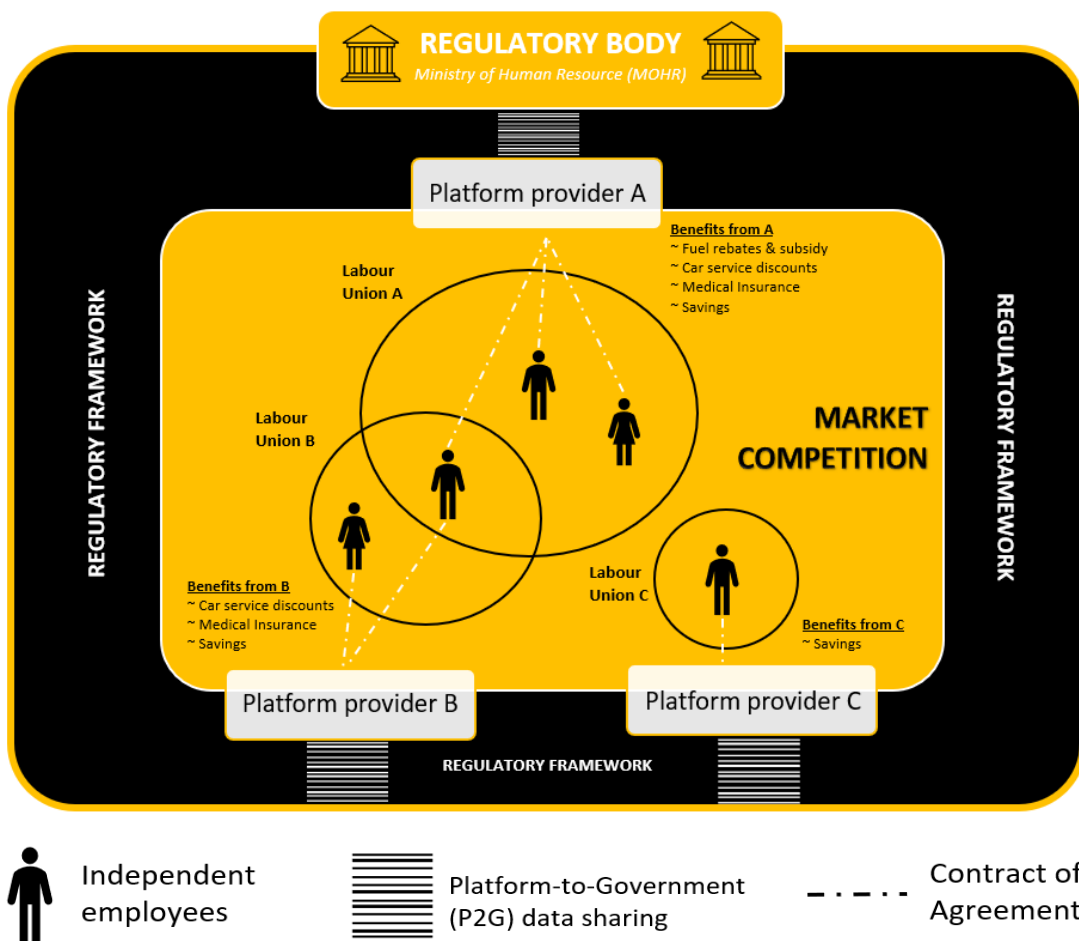
As the regulatory framework has set a benchmark on legal protections and social security measures, platform providers are encouraged and incentivized to compete with one another for independent employees.

This can be done by attracting independent employees with lucrative benefits and perks, such as rebates, subsidy, financial and tax services or procurements of various types of insurance. Hence, rather than statutorily enumerate a specific list of benefits to be provided, the decision will be left up to the platform providers and their workers based upon their particular industries and business models. Variety among the benefits made available could become an important way for platform providers to differentiate themselves from one another as they compete for independent employees. For instance, platform providers in the transportation sector might find that helping independent employees procure better terms of automobile insurance is a boon to their recruitment efforts.

## 1.3.6. The right to form labour unions



With a strong market competition and minimal regulatory measures compared to employees, it is crucial to allow independent employees to unionize and collectively bargain against platform providers. The reason for this is that labour unions have proven to secure lasting and enforceable workplace gains. Thus, labour unions can address worker misclassification claims, demand better working conditions or benefits, and even push for legal and regulatory reform. Labour unions will be the key in forming a check and balance in this new framework.



(author)

Figure 2: An illustration of the proposed regulatory framework for “independent employees” in the transportation and delivery service sector.

### 1.3.7. Current limitations on enforcing this new regulatory framework

Admittedly, this framework has its limitations. Firstly, to enable a Platform-to-Government (P2G) data sharing, the government has to severely upgrade its database server and digital connectivity to cope with the volume and speed of data traffic from platform providers to the government's server. Secondly, there is a general lack of bargaining power conferred to labour unions. This is largely due to frequent union-busting and legislation that does not enshrine the right to unionize, consequently weakening the power of labour unions in Malaysia. With that said, the government must address these issues in order to enact a framework that caters to a digitally reliant labour force.

## CONCLUDING THOUGHTS

It is evident that the government has to do more to address the challenges gig workers face, during this pandemic and beyond. With gig work not clearly defined, policymakers lack critical data about them, and this complicates efforts to provide them with financial assistance and social support. Moreover, they lack any social or legal protection, like the Employees Provident Fund (EPF), Employment Insurance System (EIS), other insurance provided by the Social Security Organization (SOCSO), and legal protection.

This renders gig workers some of the most vulnerable in the labour market. The government should do whatever it can to help them. This paper proposes several policy recommendations that may alleviate the burdens faced by gig workers. The first recommendation is to establish an Income Support Scheme (ISS) for gig workers, with its database shared with SOCSO's Self-Employed Social Security Scheme (SESSS), providing a claimable grant once a month until the pandemic has subsided. The second policy involves the ramping up of programs which facilitate gig workers to match with diverse gig-platforms in line with their respective skills, as well as upskilling, to provide alternative gig-job options. Finally, it is proposed that a new category of worker, known as a "independent employee", is established, along with a regulatory framework to govern the gig economy.

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