Gig Economy

2021

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Introduction

Are we ready for ‘New ways of working’ in a post pandemic world?

In the spring of 2020, we entered the first lockdown and the benefits of the gig economy became very clear. Throughout the pandemic, the gig economy stood its ground and kept the economy running when many of us were forced to stay indoors. Despite its contributions, both gig workers and platforms are still operating in legal uncertainty with respect to the social status and conditions of the workers. The controversy over the social status of gig workers is ongoing.

Gig workers are still often hired as self-employed workers, which meets their needs in terms of freedom and flexibility. On the other hand, they lack the security benefits that employees enjoy. The balance between flexibility and autonomous working on the one hand and social protection on the other is difficult – if not impossible – to find. Our legal frameworks simply aren’t set up to provide both at the same time. In an attempt to fit this new reality into outdated legal frameworks, both gig workers and platforms often face legal ambiguity.

Due to the increasing popularity of gig work and growing case law, the precarious position of the gig worker has, however, gained the interest of various stakeholders. This has led to different actions, varying from social dialogue on European and national level on the protection of workers, to legislative actions (Italy, Spain and UK) regarding the platform economy.

In our study, we provide an overview of how workers in the gig economy are currently being classified in a number of prominent Member States of the European Union and in the United Kingdom. We have investigated the respective national legislations and case law. In the following report, you will find an overview of the most important highlights per country up until the date of publication.

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Belgium

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Belgium (1/3)

Please describe the different types of employment status (i.e. employee, self-employed, or other) that exist in your national law and, where applicable, explain how they differ.

In principle, the parties are free to give their contractual collaboration the classification they wish (employment agreement or service agreement). The chosen classification is only to be set aside when it appears that there are a number of facts (leaving socio-economic criteria out of consideration) that are incompatible with that classification. The nature of the relationship has to be assessed on the basis of:

- the intention of the parties
- the freedom in organising working time
- the freedom in organising the work
- the ability to exercise hierarchic control

In addition to the above general principles to assess the self-employed nature of a contractual relationship, specific criteria exist for a limited number of industries (i.e. construction, security, transportation, cleaning, agriculture and horticulture):

- lack of any financial and/or economic risk on the part of the one performing the activities
- lack of responsibility and decision-making powers with respect to the financial means of the company
- lack of decision-making powers with respect to the purchasing policy within the company
- lack of decision-making powers with respect to the pricing policy within the company
- absence of obligation of results with respect to the agreed activities
- guaranteed fixed remuneration, regardless of the company's results and/or the scope of the activities
- not being an employer yourself or not having the option to have you replaced for the performance of the agreed activities
- not presenting yourself as an independent company towards third parties, or working (almost) exclusively for one party
- working in spaces of which you are not the owner nor the lessee, or working with supplies that have been provided, financed or guaranteed by the other party.

Whenever the majority of these criteria are met, the contractual relationship is legally presumed to be an employment relationship. Where less than half of the criteria are met, the collaboration is legally presumed to be of a self-employed nature. Both legal presumptions can be refuted by means of any remedies available under the law.

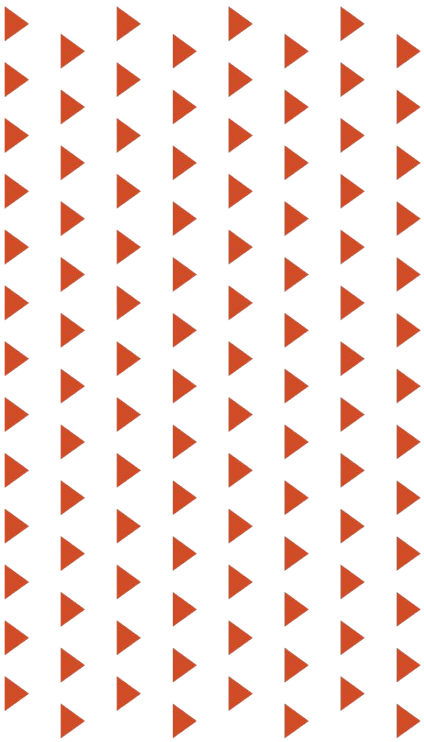
These nine specific criteria can be further complemented or replaced by criteria agreed at sector level. At this time, industry-specific criteria exist for the following sectors: bus and/or coach companies, rental of vehicles with a chauffeur and of collective taxi services, road transportation and logistics for the account of a third party, security, construction, agriculture and horticulture.

Belgium (2/3)

In which category would gig workers typically be classified and on which basis (e.g. case law, statutory law, etc.)?

The classification of workers in Belgium should be done on a case-by-case basis, depending on the factual elements in relation to the questions above. If the workers have sufficient freedom in organising their work and their working time, and are not subject to a hierarchic authority, the employees will have to be considered as self-employed. Note that special rules exist for specific industries (see above).

Most companies that can be placed in the gig economy consider their workers as self-employed. However, recent developments in case law and recent legislative initiatives tend to consider that most gig workers have more characteristics that relate to regular employees.



"Are there any major developments ongoing or expected in relation to employment status in the context of the gig economy (e.g. in case law, national law, etc)?"

In 2018, there were two non-binding rulings of the Administrative Commission for Employment Relationships in which it was decided that the couriers of Deliveroo should be considered employees, contrary to what the company stated. However, one of these decisions was found invalid by the Brussels Labour Tribunal, following an appeal by Deliveroo.

In addition, the above-mentioned commission also issued another non-binding ruling on 26 October 2020 regarding the employment status of a Belgian Uber driver, considering that the latter's classification as a self-employed worker was not in line with the applicable legal provisions and the relationship should thus be considered as employment. Even though the legal consequences of such rulings are limited and as such not binding for a judicial body, the relevance remains significant.

