Italian Labour Law e-Journal
Issue 1, Vol. 15 (2022)
ISSN 1561-8048
https://doi.org/10.6092/issn.1561-8048/15210

The legal status of platform workers: regulatory approaches and prospects of a European solution

Christina Hießl*

Abstract

The categorisation of platform workers as employees, self-employed or a tertium genus is arguably the single most decisive element determining their legal position across countries. The contribution provides an insight into the status quo in European jurisdictions, based on a comprehensive review of national case law on the classification of various types of platform workers. On this basis, it offers some considerations on the viability of an approach as proposed by the European Commission (which focuses on a legal presumption of employee status) as well as the more general question of realistic legislative strategies to ensure platform workers the protection they need.

Keyword: Labour law; Employee/worker status; Platform work; Gig economy; Comparative law; EU law; Case law analysis; Social policies.

1. Introduction.

By putting forward its proposal on improving working conditions in platform work (hereinafter: the Proposed Directive),[1] the European Commission has, for the first time, undertaken to push for the harmonisation of (one aspect of) one of the most fundamental pillars of national labour law: the delimitation of employee status. It thereby attempts to address the legal conundrum resulting from a situation in which the rise of the gig economy "produces" increasing numbers of workers facing important vulnerabilities, while their work patterns are difficult to square with traditional national concepts of employee status. Whether

* Goethe University of Frankfurt & Yonsei University of Seoul (as of 1 October 2022: Leuven University). This essay has been submitted to a double blind peer review. This publication has received financial support from the European Union Programme for Employment and Social Innovation "EaSI" (2014-2020). More information on the European Union is available on the Internet (http://www.europa.eu).

[1] Proposal for a Directive of the European Parliament and the Council on improving working conditions in platform work, COM(2021) 762 final. The European Parliament has recently approved the proposal with several requests for amendment, while the Council's position has not been published yet.

or not the approach of introducing a legal presumption, as envisaged in Articles 4 et seq. of the Proposed Directive, is a panacea – or even capable of triggering any significant improvement – is subject to debate. To inform this discussion, it seems crucial to take a step back and examine the current approach of European legal systems to the phenomenon of platform work and the consequences of altering the status assigned to platform workers in this context.

In what follows, the present contribution will present insights, based notably on the author's in-depth analysis of case law on the status of platform workers in Europe, regarding the legal status quo of the classification of platform workers (section 2), the identification of the employer (section 3) and the role of legal presumptions (section 4). Section 5 gives an overview of the already observable and anticipated future results of applying those legal standards to platform types and models as they currently exist on the European market, followed by a discussion of the past and expected future consequences of a changed qualification of platform workers. Section 7 concludes by offering some considerations on the viability of regulatory approaches to determine the status – and resulting rights – of platform workers with a view to the particularity of various platform models and the resulting vulnerabilities of individuals offering their labour in this context.

2. Employee, self-employed, or…?

Comparing concepts of worker or employee status has always been among the most complex and fascinating tasks of comparative labour law research. Despite the invaluable contribution of comparative compilations,[2] the multifaceted, fluid nature of these concepts across jurisdictions makes it difficult to grasp meaningful differences in a structural manner. If anything, the evolving case law assessing the status of platform workers (see infra in section 5) has reinforced dynamic approaches to the notion of employee in various countries, putting previous findings on the comparative restrictiveness of certain concepts into question.

To this date, those concepts remain partly or wholly unwritten in a number of European countries;[3] in others, the criteria stipulated in statutory law are so vague that they appear almost meaningless without in-depth knowledge of their application by courts and administrative bodies.[4] Where statutory definitions have been amended or added in recent years, this has often amounted to a codification of pre-existing case law rather than a conscious steering or adjustment by the legislator.[5] This is effectively also true for the famed

[2] First and foremost, the comprehensive overview provided in Waas B., Heerma van Voss G. (eds.), *Restatement of Labour Law in Europe: The Concept of Employee*, Volume I, Oxford, Hart Publishing, 2017.
[3] E.g. in Austria, France, Ireland, Luxembourg or Sweden – *see* Hießl C., *Case Law on the Classification of Platform Workers: Cross-European Comparative Analysis and Tentative Conclusions*, 2021, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3839603 (subsections 1.1.1, 1.5.1, 1.7.1, 1.9.1, 1.13.1), edited version published in *Comparative Labour Law & Policy Journal* 42:2 (2022).
[4] Therefore, also major innovations are regularly exclusively case law-based. Cf. the example of the Dutch Supreme Court abandoning the doctrine of the relevance of the will of the parties (Hoge Raad, 6 november 2020, ECLI:NL:HR:2020:1746 (X/Gemeente Amsterdam).
[5] As in Germany – *see* the revised wording of Section 611a of the Civil Code, in force since 2017.

Californian ABC test (see infra at 4.1), which was developed by the California Supreme Court.[6] Particularly in relation to this test, which has often been discussed in the comparative literature as a possible avenue for a profound reconsideration of existing approaches, some observers have expressly called for the legislature to play a more active role in delineating the inclusiveness of the notion of employee.[7]

And while the concept of worker/employee for the purpose of the application of EU law has arguably been streamlined by the jurisprudence of the CJEU,[8] effectively resulting in the application of a largely uniform notion across different directives, the Proposed Directive would be the first to interfere with the scope of the concept under national law.

