Revista CIDOB d'Afers Internacionals
n.º 131, p. 117-136
ISSN:1133-6595 | E-ISSN:2013-035X
DOI: doi.org/10.24241/rcai.2022.131.2.117/en

Reception date: 25.11.21
Acceptance date: 03.05.22

Gig economy workers in the European Union: towards change in their legal classification

Trabajadores de la economía gig en la UE: hacia un cambio en su clasificación jurídica

Tanel Kerikmäe
Professor of European Legal Policy and Law & Tech, TalTech -Tallinn University of Technology.
tanel.kerikmae@taltech.ee. ORCID: https://orcid.org/0000-0002-5972-827X

Aleksi Kajander
Junior Researcher, TalTech-Tallinn University of Technology.
aleksi.kajander@taltech.ee. https://orcid.org/0000-0001-7164-2973

How to cite this article: Kerikmäe, Tanel and Kajander, Aleksi. "Gig economy workers in the European Union: towards changing their legal classification". Revista CIDOB d'Afers Internacionals, issue 131 (September 2022), p. 117-136. DOI: doi.org/10.24241/rcai.2022.131.2.117/en

Abstract: While the classification of gig economy workers under European labour law has been controversial for many years, the COVID-19 pandemic made it a priority. The role of the gig economy has changed: from being an employment option that provides supplementary income, it has become many people's main income source, which is why the European Union (EU) announced its intention to address this issue. In 2021, there was intense activity around gig economy jurisprudence across Europe, with supreme courts in several member states making judgements and new laws classifying the participants in this sector of the labour market. This paper draws on three case studies – from the UK, the Netherlands and Spain – to explore recent developments in gig economy jurisprudence and to draw conclusions for the future.

Key words: European Union, gig economy, digital platform, supreme court, labour law, employment, jurisprudence, legal classification, ICT

Resumen*: Aunque la clasificación de los trabajadores de la economía gig lleva muchos años siendo motivo de controversia en el marco del derecho laboral europeo, la aparición de la pandemia de la COVID-19 la ha convertido en una prioridad. El papel de la economía gig ha cambiado: de ser una opción laboral para complementar los ingresos se ha convertido, para muchos, en la fuente principal de ingresos, por lo que la Unión Europea (UE) anunció su intención de abordar esta cuestión. En 2021, en el ámbito europeo, se realizó una intensa actividad en referencia a la jurisprudencia de la economía gig, con sentencias de tribunales supremos de varios estados miembros y nuevas leyes que han clasificado a los participantes en el mercado laboral de este sector. Este artículo parte de tres estudios de caso –Reino Unido, Países Bajos y España– para explorar los desarrollos recientes en jurisprudencia de la economía gig y sacar conclusiones para el futuro.*

Palabras clave*: Unión Europea, economía gig, plataforma digital, tribunal supremo, derecho laboral, empleo, jurisprudencia, clasificación jurídica, TIC*

The development of information communication technologies (ICT) has enabled the development of platforms that connect both parties of the labour equation, those in need of a service and those willing to provide it, more effectively in terms of volume and profits. As a consequence, to paraphrase one crowdsourcing company chief executive officer (CEO), whilst in the past before it was difficult to find someone, have them complete a 10-minute task and fire them afterwards, this is now possible, thanks to the platforms (Kirven, 2018: 259). This new kind of working environment has been called the 'gig economy' as it is centred around short term and task based (Bulian, 2021: 107) work by actors, who receive payment for each task they perform (Davies, 2020: 251).

The 'gig economy' has commonly been associated with benefits such as 'freedom' from the '9-5' schedule (Snider, 2018: 564), savings for employers by avoiding paying costs associated with workers (*such as unemployment insurance contributions*) by using independent contractors (Azar, 2020: 414) and improved work efficiency (Schiek and Gideon, 2018: 275). However, on the other hand these arrangements have been criticised for exploiting individuals and people providing these services by enabling employers to legally 'evade virtually every benefit attained by workers over the last 100 plus years' (Snider, 2018: 564). The legal aspect of this relates to classification of actors who provide their labour in the 'gig economy'; digital platforms aim to avoid classifying their labour actors[1] as 'workers' as regards labour terminology and thereby granting access to the ensuing workers' benefits, preferring to classify their labour actors as 'independent contractors' or 'self-employed' and thereby avoiding paying additional expenses associated with employees. The legal system is often accused of being behind technological developments and their associated legal issues, which appears to be the case globally for this dilemma of classifying 'gig economy' labour actors (Snider, 2018: 569). Platforms are presently engaged in numerous legal disputes in various jurisdictions regarding classification of their labour actors. Furthermore, the current state of affairs has led to a bleak outlook and perspective, whereby regardless of the outcome of such cases, platforms will merely adjust their terms of service to ensure that their labour actors will not

The 'gig economy' has commonly been associated with benefits such as 'freedom' from the '9-5' schedule, savings for employers and improved work efficiency. However, on the other hand these arrangements have been criticised for exploiting individuals and people providing these services.

1. The concept of 'labour actors' will be defined later on.

be considered as 'employees' (Malin, 2018: 411), effectively forcing the law to continue being the chaser here.

Based on a 2016 study in the European Union (EU), we may argue that concern for misclassifying 'gig economy' labour actors was somewhat exaggerated, as a majority (58 %) of labour actors were augmenting their income rather than completing tasks out of necessity (Bulian, 2021: 112). Similarly, the 13 EU Member State (MS) study conducted between 2016 and 2019 by the University of Herefordshire reached similar conclusions, whereby platform work is an additional source of income and being a platform worker is not a primary identity for most people. However, these conclusions were drawn before the Coronavirus (COVID-19) pandemic which had widespread effects throughout economies and societies, leading to an estimated 8 % decline in Gross Domestic Product (GDP) of the EU compared to 2019 (Römisch, 2020: 1). While impacts varied based on the sector, service sector industries such as restaurants, hotels and the retail trade were especially harshly affected as they were forced to close temporarily or were subject to restrictions (Römisch, 2020: 1). Furthermore, the negative consequences tend to 'pile up', whereby countries hardest hit by the pandemic are likely to suffer the worst effects on employment, which exacerbated existing issues such as high unemployment and precarious work (such as temporary contracts) (Fana *et al.*, 2020: 402). Considering that the 'gig economy' generally does not provide long-lasting contractual employment as could be considered the 'traditional' type of employment, it stands to reason that the number of individuals relying on the 'gig economy' has increased during the pandemic in Europe.