Moreover, the Public Prosecutor in Brussels has started an investigation regarding the employment status of gig workers. In the framework of this investigation, he invited a large number of gig workers for an interview on their employment relationships. This investigation led to Deliveroo being summoned before the labour court in January 2020. Pleadings are expected to take place in October 2021.

Belgium (3/3)

Finally, in a judgment of 16 January 2019 the French-speaking Commercial Court of Brussels incidentally ruled on the employment status of the Uber drivers and ruled that the drivers were in fact not to be considered as employees (although this court is in principle not competent for this category of disputes, which normally fall under the jurisdiction of the labour courts). This judgment, which is particularly questionable from a labour law perspective, was subject to an appeal and is now pending before the Brussels Court of Appeals. In an interlocutory judgment the Court has raised two prejudicial questions to the Constitutional Court with respect to the need for taxi licenses and whether this could constitute some form of discrimation. It is expected that the Constitutional Court will rule on the matter in the course of 2022.

In 2016, legislation came into effect that allowed platform workers, who were working for recognised platforms, to earn up to 6,000 EUR per year exempt from social security charges and personal income taxes. On 23 April 2020, the Belgian Constitutional Court considered this legislation to be unconstitutional, as it was in breach with the principle of equality (Articles 10 and 11 of the Belgian Constitution). However, the Court decided to maintain the validity of the invalidated Act until 31 December 2020.

As of 1 January 2021, a new (still beneficial) tax regime was (re-)introduced. The income earned through a recognised sharing or gig platform will in the future be subject to a flat rate of 10% (base rate of 20% minus lump sum deduction of 50%). An important condition however is that the yearly income remains below the threshold of 6,390 EUR (amount for 2021).

Are there any other important remarks in relation to employment status, specifically within the context of the 'platform or gig economy'?

Currently there is a lot of discussion going on in Belgian legal doctrine concerning the employment status of gig workers. Following our discussions with the authorities, we understand that the general consensus is, however, that the current Belgian legal framework is sufficient, although outdated, for the new phenomenon of the gig economy, and that the authorities are currently considering adapting the legislation, notably by introducing new specific determination criteria.

Gig Economy 2021

Denmark

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Denmark (1/2)

Please describe the different types of employment status (i.e. employee, self-employed, or other) that exist in your national law and, where applicable, explain how they differ.

Professional statutes in Denmark can roughly be divided into four categories, the first three are considered as different forms of employee status and the fourth as non-employee.

1. Salaried employees (white collar workers) whose employment relationships are covered by the Salaried Employees Act giving the employee a number of rights which may not be derogated from, as well as other protective legislation such as, for instance, the Holiday Act. Some white-collar work is also regulated by collective agreements.
2. Other wage earners (mainly blue-collar workers) whose employment relationships are mainly covered by collective labour agreements as well as other protective legislation.
3. Managing directors whose employment relationships are regulated by individual agreements (the only protective legislation in place concerns anti-discrimination legislation in relation to age).
4. Self-employed are usually referred to as consultants or freelancers and since they are not considered employees the contractual relation is not governed by protective legislation. The cooperation/service provided is regulated by the individual agreement/contract setting out the terms and conditions.

The following criteria should be taken into account when assessing whether the individual is a self-employed worker or an employee:

- Does the individual bear the overall economic risk of his/her own business?
- Under which legal status does the individual operate? Personal services company, VAT registration, fee recipient etc.
- Is the person subject to the client's hierarchic authority? Does the client instruct the work and does the individual report to the client?
- Does the individual have several clients or does the individual in fact depend on one client?
- Does the client put working tools at the individual’s disposal? Laptop/mobile phone/office facilities/access to client's IT systems etc.
- Does the individual receive a fixed monthly fee or is there an hourly or daily fee?
- Which termination conditions have been agreed upon in the contract between the parties: e.g. same length as a notice period in an employment contract? Compensation in the event of termination? Is the person paid in case of illness? Is the individual entitled to paid leave or other similar, typical employee benefits?

Denmark (2/2)

In which category would gig workers typically be classified and on which basis (e.g. case law, statutory law, etc.)?

The classification of workers in the gig economy depends on the factual circumstances of their collaboration.

Are there any major developments ongoing or expected in relation to employment status in the context of the gig economy (e.g. in case law, national law, etc)?

Court practice and legislation are strict as regards the self-employed status; self-employed workers have a high risk of being reclassified into employees/salaried workers. There is no tendency that this would change in favour of self-employed individuals. Similarly, current tax legislation and tax practice do not signal any changes towards a more flexible approach (especially since the consultancy/self-employed approach is often used to avoid or minimise tax payments, often by foreign service providers).

Case law also shows that the trade unions continue to keep an eye on the “grey zone area” where temporary employment is prolonged with the potential consequence of the reclassification into a permanent employment.

Are there any other important remarks in relation to employment status, specifically within the context of the ‘platform or gig economy’?

Currently, the focus of the legislators is to protect the tax base against the challenges from the sharing and gig economy. Thus, even though the legislation to a certain extent appreciates the development of a sharing or gig economy, the main steps are not to facilitate this development but rather to impose reporting requirements and similar obligations in order to avoid the development of an untaxed economy.

Generally, the gig economy in Denmark is challenged by the high requirements regarding basic working terms and conditions pursuant to collective agreements, the safety of the consumer as well as the obligation to pay tax. On this basis the ride sharing provider, Uber, closed down in Denmark in 2017.

Gig Economy 2021

France

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France (1/4)

Please describe the different types of employment status (i.e. employee, self-employed, or other) that exist in your national law and, where applicable, explain how they differ.

In France, two professional statutes exist: employee and self-employed. There is no intermediate regime between employees and self-employed.