2.1. Relevant areas of law.

The determination of a worker's status is of key relevance not only to determine the applicability of labour law. While the major share of litigation which led to a decision on a platform worker's status so far[9] have concerned labour law disputes between the parties of a contract,[10] a significant number have concerned rights and duties in the area of social security,[11] health and safety[12] or collective labour relations,[13] and more rarely tax[14] or competition law[15] other administrative regulations[16] or even criminal law.[17] Effectively, a majority or even all of the platform work-related cases decided so far have not been brought by the individual workers concerned (but rather institutional actors, trade unions or

[6] Dynamex v. Superior Court of Los Angeles, California Supreme Court, 4 Cal. 5th 903 (2018).
[7] *See* Davidov G., Alon-Shenker P., *The ABC Test: A New Model for Employment Status Determination?,* forthcoming in *Industrial Law Journal*, Volume 51, Issue 2, June 2022.
[8] Cf. the various decisions in which the Court has effectively recurred to its *Lawrie Blum* concept despite a clear reference to national law in the applicable Directive (e.g. Case C-393/10 *O'Brien* [2012] ECLI:EU:C:2012:110; Case C-212/04 *Adeneler* [2012] ECLI:EU:C:2006:443).
[9] *See* infra at 5.1 for references to the research on which these findings are based.
[10] Notably in France, Germany, the Netherlands, Spain, and the UK.
[11] Particularly in Belgium and Spain. Most recently Tribunal du travail francophone de Bruxelles, Dec. 8, 2021, JT 08 December 2021 (*Deliveroo*); Juzgado de lo Social de Córdoba, Sección 3, 19 May 2022, Nº 662/2020, SJSO 693/2022 - ECLI:ES:JSO:2022:693 (*Glovo*).
[12] E.g. in Italy, Luxembourg, Norway, Spain and Sweden. Most recently ~~Trib.~~ Trib. Torino, sez. lav., 18 novembre 2021, n. 4991/2020 R.G.L. (*UberEats*); Förvaltningsrätten i Malmö, 2022, n. 13356-20 (*Tiptapp*).
[13] E.g. in the Netherlands and the UK. Most recently The Independent Workers Union of Great Britain v. The Central Arbitration Committee [2021] EWCA Civ 952 (*Deliveroo*); Rechtbank Amsterdam, 13 September 2021 (Federatie Nederlandse Vakbeweging/ Uber B.V.) ECLI:NL:RBAMS:2021:5029.
[14] In Denmark and Ireland. Most recently recently Bindende svar fra Skatterådet, 25 januar 2022, https://www.hk.dk/-/media/images/om-hk/sektorer/privat/hkprivat/pdf/2022/wolt_skatteraadets_afgoerelse.pdf?la=da&hash=23CA29F1E4E7CE3AA1584DAC3DA569E3 (*Wolt*); Karshan (Midlands) Trading as Dominos Pizza v. Revenue Commissioners [2022] IECA 124.
[15] In Denmark and France. Most recently Konkurrencerådet, 26 August 2020, Konkurrencerådsafgørelse (*Hilfr, Happy Helpers*).
[16] As in Belgium, Luxembourg or Switzerland. Most recently Tribunal d'arrondissement de Luxembourg, 4 may 2021, 955/2021 (*Wedely*); Tribunal federal, Arrêt du 30 mai 2022, 2C_575/2020 (*UberEats*).
[17] As in France and Italy. Most recently Cass. crim., 22 june 2021, *Bull. civ.*, ECLI:FR:CCASS:2021:CR00778 (*Cliq and Walk*); Trib. Torino, sez. lav., 18 novembre 2021, n. 4991/2020 R.G.L. (*UberEats*).

competitors) in countries such as Austria, Denmark, Ireland, Luxembourg, Norway, Sweden and Switzerland.

The categorisation of workers in all these areas of law tends to be largely similar, but not necessarily identical – so that e.g. a finding that an individual is to be treated as an employee for tax, social security or competition law purposes does not automatically imply entitlements under labour law. Effectively, differences exist even within the field of labour law – so that e.g. a decision regarding health and safety protection does not necessarily predict the existence and allocation of employers' duties in the areas of minimum wage or working time law.[18]

2.2. Third or intermediate categories.

A further issue which significantly complicates the determination of a worker's status is the existence of classifications located between the poles of the "regular" dependent employee and the fully independent self-employed service provider. Partly, it is a matter for doctrine to decide whether a group which may be entitled to treatment as employees in some but not all areas of the law – as described in the previous subsection – is identified as a tertium genus. For instance, the Italian Cassation Court has rejected such identification for "hetero-organised work", despite confirming the far-reaching consequences of the applicability of the legal provisions at issue.[19] Also French self-employed platform workers, whom the law entitles to a number of specific rights,[20] are not usually identified as a "third category".[21]

In a broad sense, almost all European jurisdictions know groups of employees with reduced rights [22] or, more commonly, subgroups of the self-employed with certain (additional) social rights. The latter frequently concern social security[23] and/or collective bargaining entitlements,[24] but the concrete scope of rights is highly country-specific. Thus,

[18] As stressed e.g. in the Swedish and Norwegian decision, all of which concerned exclusively health and safety obligations. Most recently Förvaltningsrätten i Malmö, 2021, n. 13356-20 (*TaskRunner*) and 2022, n. 13356-20 (*Tiptapp*).

[19] Cass., sez. lav., 24 January 2020, n. 1663, *Riv. It. Dir. Lav.* 2020, 1, 76 (It.).

[20] *See* Articles L. 7341-1 and Art. L. 7342-1 of the French Labour Code.

[21] *See* Daugareilh I. et al., *The platform economy and social law: Key issues in comparative perspective*, ETUI, 2019, https://www.etui.org/Publications2/Working-Papers/The-platform-economy-and-social-law-Key-issues-in-comparative-perspective.

[22] Such as those excluded from social security coverage – e.g. "mini-jobbers" in Austria and Germany (see e.g. Section 8 (1) of the Fourth Book of the Social Code), or the groups identified by the Belgian Loi-programme du 1 juillet 2016. The latter specifically targets those working via electronic platforms as a side occupation, up to an annual income threshold. A much more far-reaching exclusion of platform workers has been overruled by the Belgian Constitutional Court (Cour constitutionnelle, arrêt n° 53/2020 du 23 avril 2020).