The EU Commission's announcement on 24 February 2021 on improving working conditions in platform work gives credence to this reasoning, as it is mentioned the platform economy is 'growing' with 'around 11% of the EU workforce' (Troitiño, 2022) having provided services through a platform, and that the COVID-19 crisis 'accelerated digital transformation and expansion of platform business models' (EU Commission, 2021: 1). Thus, it is reasonable for us to state, that effects of COVID-19 on the legal framework of EU labour laws require examination. Consequently, the research questions of this article are derived from what are current approaches towards the regulation of labour actors in the gig economy in the EU and what are the ongoing or expected developments in the law? We expect that the COVID-19 pandemic's impact on developments and the pre-pandemic situation mapped in 2019 by the research group of TalTech Law School (Kerikmäe *et al.,* 2019) is, are and will be significantly different.

The authors are examining three recent significant case studies of EU Member States judicial or legislative actions during the COVID-Pandemic in 2021. Consequently, three Supreme Court judgements were selected as they represent the highest level of attempts to classify 'gig economy' labour actors, possibly

in the EU perspective, barring EU action itself which as of yet is forthcoming. These three being the UK's Supreme Court judgement on Uber, and judgements of Spain's 'Rider Law' and the Netherlands' *Deliveroo v FNV*.

The 'Gig Economy' and COVID-19

While the 'gig economy' may lack a universally accepted definition (Moyer-Lee & Kountouris, 2021: 6) this article will use an amalgamation of existing definitions, which is short term and task based (Bulian 2021: 107) work by labour actors who are paid for each task they perform (Davies, 2020: 251) co-ordinated through an app that serves as a platform to connect labour actors to clients. Which is not to say that other definitions such as a 'labour market characterised by workers who are considered independent contractors and thus carved out of employment and labour law protections' (Dubal, 2017: 740) are incorrect, however, to reflect the uncertain nature of the 'workers' status this article prefers using the term 'labour actor' to retain a neutral tone and highlight ambiguity. For using a term such as 'employee' or 'independent contractor' which are generally at the heart of the debate, may serve the effect of normalising use of one or the other in this controversial context.

While the 'gig economy' may lack a universally accepted definition this article will use an amalgamation of existing definitions, which is short term and task based work by labour actors who are paid for each task they perform co-ordinated through an app that serves as a platform to connect labour actors to clients.

However, the range of economic activities covered by the term 'gig economy' is vast, ranging from accommodation, transport services (food couriers, taxi services) to dog walking. However, it cannot be argued that all economic activities are equally represented in legal disputes, seemingly a majority of cases, including those which this article examines, involve transport services. The reasons for overrepresentation of transport services are numerous, with many being readily derivable from existing literature, such as the strict control exercised by the platform over 'their' drivers, for example in the case of Uber where potential drivers are interviewed, have acceptance rate requirements and vehicle requirements (UKSC, 2021: par. 14: 15, 18). Which as this article will later examine, for some jurisdictions contributes to such labour actors being classified as 'employees'. However, the underlying threat posed by 'gig economy' companies such as Uber, Lyft and others toward 'traditional' professional taxi drivers should not be ignored in this equation. For by utilizing cost savings

provided by not employing drivers, gig economy 'taxi' services have been able to undercut prices of traditional professional taxi drivers, as well as encroach on traditional 'monopolies' of taxi companies in many countries, such as in Croatia (Pepic, 2018: 133). As a result, 'traditional' taxi companies have begun to face 'uncomfortable' competition from the 'gig economy', which has additionally resulted in traditional taxi drivers transferring to the 'gig economy' by working for platforms such as Uber (Pepic, 2018: 131,134).

Furthermore, considering that the advent of Global Positioning Satellite (GPS) technology has eroded usefulness or any absolute requirement for 'the knowledge' which traditionally restricted outsiders and 'amateurs' from becoming effective taxi drivers, this skill barrier or hurdle to becoming a taxi driver has arguably been lessened. As a result of this technological development and advent of the 'gig economy', the taxi sector as an industry was subject to major transformation. By comparison, other areas of the 'gig economy' may be less controversial because barriers to entry were lower and hence advent of the platforms that form the backbone of the 'gig economy' did not have a similarly transformative effect. For example, the sector of the gig economy dealing with daily tasks and chores, such as 'AskforTask' is likely to result in less controversy as there was a low entry-level barrier before the platforms for anyone to join the market as a labour actor (*if any barrier at all*), and as such the effect of the 'gig economy' introducing greater competition (but also making finding tasks easier) was less threatening to existing labour actors in the field. By contrast, in the taxi industry, existing professionals suddenly became threatened by the influx of 'gig' drivers, who were able to provide a comparable service at a lower cost with the aid of GPS technology, which resulted in protests over Uber when it was introduced (Allman, 2016; Kyvrikosaios, Konstantinidis, 2018; BBC, 2018)