An employment relationship is generally characterised by the following:

- Detailed instructions/orders are given to the individual concerned (keeping in mind that even self-employed workers will need to be told what is expected of them).
- The individual's activity, especially the time spent, is monitored.
- The individual is liable to sanctions if he/she fails to apply the instructions given by the employer.
- No risks are taken: the individual has a regular fixed remuneration; he/she does not bear any risk of non-payment or offsetting of payment due to poor performance.
- The number of clients: a full-time employee is generally subject to an obligation of loyalty and exclusivity, whereas a self-employed person is supposed to have more than one client.
- An employee cannot substitute him or herself whereas a self-employed individual is often free to engage another person to deliver the services and hence provide a substitute.
- An employee cannot refuse work, except under a limited number of conditions.
- An employee receives a monthly salary; a self-employed person will usually be paid for an individual assignment completed (i.e. generally at the end of the assignment, with possible payment of advances, not regular monthly payments).
- Being entitled to a fixed salary, an employee is not generally subject to variations in profit or loss: the self-employed person will suffer a loss if he/she underestimates the time it will take to complete the assignment or encounters unexpected difficulties that have not been provided for under the terms of the contract.
- An employee is generally provided equipment, or is reimbursed for its purchase.
- An employee is not responsible for his/her own professional liability insurance.

France (2/4)

In which category would gig workers typically be classified and on which basis (e.g. case law, statutory law, etc.)?

Whether the worker is classified as a self-employed worker or as an employee depends on the existence of a “hierarchical” link (as opposed to a merely “operational” link) between the platform and the individual.

Although there are no obligatory criteria to characterise a hierarchical relationship, the main elements that have been retained by the courts as exemplifying such a relationship are that an employer evaluates an employee directly to determine remuneration and career advancement, and can take disciplinary measures, including dismissal. A self-employed person, on the other hand, tends to carry out their activity in an independent manner.
An individual is generally considered to be independent when they are free to organise their time, activity and workload, bears financial responsibility for completing the work (i.e. payment is subject to completion of the work), and bears their own business expenses including the purchase of their own tools.
The fact that a person receives “operational” instructions does not in itself create an employment relationship as both self-employed and salaried workers typically receive operational instructions on what is expected of them, for instance which wall to decorate or which paint colour and other materials to use. Therefore, in the case of a dispute, looking at a combination of factors, the courts will determine on a case-by-case basis. The factors taken into account are the same for social security purposes and for employment law purposes.

Are there any major developments ongoing or expected in relation to the employment status in the context of the gig economy (e.g. in case law, national law, etc)?

Individuals who have been declared as independent workers to the French social security authorities will be legally presumed to be self-employed (at least for social security purposes “non-salariat”). This being said, this presumption can be rebutted if the self-employed worker has a “hierarchical link” with the platform. This “hierarchical link” is characterised notably by the existence of the power of direction and control of the worker by the platform. The work conditions of self-employed workers working with digital platforms have been recently analysed by the French courts.

On 28 November 2018, the French Supreme Court (i.e. Cour de Cassation) published an important decision regarding the gig economy and notably the reclassification of a self-employed worker status to an employment relationship in the courier industry.

The French Supreme Court indicated (i) that the existence of an employment relationship does not depend on the intention expressed by the parties or on the denomination that they have given to their agreement (i.e. self-employment in the case at hand), but on the factual conditions under which the activity is carried out, and (ii) that the employment relationship is characterised by the performance of work under the authority of an employer who has the power to issue orders and directives, to supervise the performance of the work and to punish the failings of subordinates.

France (3/4)

In the case in question, the French Supreme Court found that the platform had a system of geolocation allowing it to monitor the real time spent by the courier, the number of kilometres travelled as well as the (geographical) position, and had a sanctioning power with regard to the courier.

The French Supreme Court decision has since been confirmed by French case law. Indeed, on 10 January 2019, the Court of Appeal of Paris ruled that a platform worker was not to be considered as a self-employed worker but as an employee because the worker could not have his/her own clients and the prices were contractually fixed by the platform, which was also in a position to sanction the worker for misconduct.

On 4 February 2020, the Employment Tribunal of Paris condemned a platform for undeclared work. It judged that the obligation for the courier to draw up a service agreement was aimed at avoiding the application of the French labour code.

On 24 December 2019, the French Government attempted to restrain this reclassification trend by the French courts by legislating a presumption of self-employment for workers if the platform published a charter (which remains non-obligatory and is issued unilaterally) that determines the terms and conditions between the platform and individuals. However, this attempt has been nullified by the French Constitutional Council and thus did not enter into effect.

Are there any other important remarks in relation to employment status, specifically within the context of the 'platform or gig economy'?

The French Government wants to enhance the rights of workers while avoiding reclassification into an employment relationship. In the meantime, French Courts are increasingly ruling against platforms for not drawing up employment contracts. On 4 March 2020, the French Supreme Court published a decision confirming that, even if workers could choose their working days and hours, it did not exclude the fact that they could be in an employment relationship. In the case at hand, the worker did not have the possibility to freely choose his/her clients or fares, and Uber reserved the right to disconnect the driver. In this specific case and on the basis of these elements, the French Supreme Court considered that the position of the individual concerned as a self employed worker was legally unfounded.

France (4/4)

A report on digital platforms, commissioned by the French government, has been published on 1st December 2020. The main goal of the report is to describe the legal relationship between platforms and their workers and to find a way to reinforce the social position of the latter, while maintaining as much flexibility as possible. The report recommends that, after being active on the platform for 6 to 12 months and once a certain income level has been reached, workers on ride sharing platforms and delivery platforms would then be engaged and employed by a third-party company as a regular employee ("Coopérative d'activité d'emploi" – CAE). The third-party company would then lend its workers and provide a service to the platforms. These third party companies should then engage the workers as regular employees for social security purposes. Consequently the workers would benefit from full social coverage, while still being able to work as flexibly as possible. Concerning the social dialogue, the report proposes a representation of workers based on elections within each platform, after a period of experimentation. The report also proposes the creation of a regulatory authority for platforms, the supervision of driving time and a minimum wage. For ride sharing platforms and other digital work platforms, the minimum wage would be set at 7 EUR per ride, with a minimum hourly rate of 15 EUR to 18 EUR, a similar calculation should be made for other types of gig work, such as deliveries.