[23] E.g. Austrian employee-like persons (Section 4 (4) of the General Social Insurance Act), French self-employed platform workers (Articles L. 7341-1 and Art. L. 7342-1 of the Labour Code), Italian hetero-organised workers (Article 2 of Legislative Decree no. 81/2015) and coordinated collaborators (Article 409 (3) Code of Civil Procedure), or Swedish dependent contractors

[24] E.g. French self-employed platform workers, German employee-like persons (Section 12a (1) of Act on Collective Agreements), Spanish economically dependent autonomous workers (Article 11.1 of the Statute of

for instance, when comparing what well-known cases of reclassifications of platform workers confirmed by last-instance courts have meant for the workers at issue, it appears that those have paved the way for minimum wage protection both in Spain and in the UK. However, while drivers in the UK have been reclassified from a status without dismissal protection to another one with no dismissal protection either,[25] riders in Spain were moved from a status with limited protection to one with full dismissal protection,[26] resulting in their reinstatement in various cases.[27]

3. Employed by whom?

Beyond the question whether a worker performs work in subordination, a crucial determinant concerns the allocation of the role of the employer.[28] In relation to platform workers, uncertainties in this respect may arise in three constellations.[29]

A minor issue in this regard are platform companies' sometimes complex corporate structures. Particularly in case of Uber, the situation is complicated by the involvement of both the Dutch parent company and its national subsidiaries in its relation with drivers and customers. Consequently, the entity identified as employer was the parent company in France, but Uber London in the UK,[30] and the Swiss social security administration changed its target from Uber's national subsidiary to the Dutch parent company after its original decision was invalidated by the Social Court.[31]

More crucial is the allocation of employer status between a platform company and local subcontractors, which may organise its workforce. The impressive number of French cases brought against the estate of companies in liquidation[32] illustrates notably ride-hailing platforms' tendency to use highly unsustainable companies as intermediaries; in Italy, an UberEats subcontractor's exploitative practices triggered criminal investigations. In that case, a recent court ruling[33] eventually found an employment relationship to exist directly between the riders and the platform – just as the Spanish labour inspectorate found in its most recent decisions on Cabify and Uber, which disregard the existence of a formal employment

the Self-Employed), Polish persons performing gainful work (Article 239 (2) of the Labour Code), Swedish dependent contractors, and (limb (b) workers in the UK (Section 230(3)(b) Employment Rights Act).

[25] *See* the Supreme Court's ruling in Uber BV & Ors v Aslam & Ors [2021] WLR(D) 108, [2021] ICR 657, [2021] UKSC 5.

[26] *See* the Supreme Court's judgment in S.T.S., Sept. 23, 2020 (n. 4746/2019) (Glovo).

[27] *See* also subsection 2.3 of Hießl, C., *The Classification of Platform Workers in Case Law: A Cross-European Comparative Analysis*, december 2021, forthcoming in *Comparative Labor Law & Policy Journal,* Volume 42.2, 2022 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3982738.

[28] Cf. Risak M., *Fair Working Conditions for Platform Workers: Possible Regulatory Approaches at the EU Level,* Friedrich-Ebert-Stiftung, 2017, 14.

[29] *See* also subsection 2.5 of Hießl, nt. (27).

[30] *See* e.g. Cass. soc., 4 March 2020, *Bull. civ.*, ECLI:FR:CCASS:2020:SO0037 (*Uber*); Uber BV & Ors v Aslam & Ors [2021] WLR(D) 108, [2021] ICR 657, [2021] UKSC 5.

[31] Cf. Sozialversicherungsgericht Zürich June 10, 2018, UV.2017.00030 (*Uber*); and SUVA of July 5, 2019 (*Uber*).

[32] E.g. CA Paris, Pôle 6 - chambre 11, 1er juin 2021, n° 18/11917 (*Uber*); CA Dijon, Chambre sociale, 6 janvier 2022, n° 20/00002 (*Uber*).

[33] Trib. Torino, sez. lav., 18 November 2021, n. 4991/2020 R.G.L. (*UberEats*).

contract with the platforms' subcontractors.[34] The Spanish example illustrates that such cases of a requalification of the *employer* may not only give employees access to a more solvent creditor for their outstanding entitlements, but also lead to the application of a more favourable collective agreement.

Finally, and perhaps most importantly, in case of platform services which are not standardised to a significant degree, employer-like functions such as the determination of the service and its remuneration, provision of tools and exercise of control may be located with the customer rather than the platform. Needless to say, various protections under labour law are of very limited effectiveness where the worker is not considered to be in a continuous employment relationship with the platform, but rather to be concluding a series of very short fixed-term contracts with different customers, who will often be private households (and thus typically also outside the ambit of collective labour relations). Such contractual arrangement is sometimes chosen notably by platforms offering cleaning services, and has been confirmed in a part of the (scarce) case law on this platform type (see infra at 5.2).

It therefore seems significant that the so far only second-instance court decision on cleaning platforms[35] has become one of the first[36] to identify cleaners as temporary agency workers – who thus benefit from an ongoing employment relationship with the platform, but also concrete protections vis-à-vis the customer. Other forms of shared responsibilities between the platform and customer have been contemplated only exceptionally,[37] whereas unlawful subcontracting arrangements (see supra in this subsection) have regularly led to a condemnation of both the platform and the subcontractors. Reference may also be had again to the Norwegian and Swedish case law maintaining that the allocation of health and safety obligations with the customer in the cases at issue did not preclude diverging findings regarding other employer functions (see supra at 2.2).

[34] Inspección de trabajo, 2020/2021, https://govern.cat/salapremsa/notes-premsa/401344/inspeccio-treball-catalunya-sanciona-cabify-dues-empreses-subcontractistes-ett-cessio-illegal-persones-treballadores (*Cabify, Uber*).

[35] Gerechtshof Amsterdam, 21 september 2021, ECLI:NL:GHAMS:2021:2741 (Federatie Nederlandse Vakbeweging/Helping Netherlands B.V.).

[36] The only other ones were a non-published opinion by the Dutch Labour Inspectorate on the platform Temper in February 2021 and a Swiss second-instance ruling on UberEats, which has been overruled in this respect by the Federal Court very recently (see Tribunal federal, Arrêt du 30 mai 2022, 2C_575/2020).