Moreover, not all activities in the 'gig economy' were filled with professionals to begin with or at all, for example the 'Barking' app allows parking space holders to rent out their own parking space when they do not need it, such as when they are working. For such an activity, it seems highly unlikely that many used an owned parking space as their primary source of income, but rather as a means to augment their existing income with the app. Consequently, such a niche market of 'gig economy' is unlikely to spark much controversy regarding classification of labour actors, as there is not even an exchange of labour. For this reason, while such 'sharing' arrangements are often considered to be a part of the 'gig economy' (Chen *et al.,* 2021: 1), with notable examples such as AirBnB, for the purposes of this paper the primary focus is on 'task based' sectors of the 'gig economy' where there is an exchange of labour in order to explore the question of classification of labour. Consequently, when examining the impact of COVID-19, which negatively impacted the accommodation

sector (ibid.: 15), they are less relevant from a labour perspective than the impacts on fields involving an exchange of labour. However, the impact on accommodation mentioned above, should nevertheless be considered part of the larger impact on society, whereby individuals who became unemployed due to the Coronavirus pandemic are not able to use their assets such as through renting their apartment to generate income, but rather need to resort to exchanging their labour, which is relevant for the context of this article. In this vein, research indicates that accommodation and taxi service sectors were hardest hit by the 'gig economy', with food delivery, freelance and entertainment sectors increasing during the pandemic (Batool *et al.*, 2020: 2.383).

Overall negative impacts can be significant, as for example 'unemployed' 'gig economy' drivers who are not classified as employees are outside the safety net of basic labour law protection, if they have been classified as 'independent contractors' (ibid.: 2.384). Moreover, pricing for the services, and thus the income of the labour actor is often calculated using an algorithm, where an oversupply of labour will increase both competition for available tasks and additionally decrease the price of the service. Therefore, this may result in a destructive income spiral for those attempting to subsist through the 'gig economy' during the Coronavirus pandemic.

Therefore, if the 'gig economy' in fact does result in 'exploitative' working conditions, arguably they are most likely to occur when labour actors are not seeking to augment their normal income but must primarily rely on the 'gig economy'. As a result, the classification of 'gig economy' workers who are engaged in task based labour exchanges is of considerable importance at the time of writing, as the pandemic restricts functioning of society.

The United Kingdom: the Uber case

Before raising the inevitable 'Brexit' criticism of involving the United Kingdom in this paper exploring the 'gig economy' in an EU context, the landmark *Uber BV and others v Aslam and others* ('Uber case') case began in 2016 while the UK was still in the EU. Therefore, its final resolution in 2021 may arguably have relevance and bearing on the EU approach to treatment and classification of 'gig economy' labour actors, as it demonstrates one (*former*) MS's final classification. Hence, it may be used as a reference for future EU action on the matter, even if this former member state has since left the EU (but still continues to enter into endless legal disputes with the EU).

Under the 1996 national law, a 'worker' is defined in section 230 (3) of the Employment Rights Act of 1996, further subdivided into two branches (a) and (b). Under (a) a worker is defined as an individual who works under a 'contract of employment', however under branch (b), the definition is more elaborate. Under (b) 'any other contract' will suffice, which may be 'express or implied', under which an individual 'perform[s] personally any work or service' and who due to the contract does not have the status of a 'client or customer'. The definition in branch (b) is evidently broad as there are barely any formal requirements for the contract, with its type being irrelevant (i.e. does not need to be an 'employment contract'), nor must it be express or even written down. Moreover, while the definition does not refer to 'control' over the employee as a defining factor of a 'worker', this is incorporated into case law, as will become apparent in our analysis of *Uber BV and others v Aslam and others* case law.

We may examine culmination of the Uber case against this backdrop. The case originates from 2016 when Claimants submitted to the employment tribunal that they qualify for worker status, and thus for associated worker's rights such as national minimum wage (UKSC, 2021: par. 1). Uber contested this classification and claimed that drivers were 'independent contractors', which eventually led to the case being heard by the Supreme Court of the United Kingdom, which issued its judgement on 19 February 2021.

The party collectively called 'Uber' is worth discussing, as are the specific agreements. The 'Uber' party is in fact, Uber B.V ('UBV') which is a Dutch corporation and is the parent company of the other two; the two others being Uber London Limited (ULL), a UK Registered company, and Uber Britannia Limited (UBL) also a British company. The drivers were required to sign a 'partner registration form', whereby they agreed to comply with 'Partner Terms' of UBV as well as a 'Services Agreement' that was introduced in 2015 (ibid.: par. 22). The latter is of specific interest, as it is between UBV and an 'independent company [the driver]' referred to as a 'customer' (ibid.: par. 23). The aforementioned 'Services Agreement' states that UBV provides 'electronic services' i.e. access to the Uber App and payment services (UBV pays the driver weekly), and in return the 'customer' provides transportation services to 'users' (passengers) (ibid). In addition, the agreement significantly states that the 'Customer' 'acknowledges and agrees' that UBV 'does not provide transportation services' and that the 'Customer' is responsible for providing such services and thus are in a 'legal and direct business relationship' with the user (ibid.: par. 24). Which implies that the 'Customer' retains control over the transportation service, which as we will describe below is of significant importance. Consequently, it is evident how UBV's 'Services Agreement' has been written for UBV to distance itself from any transport services, merely

categorizing itself as providing access to the platform and nothing more. Furthermore, it is worth noting what is not in the Services Agreement - neither of the other two parties, i.e. ULL or UBL.

The role of the other two, ULL or UBL, is that of an 'intermediary' between the 'transport provider'[driver] and the user as is stated in the 'Rider Terms' which all users are required to accept before using the application (ibid.: 27-28). A similar disclaimer to the UBV written agreements is found in the 'Rider Terms', where it is explicitly stated that UBV (or ULL) 'does not itself provide a transport service', similarly therefore distancing itself from any notion of UBV as a transport service. Under UK law, licence must be held in order to accept private hire bookings, hence ULL holds such a licence for London while UBL has one for the rest of the UK. Consequently, Uber claimed on the basis of the above agreements, that the contract is between driver and user, and no Uber entity is party to it, rather they only provide 'technology services' and payment services (ibid.: par. 43). The Supreme Court deconstructs Uber's argument that the Claimants cannot be considered 'workers', as the written contractual relationships demonstrate. Through a number of stipulations in case law, the Supreme Court highlights the purpose of statutes that protect 'workers' in the first place. In the Supreme Court's view the reasoning for this is the vulnerability of the 'worker', i.e. subordination and dependence on another, which is to say the degree of control the 'employer' exercises (ibid.: par. 87).