In this regard, the French Government adopted on 21 April 2021 an ordinance concerning the modalities of representation of self-employed workers using platforms for their activity and the conditions of exercise of this representation. This ordinance organises the representation of workers of mobility platforms from two sectors of activity: private drivers (Uber for example) and delivery drivers (delivery by bicycle, scooter or tricycle). Nationwide social elections where workers could elect trade union representatives will take place for the first time in 2022 (on 31 December 2021 at the latest). Important to note is that self-employed gig workers would also be able to elect representatives who would then defend and advocate their interests directly with the platforms. These elections will be organised online, every four years under the supervision of a new "Authority for Social Relations of Employment Platforms" (Arpe).

Gig Economy 2021

Germany

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Germany (1/2)

Please describe the different types of employment status (i.e. employee, self-employed, or other) that exist in your national law and, where applicable, explain how they differ.

The employee status is regulated in §611a of the German Civil Code (the "BGB"). Freelancers are subject to service contracts, which are regulated in §611 BGB. While some regulations, such as the extraordinary termination according to §626 BGB, apply to both types of contract, other provisions, such as the law on protection against dismissal, only apply to employees.

The social status of an individual is determined by the extent to which the person is obligated to perform work in the service of another person under instructions and in personal dependence. The right to issue instructions may relate to the content, performance, time and place of the work. A person is bound by instructions if he or she is not essentially free to organise his or her activities and determine his or her working hours. The degree of personal dependence also depends on the nature of the respective activity. In order to determine whether an employment contract exists, an overall assessment of all circumstances must be made. If the actual performance of the contractual relationship shows that it is an employment relationship, the qualification chosen by the parties in the contract is irrelevant.

Currently, there is still a legal uncertainty about the status of gig employees. They are only entitled to special employee rights if they fall under the classification according to § 611a BGB. Otherwise, the more flexible regulations for service providing apply.

In which category would gig workers typically be classified and on which basis (e.g. case law, statutory law, etc.)?

The workers are rather classified as self-employed, but it is often hard to distinguish them from employees. This is still a major legal issue in Germany. There are no special regulations for the gig economy. The criteria for demarcation apply, which have been developed by law, case law and social security institutions.

A lot of different criteria are applied in the assessment of the classification, such as the right to issue directives on the content, implementation, place and time of the activity, personal dependence, nature of the activity, and integration into the employer's work organisation, as well as an overall assessment of all criteria.

Are there any major developments ongoing or expected in relation to employment status in the context of the gig economy (e.g. in case law, national law, etc)?

Two judgments on the subject of platform work have been issued by the labour courts.
On 4 December 2019, the Regional Labour Court in Munich decided that, in the case at hand, the platform worker was self-employed. The platform worker photographed goods in petrol stations and supermarkets to check the presentation of the goods. In early December 2020, this case was brought to the Federal Labour Court, which was the first gig economy related case.

Germany (2/2)

Based on an overall assessment, the court assumed an employment relationship with the platform operator. Although the platform worker was free to choose the assignments, he was not free to determine the place, time and content once he had accepted them.

On 14 February 2019, the Regional Labour Court of Hessen ruled that the bus driver involved (being the plaintiff) was not an employee because he was only employed on a selective basis.

The trade unions are now also discussing the issue of platform work. The trade union IG Metall has initiated the “Crowdsourcing” project. The Trade Union believes that legislative reforms are necessary when evolving towards an Industry 4.0 type of working. Since working conditions have changed drastically the current legal framework no longer suffices. For instance companies no longer need physical presence in a country to conduct business there. Another example – in the context of labour – is that more and more companies and platforms have complex algorithms in place that could impact employment conditions and thus also employment status (e.g. reduction of assignments if the individual has rejected a number of jobs in the past).

Recently, on 27 November 2020, the Federal Ministry of Labour and Social Affairs (“BMAS”) presented a key issues paper with proposals for “Fair Work in the Platform Economy”. According to the proposal, more protection will be provided for platform workers, for instance through compulsory pension insurance and accident insurance cover. The introduction of essential rights similar to those of employees is also intended. However, currently there is no final legislation available on these aspects.

Are there any other important remarks in relation to employment status, specifically within the context of the ‘platform or gig economy’?

There is the Circular of the central associations (Deutsche Rentenversicherung Bund, Bundesagentur für Arbeit, GVK-Spitzenverband) of 13 April 2010, which contains, among other things, in Annex 5 a catalogue of certain professional groups that are either considered to be employees or self-employed workers.

Gig Economy 2021

Italy

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Italy (1/2)

Please describe the different types of employment status (i.e. employee, self-employed, or other) that exist in your national law and, where applicable, explain how they differ.

Under Italian law, the main and most important test for determining the employment status is the existence of subordination; that means that the employee is subject to the executive power, control and discipline of the employer with a consequent limitation of their autonomy. Other elements are merely subsidiary, meaning that they are useful to define with greater certainty the employment relationship as subordinated when it is not easy to recognise the existence of subordination. As an example: the worker is not responsible for the organisation of the business or its financial risks; the worker observes an agreed schedule; the remuneration is only based on worked hours; the relationship has continuity and duration; the worker has to notify the employer of hi/her absence; the worker uses vehicles, equipment and/or tools provided by the employer only.

Please note that, under Italian legislation, the economic dependence of the worker cannot be seen as a test for the employment status.

In which category would gig workers typically be classified and on which basis (e.g. case law, statutory law, etc.)?