[37] Effectively in one Belgian administrative decision, which has recently been overruled by the Labour Court. Cf. Ghislain S., Verwilghen M., *Le statut social des travailleurs de l'économie de plateforme: état des lieux dans un contexte mouvant* (Première partie), 2020 J. des tribunaux du travail [J. Work Trib.] 533, and Tribunal du travail francophone de Bruxelles, Dec. 8, 2021, JT 08 December 2021 (*Deliveroo*).

4. The role of legal presumptions.

4.1. Generally applicable presumptions.

Inspired by the internationally most well-known ABC test under Californian law,[38] there has been a vivid interest in the potential of legal presumptions for achieving a categorisation of platform workers as employees.

In Europe, a minority of countries (Croatia, Estonia, Greece, Malta, the Netherlands, Portugal, Slovenia, Spain) stipulate a general rebuttable presumption of employee status where certain criteria are fulfilled.[39] Occupation-specific presumptions for activities which could also be performed in a platform work setting exist in France (e.g. for journalists and artists[40]) and Belgium. The latter is the only country employing a strategy akin to the two-out-of-five rule envisaged in Articles 4 et seq. of the Proposed Directive whose application in relation to platform workers has already been examined in practice.[41] More specifically, case law has confirmed the fulfilment of the necessary five out of nine criteria, which trigger a presumption of dependent employment in the transport and delivery sector under Belgian law, for Deliveroo and Uber. At the same time, however, this case law provides an example of a platform succeeding in rebutting the presumption before a court.[42]

Also legal presumptions of a broad and generic nature, as they exist in the Netherlands and Spain,[43] have not stood out as particularly decisive in those countries' platform-related case law. Dutch decisions have so far not even mentioned the (partial) applicability of the default categorisation as an employment contract, whereas the legal reasoning in the Spanish judgments which do cite it (including the one by the Supreme Court[44]) indicates that the fact that the burden of proof was on the employer was barely decisive for the reclassification.

The one country where a legal presumption has regularly been taken into account for assessing the status of platform workers is France. This, however, did not concern the above-

[38] According to Section 2750(b)(1) of the State of California Labour Code, a person providing labour or services for remuneration is considered to be an employee rather than an independent contractor, unless the principal demonstrates that *all* of the following three conditions are met: (A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; (B) The person performs work that is outside the usual course of the hiring entity's business; and (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

[39] *See* Kullmann M., '*Platformisation' of work: An EU perspective on Introducing a legal presumption*, forthcoming in *European Labour Law Journal* 2022, 13(1).

[40] *See* the Seventh part of the French Labour Code.

[41] *See* also subsection 2.4 of Hießl C. nt. (27).

[42] *See* Article 337/2, Section 1 of the Loi-programme (I) of 27 December 2006, and Commission administrative de règlement de la relation de travail (CRT), Feb. 23, 2018, 116 – FR – 20180209 (*Deliveroo*), Mar. 9, 2018, 113 – FR – 20180123, and Oct. 26, 2020, 187 – FR – 20200707 (*Uber*); as opposed to Tribunal du travail francophone de Bruxelles, Dec. 8, 2021, JT 08/12/2021 (*Deliveroo*).

[43] The Spanish provision (Article 8.1 of the 1995 Workers' Statute) stipulates such a presumption for any "provision of services on behalf of and within the scope of the organisation and management of the contracting party in return for remuneration", whereas the Dutch rule – which depends on a monthly working time of more than twenty hours for one employer (see Article 7:610a Civil Code) – would seem applicable at least to an important share of pf workers.

[44] S.T.S., Sept. 23, 2020 (n. 4746/2019) (*Glovo*).

mentioned, narrowly conceived occupation-specific presumption of employment, but on the contrary the presumption of *self-employed* activity in case of entry into a business register. Since notably ride-hailing platforms regularly require their drivers' entry into such a register, courts up to the Cassation Court[45] have seen a necessity to put the bar for those workers' reclassification as employees very high.

4.2. Specific provisions on platform work.

Ahead of the potential future requirement for EU Member States to introduce a legal presumption implementing the Proposed Directive, Spain has pioneered own-initiative legislative moves of this nature with the "Riders' Law" (Royal Decree-Law 9/2021), in force since 12 August 2021 and focusing exclusively on delivery platforms. Portugal has followed suit and introduced a bill on a rebuttable presumption for all platform types, which is in the process of being passed at the time of writing.[46]

While concrete conclusions would be premature at present, developments in Spain certainly indicate that the introduction of such a presumption is likely to face a host of challenges. So far, the largest delivery platform on the Spanish market (Glovo) appears to have largely ignored its obligations, requalifying only a minority of its workforce and remaining subject to prosecution for its continued work with riders under contracts for self-employed service provision.[47] Trade unions estimate that 15,000 riders continue to work as bogus self-employed, even after the company has been ordered to pay a total of at least EUR 35 million in fines and compensation. At the same time, around 10,000 jobs are estimated to have been lost as a result of platforms' reactions to the Riders' Law – which include Deliveroo's retreat from the Spanish market and substantially altered requirements for work for those platforms which now directly or indirectly hire their workers as employees. Bizarrely, UberEats (which now works with employees hired by subcontractors) has become one of the most vocal actors demanding the prosecution of Glovo, as it claims to lose workers who prefer to work under self-employed contracts to its competitor.[48]

[45] *See* notably Cass. soc., 13 avril 2022, *Bull. civ.*, ECLI:FR:CCASS:2022:SO00549 (*LeCab*).
[46] *See* Dray G., *Portuguese Green Book on the Future of Work*, presentation held at the International Seminar "*Improving the Working Conditions in Platform Work*", 22 June 2022.
[47] *See* the platform's condemnation in numerous cases brought before the courts by the social security administration, labour inspectorate and trade unions – e.g. Juzgado de lo Social de León, Sección 1, 22/12/2021, Nº 504/2021, SJSO 5990/2021 - ECLI:ES:JSO:2021:5990 (*Glovo*); Juzgado de lo Social de Córdoba, Sección 3, 19/05/2022, Nº 662/2020, SJSO 693/2022 - ECLI:ES:JSO:2022:693 (*Glovo*).
[48] *See* Cano F., *Cerco a los autónomos de Glovo: los sindicatos estiman que tiene 15.000 'riders' sin regularizar,* in *The Objective*, 10 March 2022, https://theobjective.com/economia/2022-03-10/glovo-trabajo-riders/.

