There is a crack, a crack in everything ...
How European courts counter bogus self-employment in the platform economy

A clear trend can be detected – platform workers are increasingly re-classified employees, although the arguments for this are often different

Martin Gruber-Risak is Associate Professor at the Department of Labour Law and Law of Social Security at the University of Vienna in Austria. He is the co-editor of the HSI Report on European Labour and Social Security Law and national expert for Austria with the European Centre of Expertise in the field of labour law, employment and labour market policies

The opportunities that come with platform work are great – but so are the potential downsides of low pay, long hours, and precarious conditions. And at the basis of this was and still is issue of the legal status of those working in the platform economy: Are they self-employed as most of the platforms claim or are they actually employees and therefore misclassified? As lawmakers in Europe have mostly taken a *laissez-faire* approach it is on the courts to deal with this question. In the last years more and more cases have been brought before them and very recently the supreme courts have decided in a number of countries. And it looks that the once solid narrative promoted by the platforms that they are only helping small entrepreneurs to link up with their customers is showing more and more cracks. And as Leonard Cohen sang, 'that's how the light gets in' for those working in the platform economy.

In the absence of specific legislation, platform work in Europe is legally assessed using the existing general legal framework and its concept of employee defining the personal scope of labour and employment law. The burden is thus on the courts to adapt the received concept by way of interpretation to the changed working environment in times of digitalisation. There are now numerous decisions, some of which, however, have not yet been decided in the last instance. Two central areas of platform work are particularly affected by legal disputes: passenger transport services and food delivery. Issues connected with other forms of platform work have seldom been raised in the courts. The brief comparison of the rulings below reveals clear differences, but one trend can be detected – platform workers are increasingly re-classified employees although the arguments for this are often different.

France

The French *Cour de Cassation* in 2018 ruled that bicycle couriers using the Take Eat Easy platform for food delivery are considered to be employees[1]. The combination of real-time geo-tracking applications and disciplinary sanctions amounted to a degree of direction and control that warranted the establishment of employment status. The same court also handed down the first national supreme court decision in Europe on the employee status of Uber drivers in 2020. It ruled that in the case at hand there was subordination and that accordingly, the platform employees were not to be qualified as self-employed but as employees[2]. The court reasoned that it is not the theoretical possibility to freely choose working time and place of work that excludes a relationship of subordination. Rather, what is decisive is whether the platform worker has economic and financial room to manoeuvre.

The United Kingdom

In the United Kingdom, the Employment Tribunal qualified Uber drivers as 'workers' (in the sense of the British legal understanding) and not as self-employed[3]. The findings were upheld in the Employment Appeal Tribunal and by a majority in the Court of Appeal[4]. Uber's final appeal to the Supreme Court was unanimously dismissed on 21 February 2021[5]. The final judgment emphasises five aspects which justified its conclusion that the claimants were considered workers working for Uber. First, Uber that sets the fare and drivers are not permitted to charge more Second, the contract terms on which drivers perform their services are imposed by Uber and drivers have no say in them. Third, once a driver has logged onto the Uber app, the driver's choice about whether to accept requests for rides is constrained by Uber. Fourth, Uber also exercises significant control over the way in which drivers deliver their services especially by the rating system and the sanctions resulting from low ratings. And a fifth significant factor is that Uber restricts communications between passenger and driver. Taking these factors together, drivers are in a position of subordination and dependency in relation to Uber and were therefore found to be 'workers'. Thus they are entitled to a small number of core rights attaching to worker status, including, importantly, those guaranteed by the National Minimum Wage Act 1998 and the Working Time Regulations 1998. They have not found to be employees though and are not subject to the full range of labour rights.

Germany

In Germany there the Federal Labour Court (BAG)[6] decided on 1 December 2020 on a case where the plaintiff checked ads in gas stations as a 'mystery guest' via an app (Roamler) where he was offered tasks and over which he also delivered his work by uploading photos of the add. The BAG decided in favour of the platform worker, as the framework agreement was considered an employment contract that although the platform worker was not contractually obligated to accept offers from the platform, nevertheless its organisational structure was designed so that registered platform workers in the early stages of their employment must continuously

accept bundles of simple small orders in order to complete them personally. Only a higher level (in the evaluation system that increases with the number of completed orders) enables platform workers to accept several orders at the same time in order to complete them on one route and thus, in effect, to earn a higher hourly wage. Through this incentive system, the plaintiff was induced to continuously perform activities and the incentive to work regularly regardless of the lack of a legal obligation to work was seen as a decisive criterion for the framework contract to be classified an employment contract. This is definitely a far-reaching decision that will pave the way away from a purely legal mutuality-of-obligations-test towards taking into account the economic realities and factual situation in which platform workers find themselves.