In the Uber case, the Supreme Court rejects the notion that merely including declarations which serve only to purposefully disqualify the other party from being considered a 'worker'.

This view is backed by reference to the CJEU, which also considers the existence of a 'hierarchical relationship' as 'the essential feature' of a contract between an employer and worker, with emphasis on the need to consider the 'objective situation' and 'all circumstances' of the work. Consequently, the 'wording of the contractual documents, while relevant, is not conclusive' (ibid.: par. 88). Therefore, in essence, the Supreme Court rejects the notion that merely including declarations which serve only to purposefully (at least on the surface) disqualify the other party from being considered a 'worker'. This is arguably a key feature in avoiding the sort of 'race' in the gig economy, where platform providers subtly change terms of the agreement(s) in order to keep disqualifying their labour actors as workers, for as long as the circumstances and reality remain the same, the type of teleological analysis which the Supreme Court employed would arguably result in the same qualification regardless of text changes in agreements. Thus, the Supreme Court arguably understood and upheld the very

purpose of the legislation to protect workers, which is to protect them regardless of wording of the agreement, stating they had either no or little say or protection from exploitation. Consequently, the platform must thereby either qualify their labour actors as workers with ensuing benefits or must make 'real' changes, to the extent they become 'individual contractors' with more autonomy in the relationship with the platform, and thereby prevent exploitation of labour actors either way.

On the issue of control that Uber held over its drivers, the Supreme Court highlighted five aspects which taken together led to the conclusion that Uber retained control (ibid.: par. 101), which can be summarized as follows. Firstly, Uber fixed the fare, which the driver could only lower, meaning they would have to pay it out of pocket thereby rendering it useless as a means of any meaningful driver control (ibid.: par. 94). Secondly, drivers must accept the standard form of written agreement by Uber, stating the terms for performing their services (ibid.: par. 95). Thirdly, drivers were restricted as to whether they accept or decline hires (*rides*), as not accepting would result in disciplinary measures and moreover they were unable to see the destination of the passenger before picking them up (ibid.: par. 94-95). Fourthly, Uber vetted vehicles used and provided the travel route, deviating from which is a significant risk for the driver to be rated poorly by users and so lowering their rating (ibid.: par. 98-99). Fifthly, the driver was prevented from forming any business relationship with the user, as the app was designed to prevent any contact details from being shared and drivers were specifically prohibited from exchanging contact details (ibid.: par. 100).

Consequently, taken together, based on the Supreme Court's decision to consider drivers as workers, Uber would need to take real steps in terms of the control they exercise to avoid classification of their labour actors as 'workers'. Moreover, we should add at this juncture, that the EU classified Uber as a transportation service in 2017 (Court of Justice of EU, 2017: 1), implying they too could see past declarations in contracts that Uber is 'not a transportation service'. However, before overgeneralisations of principles from the case for classification of labour actors across the EU are made, we should note how the case nevertheless was decided on specific circumstances, such as the level of control by Uber. While they may be generalizable for similar transportation related platforms, arguably these may be less useful for classifying others in different sectors. Nevertheless, the Uber case highlights the importance of looking past formal agreements and into the actual nature of the practical arrangement between the platform and its labour actors, which arguably will be a necessary mindset for a court to decide on classification of labour actors in the 'gig economy'.

The Netherlands: the Deliveroo case

Courts in the Netherlands were likewise occupied with matters relating to classifying labour actors in the gig economy, as their counterparts in the UK were during 2021. Two cases in particular stand out, in both of which the Federation of Dutch Unions (FNV, in its Dutch acronym) was one party; *Deliveroo vs FNV* and *FNV vs Uber*, with the former being decided by the Court of Appeal on 16 February and the latter on 13 September by the Court of Amsterdam. However, before delving into these cases, a brief background of labour law relating to the definition of a worker in the Netherlands is necessary.

Under the Dutch Civil Code, an employment agreement is defined under article 7:610 and which is usually raised during labour disputes relating to the gig economy. Under article 7:610, when one party ('employee') engages to perform work for a period of time for the opposite party ('employer') in exchange for payment, the resulting agreement is considered an employment agreement. Moreover, under 7:610a if work is performed for three consecutive months which amounts to a minimum of 20 hours per month, then there is a presumption of an employment contract or agreement. Moreover, the relationship of authority, i.e. 'control' is similarly important as it was in the UK when determining whether a person is a worker or an independent contractor (Rechtbank Amsterdam, 2019: par. 3.6). In addition, as a final point of convergence, the Supreme Court of the Netherlands ruled on 6 November 2020 similarly to the UK's Supreme Court, that the parties' intention is not decisive in determining whether or not a contract is classified as an employment contract (Hoge Raad, 2020: par. 3.3.2).

Against this backdrop, an interesting observation that while both the UK and the Netherlands ruled similarly for Uber Drivers in 2021, they returned opposing judgements for Deliveroo couriers. To summarize the Dutch courts' judgement on Uber, in essence the same aspects were decisive, such as while 'on paper' Uber drivers were 'independent contractors', the actual circumstances were consistent with an employment contract (*Uber vs FNV*, 2021: par. 34.). These being Uber's personal performance of work (ibid.: par. 22.) and as the court remarked the aspect, which is most characteristic and relevant, is a relationship of authority (ibid.: par. 25., 33). Therefore, in essence in the space of one year Uber's particular arrangement for their labour actors was confirmed to be consistent with those of 'workers' rather than for 'independent contractors' in both the UK and in the Netherlands. This would seemingly imply that at least in the case of the UK and the Netherlands, the approach classifying labour actors in the gig economy is quite similar, however, as will be demonstrated by the Deliveroo case(s), even small differences may lead to vastly different outcomes and results.