5. Case law developments.

While claims of employee status for platform workers may have appeared exotic several years ago, the recent past has seen a swift expansion. As of June 2022, more than 220[49] decisions have been handed down by courts and administrative bodies across European countries in disputes concerning the classification of platform workers.

5.1. Overview.

As evident from Table 1, fifteen countries' courts and/or administrative bodies have had to rule on the status of platform workers in the framework of cases brought before them. In France, Germany, Italy, Spain, Switzerland and the UK, individual cases have reached the last-instance courts.

Table 1: European case law on the status of platform workers

	AT	BE	CH	DE	DK	ES	FI	FR	IE	IT	LU	NL	NO	SE	UK
Adm.	4	4	3		3	10	2	2	1	1	1	1	2	3	
1st	4	4	3	2		28		38	1	13		4		3	9
2nd			2	2		17		32	1	1		2		1	5
3rd			2	1		2		8	1	1					3
4th															2

Source: own calculations[50]

5.2. Outcomes for different types of platforms.

Strikingly, there is virtually[51] not a single country with more than one decision on the status of platform workers where those decisions would not differ in their outcomes. The

[49] Around 220 decisions have been reviewed and analysed by the author of this contribution, as depicted infra in Table 1. This research includes the existing case law in most countries up to May 2022 comprehensively, with the exception of France and Spain (where a large number of decisions, notably by first-instance bodies, are not publicly available). Individual cases which do not concern platform companies in the strict sense (on parcel delivery and plumbing companies in the UK, a food delivery company in Ireland, and an umbrella company in Sweden) have been included due to their crucial relevance for the judicial assessment of the gig economy in those countries.

[50] An electronic copy of the database of European case law on platform work as compiled by the author may be requested via message to chiessl@yonsei.ac.kr. The most recent version of the comprehensive analysis based on it is available for download via https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3839603. The findings presented in the following subsection are based on this compilation.

[51] Finland arguably constitutes an exception, although the two rulings as indicated in Table 1 were in fact not decisions but opinions of the Labour Council (Työneuvosto, 5/10/2020, TN 1481-20 and TN 1482-20). As for Swiss case law, differing outcomes actually did not question the classification of platform workers as employees, but merely the identification of the employer or the existence of a situation of temporary agency work (*see* notably Tribunal federal, Arrêt du 30 mai 2022, 2C_575/2020 (*UberEats*)).

same effectively applies to different platform types – as all of them have been considered employers in some but not all of decisions across Europe. Nonetheless, a trend may be discerned at least for the two types which have made up the bulk of all decisions handed down so far: ride-hailing and delivery platforms. For both types, the most recent and/or highest-level decisions in most countries have classified platform workers as employees (or similar). [52] For ride-hailing platforms, this includes last-instance court decisions in France, Switzerland and the UK;[53] on food delivery platforms, last-instance rulings in France, Italy, Spain and Switzerland, as well as one second-instance judgment in the Netherlands.[54] A more cautious inclination to reclassify platform workers as employees can be identified for drivers in Spain and riders in Denmark and Finland.[55] Noteworthy recent decisions to the contrary can be found for both platform types in Belgium and France,[56] and for delivery businesses in Ireland and the UK.[57]

Only scattered decisions have dealt with the potential status of other platform types as employers. It would thus be premature to seek to identify a trend in relation to platforms offering services in private households (cf. the decisions on cleaners in Denmark, the Netherlands and Norway, on plumbers in the UK, and variable services in Sweden[58]) or for business customers (cf. the decisions on mystery shopping platforms in Austria, France and Germany, and on hiring-out services in the Netherlands[59]).

One interesting feature of all this case law is that decisions on appeal which modified the basic qualification have been much more likely to change it from self-employed to employed than vice versa,[60] and virtually[61] all last-instance decisions have found in favour of employee status or similar.

[52] Notably hetero-organised workers in Italy and (limb b) workers in the UK (see supra at 2.2), which are covered by minimum wages and collective bargaining rights just as employees.
[53] Most recently Cass. soc., 13 avril 2022, *Bull. civ.*, ECLI:FR:CCASS:2022:SO00549 (*LeCab*) and Tribunal federal, Arrêt du 30 mai 2022, 2C_34/2021 (*Uber*).
[54] Most recently Cass. soc., 19 mai 2022, *Bull. civ.,* ECLI:FR:CCASS:2022:C200500 (*Take Eat Easy*) and Tribunal federal, Arrêt du 30 mai 2022, 2C_575/2020 (*UberEats*).
[55] Most recently Bindende svar fra Skatterådet, 25 januar 2022, https://www.hk.dk/-/media/images/om-hk/sektorer/privat/hkprivat/pdf/2022/wolt_skatteraadets_afgoerelse.pdf?la=da&hash=23CA29F1E4E7CE3AA1584DAC3DA569E3 (*Wolt*), and Inspección de trabajo, 1/2022 (*Amazon Flex*).
[56] Most recently Tribunal du travail francophone de Bruxelles, Dec. 8, 2021, JT 08/12/2021 (*Deliveroo*), and CA Paris, 15 fevrier 2022, RG n° 19/12511 (*SRT*).
[57] Most recently The Independent Workers Union of Great Britain v. The Central Arbitration Committee [2021] EWCA Civ 952 (Deliveroo); Karshan (Midlands) Trading as Dominos Pizza v. Revenue Commissioners [2022] IECA 124.
[58] Most recently Gerechtshof Amsterdam 21 september 2021, ECLI:NL:GHAMS:2021:2741 (Federatie Nederlandse Vakbeweging/Helping Netherlands B.V.); Förvaltningsrätten i Malmö, 2022, n. 13356-20 (*Tiptapp*);
[59] Most recently Cass. crim., 22 juin 2021, *Bull. civ.*, ECLI:FR:CCASS:2021:CR00778 (*Cliq and Walk*); Bundesverwaltungsgericht v. 11.8.2021, I413 2221763-1.
[60] The main scenario in which courts have reversed a classification as employee are first instance judgments overturning an administrative decision (with recent examples in Austria, Belgium and Sweden). The only outlier is a very recent Irish third-instance decision (Karshan (Midlands) Trading as Dominos Pizza v. Revenue Commissioners [2022] IECA 124), which is expected to be brought before the Irish Supreme Court eventually.
[61] Although the French Cassation Court recently overturned a judgment that had classified LeCab drivers as employees, the decision does not indicate whether that classification was wrong in its outcome. Note that the same Cassation Court had overturned a classification of platform drivers as self-employed only three months earlier, and two years earlier expressly found that Uber drivers (who arguably dispose of more entrepreneurial