According to Italian law, workers in the gig or sharing economy can be classified as either (i) subordinate employees or (ii) self-employed workers, or perhaps (iii) as a third category, being "collaborative/para-subordinated/semi-subordinated" workers (in Italy referred to as “co.co.co.”). The Italian Act no. 128/19 provides that gig workers whose co.co.co. relationships result in job performance being personal and continuous and whose job execution methods are organised by the client are subject to the rules set for subordinate employment. That said, gig workers in Italy are almost always hired through a self-employment contract: they perform their activity by using their own vehicles and tools and, above all, they are free to choose whether or not to carry out the order/activity for the client they work for (which is usually a web platform).

Nevertheless, recent case law states that food delivery workers (“riders”) have to be classified as “co.co.co.”/subordinate workers subject to the rules set for subordinate employment.

Are there any major developments ongoing or expected in relation to employment status in the context of the gig economy (e.g. in case law, national law, etc)?

At the end of 2019, the Italian Government issued a new Act (no. 128/19) aimed at guaranteeing a minimum level of protection for gig economy workers hired under self-employment contracts and bringing their position closer to that of subordinate employees.

Italy (2/2)

In particular, Act no. 128/19 consists of a series of provisions including:

- mandatory written form for individual contracts, with penalties in the event of non-compliance
- minimum remuneration to be determined by the NCLA; in the absence of such NCLA provisions, gig economy workers cannot be remunerated on a deliveries-made basis but must be guaranteed a minimum hourly fee, based on the NCLA provision that applies in similar or equivalent sectors;
- compulsory insurance coverage by INAIL (National institute for insurance against industrial injuries) for accidents at work and occupational diseases.

These provisions entered into effect on 2 November 2020.

Are there any other important remarks in relation to employment status, specifically within the context of the 'platform or gig economy'?

The Italian Supreme Court ruled (decision no. 1663/2020) that gig economy workers (i.e. riders) can be classified as "co.co.co.", meaning that they are subject to the rules set for subordinate employment.

In particular, the Supreme Court ruled that even when riders are classified as collaborators/semi-subordinate workers, if their job performance is personal, continuous and organised by the client (as to the execution methods), the employment status of subordinate worker must be recognised.

The Court stated that the most recent Italian regulation (Act no. 128/19, see above) guarantees gig workers the same protection as that enjoyed by subordinate workers, in line with the general approach of the reform, in order to protect workers considered to be in conditions of economic "weakness", operating in a "grey area" between autonomy and subordination, but still considered worthy of homogeneous protection.

The Court of Palermo has even considered in its ruling no. 3570 dated 24 November 2020 that the previous case-law on this matter (according to which the pure subordination of "riders" must be ruled out because they can choose whether and when to work) is unacceptable and, as a consequence, these relationships must be considered as complete and genuine subordinate employment. This was based on the assumption that digital platforms must be considered as real business, since they not only put users in contact with each other, but also carry out a real economic activity.

In February 2021 Milan prosecutors announced that they had ordered the four main food delivery platforms (i.e. UberEats, Deliveroo, Just Eat, and Foodinho-Glovo) to officially hire their workers (60,000 in total) as employees and pay a total of 733 million EUR in fines. The public prosecutor's office argued that the working conditions were inadequate and that there were several elements to conclude that the workers were fully integrated into the companies and that they were subject to the platform's authority (e.g. the use of algorithms to determine the number of gigs somebody could perform). It is not yet clear what the platform's reaction to these conclusions will be and whether the reasoning of the prosecutor's office will hold up in court.

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Norway

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Norway

Please describe the different types of employment status (i.e. employee, self-employed, or other) that exist in your national law and, where applicable, explain how they differ.

According to case law and the text of the debates leading to the Working Environment Act ("WEA"), some of the decisive factors are:

- Who is responsible/carries the risk for the final work result?
- How many job suppliers does the person who claims to be self-employed have? If there is only one, this is a factor that may indicate that there is in reality an employer and not a work supplier relationship.
- How long has the work relationship lasted?
- Who pays taxes and insurance premiums?
- Who instructs how the work is to be carried out? If the person concerned is obliged to submit to the employer's management and control of the work, this may indicate that the relationship between the parties in reality is an employment relationship.
- Who owns the equipment used to perform the work?
- Can the relationship between the parties be terminated with a specific notice period?
- Is it possible for the person concerned to use assistants/helpers at their own expense?

The conclusion in terms of whether or not the set-up should be considered as an employment relationship is made on the basis of an overall assessment of the concrete circumstances of the relationship between the parties. It is the legislator's intention that those in need of the protection provided by the WEA, the Holiday Act etc. should be protected by those acts, and the definition of employee/employment relationship must therefore be given a broad interpretation.

In which category would gig workers typically be classified and on which basis (e.g. case law, statutory law, etc.)?

Workers in the gig or sharing economy can be classified as either employees or self-employed workers, depending on an overall assessment of the factual realities of the case.

Are there any major developments ongoing or expected in relation to employment status in the context of the gig economy (e.g. in case law, national law, etc)?

There are no major developments to report so far. There is a study group for the Ministry of Employment whose task was to examine whether the current legislation is sufficiently agile to respond to the gig challenges. The working group concluded that, as for now, there is no need for legislative changes.

There have been some Uber cases, but these were handled by the police as issues of violation of the legislation on driving permits (no assessments under employment or tax laws).

Are there any other important remarks in relation to employment status, specifically within the context of the 'platform or gig economy'?

N/A.

Gig Economy 2021

United Kingdom

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United Kingdom (1/2)

Please describe the different types of employment status (i.e. employee, self-employed, or other) that exist in your national law and, where applicable, explain how they differ.