Spain

In Spain, a number of lower court rulings have found an employment relationship of platform workers in the transportation sector, while others argued that they were self-employed. Rather recently, the Spanish Supreme Court decided on the case of a bicycle courier delivering food for the platform Glovo in a ruling of 25 September 2020[7]. It considered the courier to be an employee and it seems that this court adapted the criterion of subordination and its sub-criteria to the social changes and especially to the new ways in which work is organised. It considers the digital platform to be the essential means of production, and views the mechanisms underlying the 'digital reputation' as a form of control over the platform workers. Also relevant is the fact that the riders work under the brand of the platform following the line of jurisprudence taking into account economic aspects when interpreting the concept of employee.

Belgium

In contrast to the decisions above, in Belgium a court in Brussels[8] ruled regarding the transportation service Uber X that there was no 'subordination', which is why the platform employees were qualified as self-employed persons. The arguments cited for this were that the drivers were free to decide where and when they wanted to work, how long they wanted to work and which trips they wanted to accept or reject. In addition, the judges argued that drivers used their own vehicle and that drivers could work elsewhere if they wanted to. The court also decided that this variant of the Uber app is not a transport service, but an intermediary service. This has been appealed.

Italy

There are also a number of platform work cases in Italy, mostly dealing with bicycle couriers delivering food. While the first instance, *Tribunale di Torino*[9], invoked similar arguments to those used by the Belgian judges to deny employee status to workers, the Appellate Court[10] changed the decision, allowing for an 'immediate category' for qualifying platform workers, to whom certain labour law provisions (in this case, the application of the national collective bargaining agreement for the logistics and freight transport sector) were applicable. However, workers in this category were determined ineligible to invoke the protection against dismissal, as this right is reserved for genuine employees. Finally though, the *Corte di Cassazione*[11] in January 2020 ruled that, regardless of the legal status, workers who are organised by the other party are entitled to the same employment protection originally intended for employees.

Conclusion

The court decisions outlined above show that in Europe, there exist a variety of different interpretations of the concept of employee in the platform economy. Nowadays it seems that most national courts adapt their criteria to the changing ways work is organised and develop the received concept beyond a formal assessment, while a few others remain rather formalistic and accept the contractual terms as plain facts. But increasingly courts do not accept the two main narratives of the platforms anymore: Firstly, that the platform economy is so new and innovative that it does not fit into any existing regulations and, secondly, that all platform workers are self-employed. The rulings reclassifying platform workers and therefore granting them employee rights are not only an important step for those working in the platform economy but also to establish a level playing field of traditional and digital business models. It is now time to 'disrupt the disruptors'[12], and many courts in Europe are doing this and thereby widen the cracks and let the light of labour and employment legislation in.

Increasingly courts do not accept the two main narratives of the platforms: that platform work is so new and innovative it does not fit any existing regulations; or that all platform workers are self-employed

Notes

1 *Court de Cassation* of 28.11.2018, N°1737 (appeal n°17-2079).
2 *Court de Cassation* of 4.3.2020, N°374 (appeal n° 19-13.316). It has to be pointed out that in French labor law there is no intermediate category between employees and self-employed persons. Cf. the Court de Cassation, Explanatory note (in English), available at www.courdecassation.fr/IMG/20200304_arret_uber_note_%20ENGLISH.pdf (22.11.2020).
3 Aslam & Ors v Uber BV & Ors, EW Misc B68 (ET), 28/10/2016, https://www.bailii.org/ew/cases/Misc/2016/B68.html.
4 Uber BV & Ors v Aslam & Ors, EWCA Civ 274, 19/12/2018, https://www.bailii.org/ew/cases/EWCA/Civ/2018/2748.html.
5 Uber BV & Ors v Aslam & Ors, [2021] UKSC 5, 19/02/2021, https://www.supremecourt.uk/cases/docs/uksc-2019-0029-judgment.pdf.
6 *Bundesarbeitsgericht* of 01.12.2020, 9 AZR 102/20, available at http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=pm&nr=24710.
7 *Tribunal Supremo* of 25.9.2020, rec. 4746/2019, available at http://www.poderjudicial.es/search/AN/openCDocument/f0956b14a72ff217df076c0e9ad89c79ceb6f15323e93ff2 (last accessed 22.11.2020); cf. A. Todolí Signes, *Notes on the Spanish Supreme Court Ruling that considers Riders to be employees,* available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3717599.
8 *Tribunal de l'enterprise francophone de Bruxelles* of 16.1.2019, A/18/02920.
9 *Tribunale di Torino* of 7.5.2018, no. 778/2018.
10 *Corte di Appello di Torino* of 4.2.2019, 26/2019.
11 *Corte di Cassazione* of 24.1.2020, 1663/2020.
12 J. Prassl, *Humans as a Service* (OUP 2017) pp 93 et seqq.