In the Dutch Deliveroo case of 2021, labour actors were classed as workers while in the equivalent UK case they were deemed independent contractors. To briefly summarize the facts of the Dutch case, Deliveroo is a platform providing an online meal ordering and payment system as well as a delivery service (Rechtbank Amsterdam, 2019: par. 2.1.). Initially, couriers held a fixed-term employment contract (ibid.: par. 2.2.), however in 2018 employment contracts were no longer renewed and instead two service agreements were offered, 'Regular' and 'Unlimited (ibid.: par. 2.4.). Under the former, a person could only earn a maximum of 603.92 euros (40 % of the minimum wage) due to VAT and tax considerations (ibid.: par. 2.4.). With the latter, the person could exceed this earning limit, and as such the two were colloquially referred to as 'hobbyist' and 'professional' contracts.

Deliveroo, used an algorithm called 'Frank' to determine which courier is assigned a delivery and other aspects such as the estimated delivery time, which is communicated to the customer (ibid.: par. 3.7.3.). It is worth noting, that as of March 2020 there were no adverse consequences for rejecting orders (before, refusals would reduce a courier's chance of working at certain peak times) (ibid.: par. 3.7.4.) which, at least after March 2020, contrasts with Uber's penalties for refusing rides. The Dutch court found that wage payments made by Deliveroo were consistent with that of an employment contract (ibid.: par. 3.8.4.), as was the control exercised over its labour actors through 'Frank' (such as setting the estimated delivery time) as well as monetary bonuses (ibid.: par. 3.9.7.).

In the Dutch Deliveroo case of 2021, labour actors were classed as workers while in the equivalent UK case they were deemed independent contractors.

However, Dutch and UK courts' opinions diverge over the possibility of using replacements for deliveries. The reader should note here, that Dutch Civil Code contains an obligation for personal performance unless a replacement is notified and approved by the worker in advance, in Article 7:659. Consequently, while the Dutch court agreed that a replacement option is present and is used in practice, this only occurs occasionally due to domestic legislation requiring Deliveroo to ensure their labour actors are entitled to work with regard to their residence status, as well as the interest held by Deliveroo in knowing the identity of 'their' drivers as anyone observing an unsafe situation with a courier can report it to Deliveroo (ibid.: par. 3.7.5.). Consequently, the court concluded that while occasional replacements are possible even without notification, it would not be possible to do so permanently without notifying Deliveroo, which is also possible for workers under Article 7:659. Therefore, while this freedom may indicate the absence of an employment contract, it was not incompatible with one either (ibid.: par. 3.7.8.).

On the contrary, the UK's equivalent case effectively turned on this point, as noted by reference to the 'virtually unlimited right of substitution' which thus runs contrary to the 'central feature' of an employment relationship in English law which is an obligation to provide a personal service (UKSC 5, 2021: par. 77). Arguably, it was largely due to this difference that Deliveroo couriers were not considered workers in the UK case. Consequently, it could reasonably be implied that wording of the Dutch Civil Code's Article 7:659, whereby replacements are permitted if notified in advance, arguably contributed to the differing outcomes. Had the latter part of Article 7:659 not been included, i.e. the wording would simply have been "A worker has the obligation to perform work personally', the Dutch case may have reached a different outcome, as in such a hypothetical case there would have been at least one element which would have been incompatible with an employment relationship. Whilst at present, there were four indicators of an employment contract and one that may indicate against it, albeit not in an incompatible manner, thereby leading the Court to find that there was indeed an employment contract (Rechtbank Amsterdam, 2019: par. 3.12.1.).

Thus, considering differences across all the EU in the various MS's labour laws, it is safe to say that differing outcomes such as with the UK and Dutch courts' interpretation of Deliveroo couriers' rights will probably continue to emerge, unless one harmonizing interpretation is reached on a European Union level.

Spain: the Glovo case and Rider's Law

Spain differs from the previous case studies discussed above, as not only has its Supreme Court decided on landmark cases classifying labour actors in the 'gig economy', but it has additionally implemented changes to its legislation as a result. Consequently, the Spanish case study provides an opportunity to examine Spanish courts' approach as well as that of legislators in incorporating important aspects into domestic legislation. Therefore, the Spanish example is particularly relevant for other Member States looking to modify their labour laws and even potentially the European Union, for deciding on its response to the 'gig economy'.

Spain's primary source for the legal definition of an employed person is the Worker's Statute Law (Royal Legislative Degree 2/2015), whereby under Article 1 (1) a worker is a person who voluntarily provides their services for renumeration on behalf of another within the scope of the organisation and management of another legal or natural person (Worker's Statute, 2015: Article 1). Additionally, as the Spanish Supreme Court noted in the *Glovo case*, 'repeated' jurisprudence

has established that dependency and working for another rather than for oneself (*ajenidad*) are the essential features defining an employment contract (*Glovo*, 2021: Section 7, Para 2). Interestingly, Spanish Civil Code specifically incorporates the notion of a changing 'social reality' being considered when interpreting norms, which is raised by the Supreme Court in the context of the 'gig economy' (ibid.: section 7, par. 2). This codification within the Civil Code arguably provides Spanish Courts a definitive requirement to adapt rules to the changing 'social reality', which is valuable in relation to the 'gig economy', as it seemingly prevents an overly rigid approach relying solely on wordings and prior case law or jurisprudence, that no longer reflect present reality.