5.3. Criteria and innovations

A comprehensive analysis of the partly remarkable developments that are observable in the courts' approaches to national concepts of employee status when confronted with the task of assessing the situation of platform workers has been provided elsewhere[62] and would be beyond the scope of the present contribution. Suffice to say at this point that many – though not all – European decision-making bodies have explored approaches to the reclassification of platform workers which may involve limiting the importance attached to contractual designations as "self-employed"; less insistence on exclusively personal work performance (and notably its basis in a contractual obligation); a more liberal approach to the question of an obligation to work (either by effectively accepting incentives or expectations instead of strict obligations, or by a purposive interpretation which reassesses the role of this criterion as an indicator of entrepreneurial independence); a broader understanding of the concepts of instructions, control and sanctions; and/or a shift of focus towards criteria of organisational integration (as opposed to genuine independence/entrepreneurship), and a more in-depth assessment of the factors that determine such integration. By contrast, only very scattered evidence points to an embracement of economic dependence in the narrower sense as a significant criterion, or of a consideration of indicators of the principal's appearance as an employer.

Remarkably – and in contrast to general perceptions of the notion of worker under EU law appearing broader than most national concepts in Europe – many national-level approaches in this context, particularly also in the highest-instance courts, seem prepared to go much further than the CJEU in Yodel[63] in terms of overcoming traditional concepts of subordination in favour of an increased focus on organisational integration and the lack of genuine entrepreneurial independence.[64]

6. The Consequences of a changed categorisation.

All in all, in more than three quarters of the cases ruled on by administrative and/or judicial bodies in Europe so far, platform workers have been considered to work in subordination in the (hitherto) highest instance. The far-reaching consequences for platforms have included the payment of millions in arrears of taxes and social security contributions (particularly in the Spanish cases, which have repeatedly concerned hundreds of riders[65]), compensation payments to employees, which partly amounted to six-digit sums

freedom than LeCab drivers) were to be considered employees. See Cass. soc., 4 mars 2020, *Bull. civ.*, ECLI:FR:CCASS:2020:SO0037; Cass. soc., 13 avril 2022, Bull. civ., ECLI:FR:CCASS:2022:SO00549 (LeCab); Cass. soc., 12 janvier 2022, *Bull. civ.*, ECLI:FR:CCASS:2022:CO00023.

[62] *See* Hießl C., nt. (3) (notably subsection 2.1) and Hießl C., nt. (27) (notably section 3).

[63] Case C-692/19, *B v Yodel Delivery Network Ltd.* [2020] ECLI:EU:C:2020:288.

[64] *See* subsection 3.2 of Hießl C., nt. (3).

[65] Most recently Juzgado de lo Social de Córdoba, Sección 3, 19 May 2022, Nº 662/2020, SJSO 693/2022 - ECLI:ES:JSO:2022:693 (*Glovo*).

for a dozen of violations,[66] in some cases reinstatement,[67] and occasionally convictions under criminal law.[68]

Much more complex is the question of the longer-term consequences for future labour relations with the platform companies at issue. Up to now, the described multitude of decisions has not led to a large-scale move by platforms to hire various types of their workers as employees.

All in all, the platform type most likely to conclude direct employment contracts with its workers is the delivery platform. Regarding the most debated area of food delivery, European markets such as the German one are dominated by platforms which have long classified their workers as employees before ever becoming subject to litigation.[69] Platforms such as JustEat have converted the service contracts with their riders into employment contracts in recent years.[70] But examples of platform "voluntarily" assuming the role of employer exist also for other types: in fact, the only example of a "reverse reclassification" from employee to self-employed has concerned two Danish cleaning platforms, who were condemned for violating competition law in 2020.[71]

On the whole, however, the overwhelming majority of platforms have so far rejected calls to offer regular employment. Major platform companies' standard reaction to judicial or administrative rulings affirming their workers' employee status has generally involved a combination of appealing decisions until the last instance and repeatedly amending their terms and conditions, so that even last-instance decisions could be claimed void of significance for their current contracting models.[72] Notably ride-hailing platforms, which have typically been confronted with lawsuits in connection with administrative rules on passenger transport long before labour law issues were brought up, have developed country-specific approaches, and are consequently working partly or even exclusively with subcontractors which hire their drivers (depending on requirements of national law). Subsequently, such subcontracting constructions have also gained popularity among other platform types (notably delivery businesses, resulting in issues as discussed supra at 4.2.