In the UK, an individual doing paid work falls into one of three categories: an employee, self-employed and an intermediate category called worker. In determining the status of an individual, it is necessary to look at a whole range of factors and not merely at any written contract that may be in place between the parties. There are three main factors:

1. Mutuality of obligation: is the engaging entity obliged to offer, and is the individual obliged to accept, any work?
2. Personal service: is the individual obliged to perform services personally, or do they have an unlimited right to provide a substitute?
3. Control: what level of control is exercised by the engaging entity over the performance of the services?

In addition to the above, other relevant factors that are taken into account include the level of financial risk taken on by the individual in providing the services; the degree to which the individual is integrated into the engaging entity's organisation; and whether the individual provides their own equipment.

The same tests apply to determine whether someone is self-employed, a worker or an employee, but it is more difficult for an individual to demonstrate that they are an employee rather than a worker.

In which category would gig workers typically be classified and on which basis (e.g. case law, statutory law, etc.)?

An individual in the gig or sharing economy can fall into any of these three categories depending on the circumstances of their engagement. There are no special rules for the gig or sharing economy in determining employment status. Over the past 12 months, there have been a number of highly publicised employment tribunal cases in the UK (including a Supreme Court decision) where individuals who have been labelled by the parties as self-employed have been found to be workers in reality.

Are there any major developments ongoing or expected in relation to employment status in the context of the gig economy (e.g. in case law, national law, etc)?

There are a number of recent and expected changes.

- Case law: The Supreme Court determined an employment status case on the basis that the substance and reality of the working arrangements are more important than the written contractual terms between the parties. In this case, whilst the legal documentation described the individuals as self-employed, the court determined that the substance of the arrangements meant they were actually workers.

United Kingdom (2/2)

- Changes to tax rules for the engagement of PSCs – "IR35 rules": From 6 April 2021, all medium and large sized companies in the private sector who are provided with the services of an individual through an intermediary (typically a personal service company) must determine whether the individual would have been an employee of the company but for the existence of the intermediary. The company and other entities in the contractual chain have various obligations depending on the outcome of the status determination and where the entity sits in the contractual chain. These include administrative obligations and tax and NICs withholding obligations.
- Further change in the UK's contingent worker landscape is expected to come from the Government's plans to implement the proposals in its Good Work Plan. These changes are proposed to include the introduction of stronger state enforcement of worker rights (such as holiday pay) through a new single market labour enforcement body. In the longer term, the Good Work Plan envisages greater alignment between the tax and employment rights regimes.
- In May 2021 media reported that Uber had made a deal with the GMB trade union for its ride-hailing service (the deal does not (yet) apply to Uber Eats delivery riders). In the deal it was agreed that GMB could represent drivers (even if they had lost access to the app) and would have frequent access to drivers' meeting hubs and to local management. Drivers would be offered the possibility to sign up to take part in collective bargaining. Uber is the first gig economy platform in the UK to recognise a trade union.

Are there any other important remarks in relation to employment status, specifically within the context of the 'platform or gig economy'?

In the UK, the issue of employment status is a hot topic with much media interest and many employers reflecting on how contingent workers fit in with their overall workforce strategy. Pressures for change are coming from the introduction of the IR35 rules (with many contractors predicted to move away from a personal services company model), the recent Supreme Court decision regarding worker status and the Government's Good Work Plan.

Gig Economy 2021

Spain

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Spain (1/3)

Please describe the different types of employment status (i.e. employee, self-employed, or other) that exist in your national law and, where applicable, explain how they differ.

Currently, labour courts decide on the nature of the relationship by considering historic laws (Workers' Statute that rules employment relationships and Act 20/2007 on self-employed work) and case law on the matter.

That is to say, in view of the circumstances and the presence of the characteristics of an employment relationship (dependence and subordination), the courts have to determine, depending on the circumstances in each case, whether the relationship with the worker is a labour relationship or a business relationship, and in the latter case, whether the employee is common self-employed or self-employed economically dependent (the so-called TRADE statute).

The basic principles to define whether the nature of a relationship is a labour relationship or a business relationship are:

- There is a presumption 'juris tantum' that the relationship is a labour relationship if the worker receives remuneration under the organisation and direction of the company.
- According to case law, there is a labour relationship if the individual:
  - renders services regularly on behalf of the company
  - earns a steady income
  - has to follow the instructions of staff of the company
  - has to comply with certain standards set by the company
  - does not reject services and can be identified as related to the company (e.g. through logos or publicity).
- No matter the name that the parties have given to the contract, in the event of a dispute, the relationship will be considered a labour relationship if there is evidence of dependence and subordination.

In view of the above, there are two main groups: the Workers' Statute, which regulates the rights and duties of employees, and the Self-Employed Workers' Statute Law, which regulates the rights and duties of self-employed workers.

The main differences are:

- **Dependency.** An employee is dependent on his or her employer, whereas a self-employed person is not.
- **Subordination.** An employee is subordinate to his employer, whereas a self-employed person is not.
- **Personal.** In the case of employees, the worker must carry out the work himself, while the self-employed can delegate functions.

In practice the main differences between both types of workers is that employees falls within the scope of the Workers Statute whereas self-employees' conditions are governed by the autonomy of the parties.

Spain (2/3)

In which category would gig workers typically be classified and on which basis (e.g. case law, statutory law, etc.)?

A new piece of legislation was introduced and will enter into effect on 12 August 2021. This so-called “Rider’s Law” forces all electronic platforms to draw up regular employment contracts with their gig workers, carrying out deliveries.

The new Rider’s Law typically envisages all forms of activities requiring workers to carry out the distribution of consumer goods at the behest of a digital platform that has the ability to exercise any business powers, management and/or control (either directly or indirectly) over the performed activities or over the working conditions through an algorithmic management. Activities that meet this definition will fall into the scope of the Rider’s Law, thus creating the obligation to conclude an employment contract.