For Spain, arguably the *Glovo* case was the case that encapsulates the changed 'social reality', and which was ultimately decided by the Supreme Court on the 25 September 2020 and concerned a food delivery platform (Glovo), with a comparable function to Deliveroo described in the section above. This case concerned determining whether a food courier was an employee or was self-employed, with two Courts (Social Court Number 39 of Madrid in 2018 and the Superior Court of Justice of Madrid in 2019) ruling that the courier was not an employed person (Foundation of Law First, 2 (2)). Ultimately, the Supreme Court concluded that an employment relationship did exist (ibid.: Conclusion, par. 3) on grounds that will appear similar to the cases discussed above, however the judgement contained notable additional aspects. The grounds for finding that Glovo was not a mere intermediary included the role it held in coordinating and organizing the service, such as the controlling influence through algorithmic management of the service (such as courier ratings), setting the price and payment and its ownership of 'essential assets' for the activity, i.e. the application itself (ibid.*:* section 21, par. 1). This latter point on ownership of the platform warrants further discussion , as it was not raised in previous judgements, while the other criteria are similar to what was discussed before.

Regarding the food delivery platform Glovo, the Supreme Court concluded that an employment relationship did exist on grounds that will appear similar to the cases discussed above, however the judgement contained notable additional aspects.

The Supreme Court noted the difference in significance between tools provided by the labour actor, a mobile phone and a motorcycle, which are of secondary importance to the digital platform, which is the essential tool for providing the service, as without it no service could be provided (ibid.: section 20, par. 4). Furthermore, the application limits the autonomy of the labour actor, as it assigns services based on a rating of the courier, essentially conveying traditional managerial powers through the application (ibid.*:* section 21, par. 2).

Therefore, the Supreme Court considered the labour actor to only retain limited autonomy in secondary matters, such as their preferred means of transport and route, thereby overall indicating the presence of an employment contract (ibid.: section 21, par. 2). This places the platform provider in a challenging position, as while the terms of service and agreements between labour actors may be changed, arguably tying the factor limiting autonomy and control to the platform itself is far harder to address, if the platform provider wishes to continue (successfully) classifying their labour actors as self-employed.

The resulting changes to the Worker's Statute incorporated these reflections in the form of the 'Rider's Law', as ultimately an additional 23rd provision was added, as well as a sub-section to Article 64.4. The former, incorporates the presumption of employment for digital delivery platforms, whereby those who make deliveries for an employer subject to their organization, management and control directly, indirectly or implicitly through algorithmic management by a digital platform of the service or working conditions (BOE, 2021: section III, sole article). Which thereby explicitly places at least those gig economy labour actors involved in deliveries within the scope of the existing presumption that an employment contract exists, between individuals who provide a service for a fee on behalf of another within their scope of organization and management. Nevertheless, the wording is specific to those in 'distribution' or 'delivery', thereby arguably potentially excluding other labour actors that perform other activities in the 'gig economy'.

The addition to Article 64.4 essentially grants the 'works council' the right to be informed by the company of any parameters, rules or instructions including those derived through the algorithms or artificial intelligence that may affect working conditions, including profiling, by its decision-making entity. This arguably is a welcome addition as the exact nature of the algorithm that makes important decisions (from the labour actor's perspective) has been shrouded in mystery as platform providers have been reluctant to share the details, even in legal proceedings, as we could note from the *Aslam v Uber* and *Deliveroo v FNV* cases, thereby implying such a right might be equally welcome in other EU member states.

Considering how recent the Spanish 'Rider's law' is at the time of writing, with changes assuming legal effect on 12 August 2021, it not possible to discuss the resulting consequences in a definitive manner, especially long-term effects, however certain short term changes are already appreciable. Firstly, Glovo only hired 2,000 out of their 12,000 riders, with a 'choice' to either accept a new 'self-employed' model or be shut out of the platform for the rest (Brave New Europe, 2021). For those not employed, they initially faced 'multiplier' auctions, whereby each 'rider' could 'decide' if they would work for a regular fee

(1x multiplier), for less (0.7x) or for the maximum (1.3x), thereby 'returning' autonomy from the platform by enabling them to 'set' their own fees (Guzzer, 2021). However, multipliers below 1x were abandoned in the face of complaints from riders, nevertheless individual riders have complained that their earnings have fallen. Which considering the fact that as Glovo ultimately sets the base rate, any 'multiplier' chosen by a rider is still a derivation of the price point set by Glovo, thereby making the 'autonomy' derivative at best. This could arguably be considered inadequate 'autonomy' as the Supreme Court referred to the 'riders' ability to only make decisions of 'secondary importance', hence it could clearly be argued that Glovo still makes the decision of primary importance with regard to fees (base price), while the rider's 'choice' is secondary. This interpretation would mirror the UK Supreme Court's view of Uber's claim their drivers could set their own fees as Uber only set the maximum, which drivers could lower for the customer while Uber's fee remained the same, which in the Supreme Court's opinion was essentially worthless, as any lowering of prices would be paid out of the driver's own pocket (UKSC 5, 2021: par. 94). Consequently, even after introducing the new law, there would still appear to be tension and a sense that more legal disputes may follow, making Spain an interesting example to continue to follow in future.

Discussion and Conclusion

The three case studies examined in this article have demonstrated that the challenge the gig economy entails, regarding classification of labour actors is European in scope, because all three member states examined face similar challenges. This has resulted in an excellent point of comparison between courts in different EU Member States' approach towards essentially identical circumstances for labour exchanges as a part of the 'gig economy', such as in the directly comparable cases for Uber and Deliveroo between the Netherlands and the UK. Consequently, while the outcome may be the same in the case(s) of Uber, the Deliveroo example demonstrates how significance attached to a factor such as the possibility of substitution, may result in drastically different classifications.

Spain has perhaps become the pathfinder, by taking the first step through adjusting their labour law as a result of their Supreme Court's judgement to better reflect the new 'social reality' that the advent of the 'gig economy' has delivered. However, as changes are relatively recent, only time and future research will be able to shed a definitive light on the relative success and failure of the changes,

which in turn will be useful for other MS looking to update their legislation, as well as the EU. As a result, any EU level action will need to be mindful of the overall impact of variations in the value attached to certain aspects of labour relations as well as the relative success and shortcomings of changes made to EU MS labour laws due to the 'gig economy'.