[66] *See* e.g. CA Paris, Pôle 6 - chambre 6, 9 mars 2022, n° 19/00983.
[67] Notably in Italy and Spain – *see* e.g. Trib. Palermo, 21 April 2021, sez. lav., GL n. 740/2021 (*SocialFood*).
[68] E.g. Trib. Torino, sez. lav., 18 November 2021, n. 4991/2020 R.G.L. (*UberEats*).
[69] On the German situation *see* Kapalschinski C., *Foodora gibt sich geschlagen, Lieferando triumphiert,* in *Handelsblatt*, 21 December 2018, https://www.handelsblatt.com/unternehmen/handel-konsumgueter/delivery-hero-foodora-gibt-sich-geschlagen-lieferando-triumphiert/23790642.html?ticket=ST-3397145-X1r4a13xo9YJd9uF5GKt-ap1.
[70] *See* e.g. Todolí A., *Argumentos de la sanción a Cabify por cesión ilegal de la Inspección de trabajo – aplicables a muchas de las plataformas digitales*, in *Argumentos en Derecho Laboral*, 25 March 2021.
[71] *See* Konkurrencerådet, 26/8/2020, Konkurrencerådsafgørelse (*Hilfr, Happy Helpers*).
[72] The most prominent examples may be Deliveroo's abandonment of the shift schedule system, and Uber's moves to offer more choice (e.g. on the route to take) and provide more information to its drivers. Thereby, certain key indicators of subordination as identified in decisions on these platforms in e.g. Belgium, France, Italy, the Netherlands, Switzerland and the UK are actually no longer present. Yet, at least some recent rulings have reclassified these platforms as employers also in regard of their amended terms and conditions: see Gerechtshof Amsterdam 16 februari 2021, ECLI:NL:GHAMS:2021:392 (Deliveroo Netherlands B.V./ Federatie Nederlandse Vakbeweging); Tribunal federal, Arrêt du 30 mai 2022, 2C_34/2021 (*Uber*).

7. Discussion.

The idea of addressing problems of bogus self-employment and legal uncertainties about the status of platform workers by the introduction of a legal presumption has many proponents in the pertinent literature.[73] Among the potential benefits, Kullmann[74] mentions legal certainty, greater amenability to representation by social partners organisations (who may devise individualised collective solutions) and enforcement of right, while recognising as one critical aspect that presumptions "still require a case-by-case approach (by courts)".

This last aspect appears significant when assessing the impact to be expected from the introduction of a presumption along the lines of the Proposed Directive. Fundamentally, legal presumptions can be assumed of crucial relevance if the resulting shift of the burden of proof can be expected to constitute a major hurdle for employers to overcome. This is certainly the case in sectors characterised by a multitude of individualised and potentially poorly framed contractual relationships, for which employers may struggle to proof the essential facts and shy away from litigation over a single contractual relationship. The platform economy, by contrast, is characterised by companies imposing identical contractual conditions on a (very) large number of workers. The sheer scale of those conditions' use means not only that platforms will regularly be more than ready to leave no remedy untried to avoid them from being declared unlawful, but also that there is regularly and abundance of evidence about the exact contents and circumstances of the contractual relationship. In fact, in the overwhelming majority of decisions on the platform economy as described supra in section 5, all of the major contractual features considered relevant by the decision-making bodies were common grounds between the parties of the dispute. In other words, the allocation of the burden of proof was irrelevant.

Here, it may be important to note that the effective impossibility for platform companies to escape a classification as employers under the Californian ABC test (see supra at 4.1) before the introduction of Prop 22[75] was not due to the mere existence of a (broadly framed) legal presumption of employee status, but crucially to the exceptional difficulty of rebutting that presumption. After all, such rebuttal requires the *cumulative* proof of three elements, two of which (prongs B and C[76]) are effectively alien to European concepts of employee status.[77] The same effect can thus hardly be expected from the introduction of a legal presumption which leaves the eventually decisive test of employee status untouched. This may best be illustrated by the example of Belgian law, which combines a presumption favouring employee status for transport and delivery workers with a comparatively very restrictive notion of

[73] *See* e.g. Countouris N., De Stefano V., *New Trade Union Strategies for New Forms of Employment*, ETUC, 2019; Risak M., nt. (28).
[74] Kullmann M., nt. (39).
[75] Regarding the background and impact of Prop 22, which effectively exempted key platform types from the application of the ABC rule, *see* Dubal V., *Winning the Battle, Losing the War: Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy*, in *Wisconsin Law Review*. 2017, 754.
[76] For a discussion of the potential over-inclusiveness of the current concept and possible modifications to achieve better targeting *see* Davidov G., Alon-Shenker P., nt. (7).
[77] *See* subsection 3.1 of Hießl C., nt. (3).

employee,[78] as illustrated by the Brussels Labour Court's most recent judgment on Deliveroo, in which it considered the presumption to have been rebutted successfully.[79]

This may constitute the major question mark in relation to the regulatory strategy chosen by the European Commission in the Proposed Directive – which, as noted by Waas,[80] may naturally result from the fact that any actual harmonisation of national concepts of employee status would have appeared questionable in light of the EU's competences in the area of labour law.

A second issue which may deserve discussion is the fact that any approach aiming to facilitate the reclassification of platform workers effectively amounts to the protection of a minority at the possible expense of the majority of platform workers. First insights from the Spanish situation (see supra at 4.2) underline the unsurprising fact that, once platforms recognise that declaring their workers self-employed is not legally possible, they see no more reason to offer workers the flexibility which currently characterises work in the industry. Rather, they will likely use the power of direction appertaining to them as legal employers, so as to actively organise their workforce in the most profitable way – notably by instructing individuals to work certain shifts and perform the tasks assigned to them, while laying off those whose added value for the company seems limited e.g. due to only sporadic and irregular commitment. Such outcome seems effectively unavoidable if employee status means that e.g. riders and drivers become entitled to pay during on-call periods when they are logged in and ready to accept assignments.[81]

This outcome appears justified when considering that it benefits those earning their living through platform work, by offering them the prospect of a more stable and secure work and income pattern. These individuals arguably seem more worthy of protection than those for whom platform work constitutes a side activity to top up their income flexibly. Nonetheless, the fact remains that a shift as described would likely lead to the exclusion of groups at the margin of the labour market, who for various reasons are unable to commit to larger-scale, regular work involvement, and for whom platform work in its current form may constitute a unique opportunity of low-barrier gainful employment. Note that possible concepts of preserving the "on-demand" work model under certain preconditions as an alternative to regular platform employment are already being discussed in the pertinent literature. [82]