Moreover, recent labour court decisions against major companies operating in the Delivery sector whose activity is based on riders’ services have confirmed that the relationship between riders and companies is an employment relationship, as riders’ conduct meets the characteristics of subordination and dependence, typical of the employee status (STS 2924/2020 25 September). That said, each individual case needs to be considered to determine whether or not an employment relationship exists.

Are there any major developments ongoing or expected in relation to employment status in the context of the gig economy (e.g. in case law, national law, etc)?

The aforementioned Rider’s Law was published in the Spanish Official State Gazette on 12 May 2021 and will enter into effect on 12 August 2021.

Companies that fall under the scope of the Law and need to comply with its provisions will be granted a three months’ transition period to take all necessary actions in order to prepare for full compliance and to register with the Social Security Authorities.

Moreover, platforms in scope will have to inform their workers on how the underlying algorithms work and how they take typical HR decisions (e.g. termination of the contract, ban from the platform, evaluations and ratings, etc.).

Spain (3/3)

Case law

On 25 September 2020 the Spanish Supreme Court ruled that the riders of the delivery company Glovo are employees and not self-employed workers or economically dependent self-employed workers (TRADE). The Court came to this conclusion because it argued that Glovo coordinated and organised its services. Workers were not at liberty to organise the activity by themselves, nor negotiate prices or conditions, nor did they receive any remuneration from the end customers. Due to a complete lack of autonomy, there was no doubt – according to the Supreme Court – that the riders were in fact regular employees.

In January 2021 Deliveroo was forced to register 748 of its riders in Barcelona with the Spanish Social Security Authorities and thus consider them as employees, following a court order. The local court based its judgement for a large part on the above mentioned ruling of the Spanish Supreme Court. Also in this case the court argued that there was a lack of autonomy and there were several elements indicating a link of subordination (e.g. the option to impose penalties when rejecting orders). Deliveroo has already confirmed that they do not agree with the judgment and the reasoning of the court and that they will appeal against the decision.

Currently similar cases are also pending in Madrid (542 Deliveroo riders) and Barcelona (more than 1,000 Glovo riders). Hearings and trials are scheduled for 2022.

It is expected that the introduction of the new "Riders Law" will reduce the number of discussions on the employment status of gig workers and will leave little to no room for loopholes.

Are there any other important remarks in relation to employment status, specifically within the context of the 'platform or gig economy'?

N/A.

Gig Economy 2021

Sweden

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Sweden (1/2)

Please describe the different types of employment status (i.e. employee, self-employed, or other) that exist in your national law and, where applicable, explain how they differ.

The term employee has not been defined per se in Swedish legislation, but is subject to interpretation of legislative preparatory work and case law. Generally, an employment relationship is typically deemed to exist if:

- The worker is expected to personally perform the work.
- The contractual relationship is of a lasting nature.
- The worker is prevented from performing work for another company.
- The worker is under the company's control and is bound by the company's continuous instructions.
- The worker uses the company's property (e.g. computers and other equipment) in order to perform the work.
- The worker performs the work within the company's premises or at another place assigned by the company.
- The worker's compensation is predetermined and guaranteed.
- The worker is compensated for any expenses incurred in performing his/her duties.

The term self-employed is used to describe a person who has an account with a self-employment company. These are usually freelancers or consultants who wish to acquire their own assignments but outsource the accounting and do not have the legal liability that being a sole trader entails. Self-employment is in fact an employment as the person becomes an employee of the self-employment company for the duration of each assignment.

In which category would gig workers typically be classified and on which basis (e.g. case law, statutory law, etc.)?

If an employee is employed part-time pursuant to the Swedish Employment Protection Act and applicable Swedish legislation, the employer is obliged to ensure the employee a minimum amount of working hours. Furthermore, if the employment contract stipulates a certain amount of hours per month and these cannot be offered by the employer, the employer is still obliged to pay the employee a salary as if the employee had worked the minimum number of hours. If the worker is regarded as a part-time employee, the employer will be obliged to pay social taxes etc.

A common set-up is that of self-employment companies that hire workers who do not have a corporate tax card but who wish to freelance. The worker is responsible for performing the work whilst the company does the billing. However, the company still has to pay social taxes as well as grant the worker the above minimum rights.

The most common set-up to avoid any social taxes etc. is a consultancy agreement. If the part-time worker is regarded as a consultant, the company is not obliged to pay any social taxes or observe the notice periods set down in the Employment Protection Act. In such cases, the parties can freely agree on working hours etc.

Sweden (2/2)

Are there any major developments ongoing or expected in relation to employment status in the context of the gig economy (e.g. in case law, national law, etc)?

In 2012, Sweden implemented the Agency Work Act, which strengthened the rights of agency workers. Self-employment companies are currently under pressure from trade unions since the trade unions wish to strengthen the employees' rights in respect of notice periods and minimum wages. However, there are no upcoming major legislative changes in the context of the gig economy.

In the autumn of 2020, the Swedish Work Environment Authority initiated an inspection of +/- 50 Swedish gig companies who operate and offer services through apps (such as Uber, Foodora and Yepstr) in order to establish whether these app based gig companies are to be considered employers or principals. The inspection has been requested by the Swedish Government as part of an investigation into the working conditions within the gig industry. The aim of the inspection is to assess the quality of the gig workers' working environment and if the gig companies are responsible for the working environment in their possible capacity as employers.

Are there any other important remarks in relation to employment status, specifically within the context of the 'platform or gig economy'?

When determining the set-up as regards the gig economy, it is crucial that the difference between the notion of employee and that of consultant is kept in mind in order to avoid any tax related consequences and damages. In the autumn of 2020, the Swedish Work Environment Authority ruled that the company Taskrunner was to be classified as an employer (with employees) rather than a principal (with hired consultants). In addition to any tax implications, this also entails a responsibility to continuously map and assess the working environment. Taskrunner was also issued a fine of SEK 75,000 for not having met the requirements of mapping and assessing the work environment. Taskrunner has appealed against the ruling, saying that they should not be classified as an employer, and the matter is yet to be settled.