In this regard, we ought to reiterate that the 'gig economy' does not merely concern varying forms of transport services, such as driving passengers or food deliveries. While it was not directly the intention of this paper to exclusively examine case law developments in this (*narrow*) field of the 'gig economy', it appears that it receives the majority of attention from the courts, at least in the context of classification of labour actors. The 'rider's law' in particular reflects this, as wordings are specific to delivery or distribution services, which naturally begs the question of what about the other 'gig economy' sectors where labour actors may be subject to both misclassification and algorithmic control through applications. Considering the 'gig economy' is not inherently restricted to any particular field, as effectively as long as a task can be defined simply enough, arguably it will be possible to have a platform connecting labour actors to end users, and as such it would be detrimental to restrict the perception of the 'gig economy' merely to transport services, which are currently grabbing the spotlight.

Spain has perhaps become the pathfinder, by taking the first step through adjusting their labour law as a result of their Supreme Court's judgement to better reflect the new 'social reality' that the advent of the 'gig economy' has delivered.

Therefore, the 'gig economy' ought conceivably to be further segmented and divided at least in a legal sense into more specific and therefore more accurate sections for regulation. For example, considering that 'active' sectors of the 'gig economy' where labour is actively exchanged, such as the food courier sector, are arguably significantly different from more 'passive' sectors of asset-sharing where there is no comparable exchange of labour. Similarly, even within 'active' gig economy fields and sectors, certain activities are arguably more conducive towards labour actor exploitation, if for example Uber drivers are compared to dog sitters, both of which are currently lumped under the 'gig economy' umbrella. Considering the former often need a license, at least to drive, and the latter is effectively unregulated, it would be reasonable to suggest that they may need a different approach in terms of labour laws (Troitiño, 2021).. In this respect, Spain's 'rider law' has already been targeted, as it specifically focuses on the delivery and distribution sector, however regulators must be careful not to become too comfortable and relaxed with the impression that they have thus solved issues regarding the 'gig economy', by regulating only one specific segment.

In conclusion, the 'gig economy' is still a source of controversy in terms of classification of labour actors and it is likely to remain so until there is action on an EU-wide level. As this paper has demonstrated, while the approach of courts is broadly similar, there are differences in the weighing of the factors and labour laws which may result in different or opposing judgements, even in almost identical circumstances. Moreover, with the COVID-19 pandemic, there is arguably even more urgency to determine consistent classification for 'gig economy' labour actors, as what previously was a means of augmenting income, may increasingly become a primary source of income. Therefore, further attention must be paid to various significant legal outcomes of disputes as well as legislative changes and their relative successes and shortcomings, to determine the future course of labour law in the EU with regard to the 'gig economy' which will strike an appropriate balance between workers' rights and interests of the 'gig economy' companies.

Bibliographical references

Allman, Tim. Taxi drivers protest after Uber launches in Argentina. BBC. 16 April 2016. [viewed date: 10.10.2021]. Accessible from: <https://www.bbc.com/news/av/world-latin-america-36060209>.

Azar, Justin. "Portable Benefits in the Gig Economy: Understanding the Nuances of the Gig Economy". Georgetown Journal on Poverty Law and Policy, vol. 27, n.º 3 (Spring 2020), p. 409-428. (online) [Date accessed 10.10.2021].

Batool, Maryam *et al*. "How has COVID-19 shaken the sharing economy? An analysis using Google trends data". *Economic Research - Ekonomska Istraživanja*, vol. 34, n.º 1 (28 December 2020.), p. 2374-2386. DOI:10.1080/1331677X.2020.1863830 (online) [Date accessed 10.10.2021].

BBC. Spanish taxis block roads in 'anti-Uber' protest. BBC. 30 July 2018. [Date accessed 10.10.2021]. Accessible from: <https://www.bbc.com/news/world-europe-45009087>.

Boletin Oficial Del Estado. Royal Legislative Decree 2/2015. Madrid: BOE, 23 September 2015. [viewed date: 10.10.2021]. Accessible from: <https://www.global-regulation.com/translation/spain/615191/royal-legislative-decree-2-2015%252c-on-23-october%252c-which-approves-the-recasted-text-of-the-law-of-the-statute-of-workers.html>.

Boletin Oficial Del Estado. Real Decreto-ley 9/2021. Madrid: BOE, 12 May 2021. [viewed date: 10.10.2021]. Accessible from: <https://www.boe.es/boe/dias/2021/05/12/pdfs/BOE-A-2021-7840.pdf>.

Brave New Europe. Gig Economy Project – Spain: Glovo riders protest and picket in Barcelona against "inhuman" competitive pay system. Brave New

World. 16 August 2021. [viewed date: 10.10.2021]. Accessible from: <https://braveneweurope.com/gig-economy-project-spain-glovo-riders-protest-and-picket-in-barcelona-against-inhuman-competitive-pay-system.>.

Bulian, Luka. "The gig is up: who does the gig economy actually benefit?". Interdisciplinary Description of Complex Systems, vol. 19, n.º 1 (2021), p. 106-119. DOI:10.7906/indecs.19.1.9 (online) [Date accessed 10.10.2021].

Chen, Guangwu *et al.* "COVID-19 pandemic exposes the vulnerability of the sharing economy: a novel accounting framework". *Journal of Sustainable Tourism*, p 1-18. DOI: 10.1080/09669582.2020.1868484 (online) [Date accessed 10.10.2021].

Court of Justice of EU. The service provided by Uber connecting individuals with non-professional drivers is covered by services in the field of transport. Luxembourg: Court of Justice of the European Union, 20 December 2017. [viewed date: 10.10.2021]. Accessible from: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-12/cp170136en.pdf>.