A closer look at the case law on employee status handed down so far evidences that at least some European jurisdictions allow for legal arrangements which combine "on-demand" work patterns with employee status for vulnerable groups of workers. This includes the

[78] Notably regarding the importance attached to the contractual designation and the obligation to work, as opposed to courts in other countries, which seem to gradually limit the weight attached to these criteria. See subsections 3.1 and 3.5 of Hießl C., nt. (27).
[79] Tribunal du travail francophone de Bruxelles, Dec. 8, 2021, JT 08/12/2021 (*Deliveroo*).
[80] Waas B., *Verbesserung der Arbeitsbedingungen von Plattformbeschäftigten*, forthcoming in *Zeitschrift für Rechtspolitik*, 2022.
[81] A currently highly contentious issue – cf. Uber's commitment to recognise worker status for its UK drivers with the exception of payment between assignments (*see* e.g. BBC, *Uber 'willing to change' as drivers get minimum wage, holiday pay and pensions*, 17 March 2021, https://www.bbc.com/news/business-56412397.
[82] *See* notably Katsabian T., Davidov G., *Flexibility, Choice and Labour Law: The Challenge of On-Demand Platforms,* forthcoming in *University of Toronto Law Journal*, 2022.

umbrella company model assessed by the Swedish courts,[83] which is based on a series of fixed-term employment contracts, and the Amsterdam Civil Court's solution of classifying a cleaning platform as a temporary work agency.[84] These examples illustrate that platforms which do not determine or control the services offered by their workers in any significant way can – and should perhaps be obliged to(?) – be a vehicle for various protections that improve the situation of workers, compared to a scenario of exclusively direct contractual relations with a customer. This may include social security affiliation, collective bargaining, the provision of training, safeguards against non-payment and other issues in the relationship with customers etc.

In the end, with a view to the diversity of situations – and despite the justified scepticism frequently expressed in relation to the introduction of "intermediate" status – there may be a case for a layered system of protection for platform workers. This may include ensuring a stable, "regular" employment pattern (including payment between assignments) for those cases where this is realistic and justified due to the platform's role in organising and determining the service and its pricing, but also tolerating models of more occasional work performance based on actually flexible individual agreements between worker and customer – in which case the challenge is one of allocating protective functions to platforms and customers in a reasonable way. Finally, in line with the spirit of the P2B Regulation[85] – which so far does not seem to have been invoked in a single case of platform work – it seems worthwhile to focus on the situation of those "genuinely self-employed" platform service providers, who cannot reasonably be considered in a situation of subordination in their relation to either the platform or the customer, but for whom certain standards of fairness seem nonetheless imperative with a view to the overwhelming imbalance of bargaining power they face when contracting with those entities. Some elements of the Proposed Directive, which are meant to apply to all platform workers irrespective of their status – such as protections in the context of algorithmic management – seem a crucial step in this respect.

Bibliography

Cano F., *Cerco a los autónomos de Glovo: los sindicatos estiman que tiene 15.000 'riders' sin regularizar,* in *The Objective*, 10 March 2022;

Countouris N., De Stefano, V., *New Trade Union Strategies for New Forms of Employment*, ETUC, 2019;

Daugareilh, I. et al., *The platform economy and social law: Key issues in comparative perspective*, ETUI, June 2019;

[83] *See* Högsta Förvaltningsdomstolen, 15 January 2021, Mål nr 6245-19 (*Cool Company*).

[84] Gerechtshof Amsterdam, 21 September 2021, ECLI:NL:GHAMS:2021:2741 (Federatie Nederlandse Vakbeweging/Helping Netherlands B.V.).

[85] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.

Davidov G., Alon-Shenker P., *The ABC Test: A New Model for Employment Status Determination?,* forthcoming in *Industrial Law Journal*, Volume 51, Issue 2, June 2022;
Dray G., *Portuguese Green Book on the Future of Work*, presentation held at the International Seminar "*Improving the Working Conditions in Platform Work*", 22 June 2022;
Dubal V., *Winning the Battle, Losing the War: Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy*, Wis. L. Rev. 2017, 754;
Ghislain S., Verwilghen M., *Le statut social des travailleurs de l'économie de plateforme: état des lieux dans un contexte mouvant* (Première partie), 2020;
Hießl C., *Case Law on the Classification of Platform Workers: Cross-European Comparative Analysis and Tentative Conclusions*, 2021, forthcoming in *Comparative Labour Law & Policy Journal*;
Hießl, C., *The Classification of Platform Workers in Case Law: A Cross-European Comparative Analysis*, 2021, in *Comparative Labor Law & Policy Journal,* Volume 42.2, 2022;
Kapalschinski C., *Foodora gibt sich geschlagen, Lieferando triumphiert,* in *Handelsblatt*, 21 December 2018;
Katsabian T., Davidov G., *Flexibility, Choice and Labour Law: The Challenge of On-Demand Platforms,* forthcoming in *University of Toronto Law Journal*, 2022;
Kullmann M., '*Platformisation' of work: An EU perspective on Introducing a legal presumption*, forthcoming in *European Labour Law Journal* 2022, 13 (1);
Risak M., *Fair Working Conditions for Platform Workers: Possible Regulatory Approaches at the EU Level,* Friedrich-Ebert-Stiftung, 2017;
Todolí A., *Argumentos de la sanción a Cabify por cesión ilegal de la Inspección de trabajo – aplicables a muchas de las plataformas digitales*, in *Argumentos en Derecho Laboral*, 25 March 2021;
Waas B., Heerma van Voss G. (eds), *Restatement of Labour Law in Europe: The Concept of Employee*, Vol. I, Oxford, Hart, 2017;
Waas, B., *Verbesserung der Arbeitsbedingungen von Plattformbeschäftigten*, in *Zeitschrift für Rechtspolitik* 2022.