Gig Economy 2021

The Netherlands

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The Netherlands (1/2)

Please describe the different types of employment status (i.e. employee, self-employed, or other) that exist in your national law and, where applicable, explain how they differ.

In the Netherlands, an employment relationship needs to have three elements: labour (services provided), pay, and a relationship of authority (between the employee and the employer).
If these criteria are met, the contract of services between an entity and the self-employed worker qualifies as an employment agreement.

Whether this is the case, is determined based on the actual execution of the contract as well as considering all facts and circumstances. The relationship of authority forms the most essential distinction between the employment agreement and the contract of services.

In which category would gig workers typically be classified and on which basis (e.g. case law, statutory law, etc.)?

Workers in the gig or sharing economy in the Netherlands can be classified as employees or as self-employed workers, depending on the facts of the situation in question. Employees are generally defined as individuals working under an employment agreement. Self-employed workers are individuals who work under a contract of services. The primary difference between self-employed workers and employees is that self-employed workers are not subject to any relationship of authority. Self-employed workers do not have the same level of rights and protection as employees.

The Netherlands (2/2)

Are there any major developments ongoing or expected in relation to employment status in the context of the gig economy (e.g. in case law, national law, etc)?

The Dutch government believes that many self-employed workers in the gig economy qualify as employees. This is because many platforms exercise a certain form of authority that is expressed not so much in 'hard' instructions, but through incentives and nudges, amongst other things. In addition, self-employed workers are usually clearly embedded in the organisation, or even, form the core of the organisation. The government is therefore considering the following:

- Investigating the possibilities of introducing a legal presumption for self-employed workers who provide services via the gig or sharing economy. This means that such a worker, whereby the software application exercises some influence on the way in which work is obtained and/or performed, is presumed to be performing these jobs on the basis of an employment agreement. In this way, a self-employed worker can more easily claim the protection of an employment agreement. Nevertheless, it remains possible for a self-employed worker to continue working as a self-employed person, if he/she can prove with facts and circumstances that there is actual work outside the scope of an employment agreement. In that case, the legal presumption is rebutted.
- The above-mentioned plan is being discussed with the European Commission, with the aim of making an elaboration of the legal presumption tenable under European law.

In 2020, the Supreme Court concluded that the intention of the parties is no longer relevant when assessing the qualification of the employment relationship. It only concerns the factual circumstances in determining whether there is an employment or self-employed worker relationship. This means that the parties cannot themselves determine whether a self-employed worker is admitted to the employment system.

With this judgment in mind, the Court of Appeal ruled that Deliveroo's workers qualify as employees, rather than self-employed workers. This means that Deliveroo's workers can claim an employment agreement. Deliveroo has indicated that it will appeal to the Supreme Court.

Are there any other important remarks in relation to employment status, specifically within the context of the 'platform or gig economy'?

In January 2021, the online web module was introduced that provides more clarity on the question of whether work is performed within or outside the scope of the employment agreement. The module is intended as a pilot and will be evaluated in the summer of 2021. Currently, the module is an informative tool. No rights can yet be derived from it.

Conclusion

We are living in a continuously changing society, which is not only reflected in the way we conduct business but also in people's mindsets and the way we work. With the COVID-19 pandemic as the ultimate catalyst, the latent needs of our society have surfaced. As a result of massive homeworking, employees are now also clearly indicating that they are looking for a flexibility that they cannot obtain within the current legal framework. As a result, the concept of standard employment status is coming under increasing pressure. The evolution towards the new ways of working such as the gig economy is therefore clearer than ever.

Due to the rising popularity of gig work, the case law with respect to the social status of such workers has also increased. In almost all countries, governments and judicial bodies rule that gig workers should qualify as employees. However, the employment status often goes hand in hand with protective measures that don't provide the freedom that gig workers and platforms – i.e. consumers – long for.

Countries leave it up to the competent courts to decide over the social status of gig workers and as a result we shouldn't be surprised that we keep coming back to employment statutes as a result. We see countries holding on to their often dichotomous model of employee/self-employed, trying to equalise the work conditions for both, with employee working conditions as the norm. The judicial system can only make use of the legal framework that is in place and so we cannot expect innovative and ground-breaking case law if courts are making their judgements based on antiquated legislation.

In our opinion, the answer doesn't lie in obtaining additional case law but rather a need to rethink labour law. We need a legal framework that welcomes flexibility and truly questions whether the binary distinction employee/self-employed is still relevant in today's and certainly tomorrow's labour market?

If a company wants to provide social protection to its gig workers, they have no other choice but to resort to an employee status. This clearly shows the inherent flaws of our legal framework. Holding on to this strict division is a disadvantage for the companies but mainly for the gig workers themselves. Considering that an increasing number of gig workers perform gig work as a main professional activity, it is essential that we adapt the current legislation and evolve.

We welcome initiatives such as the ones we have seen in France and Italy, where governments don't shy away from a self-employed status and try to provide these workers with additional social protection. These are hybrid solutions where various stakeholders' needs are met and which we feel are sustainable in tomorrow's world. It is disheartening to see that most countries do not seem to succeed in combining flexibility and the protection of workers in one legal concept, moving away from statutes and towards content.

In short, the topic of the social status of gig workers is top of mind but no original advancements have been forthcoming during the past year. Taking the significant developments towards an employment status into consideration, we are questioning how innovative business ideas are being fostered in our European labour market. It's up to "us" to nurture those who are willing to take the jump and contribute to new ways of working. It is up to European and local authorities to roll up their sleeves and re-evaluate our employment market. They hold the key to providing Europe (and the UK) with labour law and a labour market that creates prosperity and enables innovation.

Thank you

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