Davies, Anne. "Wages and Working Time in the 'Gig Economy". *King's Law Journal*, vol. 31, n.º 2 (2020), p. 250–259. DOI:10.1080/09615768.2020.1790820 (online) [Date accessed 10.10.2021].

Dubal, V.B. "Winning the Battle, Losing the War: Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy". *Wisconsin Law Review*, n.º 4 (2017), p. 739-802. (online) [Date accessed 10.10.2021].

EU Commission. Questions and Answers: First stage social partners consultation on improving the working conditions in platform work. Brussels: EU Commission, 24 February 2021. [viewed date: 10.10.2021]. Accessible from: <https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_656>.

Fana, Marta *et al.* "Employment impact of Covid-19 crisis: from short term effects to long terms prospects". *Journal of Industrial and Business Economics*, vol. 47 (2020), p. 391–410. DOI:10.1007/s40812-020-00168-5 (online) [Date accessed 10.10.2021].

Guzzer, Stefania. Spain had a plan to fix the gig economy. It didn't work. Wired: 09 September 2012. [viewed date: 10.10.2021]. Accessible from: <https://www.wired.co.uk/article/spain-gig-economy-deliveroo>.

Hamulák, O. (2018). La carta de los derechos fundamentales de la union europea y los derechos sociales. *Estudios constitucionales*, *16*(1), 167-186.

Hoge Raad. ECLI:NL:HR:2020:1746. Amsterdam: Rechtspraak.nl, 06 November 2020. [viewed date: 10.10.2021]. Accessible from: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2020:1746>.

Kerikmäe, Tanel; Ondrej Hamulák, Olga Shumilo, Alexander Antonov and Henri Mart Pihl. "Employment status of gig companies working force in EU/EEA member states". Accessible from: https://haldus.taltech.ee/sites/default/

files/2021-10/Employment%20status%20of%20gig%20companies%20working%20force%20in%20EUEEA%20member%20states.pdf?_ga=2.268040910.1155068199.1634382905-1384769620.1633335591

Kerikmae, T., & Troitiño, D. R. (2021). El mercado digital europeo y los acuerdos comerciales con Iberoamérica: Problemas y oportunidades de seguridad. In *La integración europea e iberoamericana II: Las relaciones de la Unión Europea (UE) y el Mercado Común del Sur (MERCOSUR) con el Sistema de Integración Centroamericano (SICA)* (pp. 139-155). Thomson Reuters Aranzadi.

Kirven, Alex. "Whose Gig Is It Anyway: Technological Change, Workplace Control and Supervision, and Workers' Rights in the Gig Economy". *University of Colorado Law Review*, vol. 89, no.º 1 (2018), p. 249-292. (online) [Date accessed 10.10.2021].

Kyvrikosaios, Deborah and Konstantinidis, Alkis. Taxi drivers protest against Uber 'invasion' in Greece. Reuters. 6 March 2018. [viewed date 10.10.2021]. Accessible from: <https://www.reuters.com/article/us-greece-protests-taxis-uber-idUSKCN1GI1ST>.

Malin, Martin. "Protecting platform workers in the gig economy: look to the FTC". Indiana Law Review, vol. 51 (2018), p. 377-411. (online) [Date accessed 10.10.2021].

Moyer-Lee, Jason and Kountouris, Nicola. "The "Gig Economy": Litigating the Cause of Labour". International Lawyers Assisting Workers Network, March 2021 Issue, p. 6-36. (online) [Date accessed 10.10.2021].

Pepic, Lana. "The sharing economy: Uber and its effect on taxi companies". Acta Economica, vol. XVI, n.º 28 (June 2018), p. 123-136. DOI: 10.7251/ACE1828123P (online) [Date accessed 10.10.2021].

Rechtbank Amsterdam. ECLI:NL:RBAMS:2019:198 (Deliveroo vs FNV). Amsterdam: Rechtspraak.nl, 15 January 2019. [viewed date: 10.10.2021]. Accessible from: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI%3ANL%3ARBAMS%3A2019%3A198>.

Rechtbank Amsterdam. 8937120 CV EXPL 20-22882 (Uber vs FNV). Amsterdam: Rechtspraak.nl, 13 September 2021. [viewed date: 10.10.2021]. Accessible from:<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2021:5029>.

Römisch, Roman. "Covid-19 effects on Central Europe". Interreg, 2020.

Schiek, Dagmar and Gideon, Andrea. "Outsmarting the gig-economy through collective bargaining – EU competition law as a barrier to smart cities?". *International Review of Law, Computers & Technology*, vol. 32, n.º 2-3 (2018), p. 275-294. DOI: 10.1080/13600869.2018.1457001 (online) [Date accessed 10.10.2021].

Snider, Laureen. "Enabling Exploitation: Law in the Gig Economy". *Critical Criminology*, vol. 26 (2018), p.563–577. DOI:10.1007/s10612-018-9416-9 (online) [Date accessed 10.10.2021].

Troitiño DR. La «Década Digital» de la Unión Europea: desarrollos e impactos sobre su ciudadanía y economía. IDP: revista d'Internet, dret i política. 2021 Dec 9(34):1-4.

Troitiño, David Ramiro. «The European Union Facing the 21st Century: The Digital Revolution.» TalTech Journal of European Studies 12, no. 1 (2022): 60-78.

Tribunal Supremo. TS Sentencia num. 805/2020. (Glovo case). Madrid: 23 September 2020. [viewed date: 10.10.2021]. Accessible from: <https://aefabogados.com/wp-content/uploads/2020/10/sentencia_riders-2.pdf>.

UKSC 5. Uber BV and others (Appellants) v Aslam and others (Respondents). London: Weekly Law Reports Daily, 19 February 2021, vol. 108. [viewed date: 10.10.2021]. Accessible from: <https://www.supremecourt.uk/cases/docs/uksc-2019-0029-judgment.pdf>.