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The Classification of Platform Workers through the Lens of Judiciaries: A Comparative Analysis

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I. Introduction

According to a widespread definition, the so-called gig economy refers mainly to two forms of work: crowdwork performed by online labour platforms and work-on-demand via app through on-location labour.[1] They both involve the performance of labour-intensive services in a triangular relationship, in which workers – classified as independent contractors – and customers are matched by online platforms in a (relatively) new work paradigm. However, they differ regarding a very relevant element: whereas crowdwork encompasses the completion of electronically transmittable services through online platforms, work-on-demand is more connected to traditional jobs, requiring physical and localised delivery, often relating to easy tasks, such as driving, cleaning and personal services.

The following considerations will be mainly focused on work-on-demand via app and on-location labour platforms, which is far more interesting from a labour perspective than crowdwork for two reasons. First, it involves local labour markets, therefore platform activities and the problem arising from this business model can be dealt with through national labour laws and by national courts. The second reason of interest concerns the impact of work-on-demand via app on the labour market. Even if it is still just about a very small percentage of the total workforce, the number of workers

[1] For a comprehensive and up-to-date glossary, see European Commission, 'First-phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work' C(2021) 1127 final. See also C Codagnone, F Abadie and F Biagi, *The Future of Work in the 'Sharing Economy'. Market Efficiency and Equitable Opportunities or Unfair Precarisation?* (Institute for Prospective Technological Studies, JRC Science for Policy Report, 2021), available at: www.ec.europa.eu/jrc/en/publication/eur-scien-tific-and-technical-research-reports/future-work-sharing-economy-market-efficiency-and-equitable-opportunities-or-unfair; V De Stefano, 'The Rise of the "Just-in-Time Workforce": On-Demand Work, Crowdwork, and Labor Protection in the "Gig-Economy"' (2016) 37 *Comparative Labor Law and Policy Journal* 471; MA Cherry, 'A Taxonomy of Virtual Work' (2011) 45 *Georgia Law Review* 951.

involved with on-location platform work has sharply increased over the last few years. To the point that, according to recent studies, in 2018 more than 10 per cent of the EU total workforce has performed gig-work to varying extents,[2] and the digital labour platform economy has increased overall five times from 2016 to 2020.[3]

Very intensive discussion has been taking place on the outcomes of gig-work, eventually convincing the European Commission to propose a legislative initiative aimed at improving the working conditions of people working through platforms. As shown by Martin Gruber-Risak, platform work involves some pros and cons for the various players involved. As for workers, the main issues stem from their classification: being normally considered by the platforms as independent contractors, they do not usually have any guaranteed amount of work or the rights and entitlements typically accorded to employees.

As this chapter is going to highlight, this classification is rather controversial and it has been challenged, with mixed fortune, in courts all over the world. The essential and hard question which judges from different jurisdictions have been trying to answer in the last few years is: are gig-workers really independent contractors or just misclassified employees?

The 'formal reality' emerging from customary contractual terms and conditions provided by platforms is normally the following:

(a) Platforms are not comparable to temporary work agencies or to employers; they just offer independent contractors, who are not employees, workers or agents, a technology platform as a referral tool for a service, and facilitate payments and other operational details.
(b) Workers are almost free from direction in the performance of their services. Platforms might just set certain quality standards. Platforms do not directly monitor workers. However, final-users rate and review the performance of workers at the end of any gig.
(c) Workers are not obliged to grant a minimum availability, and the platforms do not have to grant a minimum amount of work. Workers often have the opportunity to review jobs and select those that meet the preferred specifications regarding time frame, date, neighbourhood or geographic location.
(d) Platforms manage payments. They usually pay fees to their workers periodically while retaining their share. The workers must meet all expenses associated with running their business and carry the related risks.

Besides this approximate description, it should be considered that work-on-demand via app is a nuanced phenomenon, in which a rough distinction can be drawn between two main business models: that of platforms just matching workers to final users and managing payments and other operational details, which are mostly providing a business-to-business service; and that of 'vertically integrated' platforms, which tend to

[2] European Commission, 'Second-phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work' C(2021) 4230 final, 5.

[3] WP de Groen, Z Kilhoffer, L Westhoff, P Doina and F Shamsfakhr, *Digital Labour Platforms in the EU: Mapping and Business Models*, Study prepared by CEPS for DG EMPL under service contact VC/2020/0360, 2021, available at: www.ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8399&furtherPubs=yes.

maximise control over the 'affiliated' independent contractors in order to ensure coordination, speed, reliability and good quality of the service provided.[4] The latter platforms (eg, *Uber*, *Uber Eats*, *Fodoora* and *Deliveroo*) very often go as far as imposing working tools or equipment specifications, routes, strict timing for the gig and (almost) mandatory fees; the whole thing is enforced through a kind of disciplinary power which may involve the 'de-activation' of the worker.

No matter which model of business they are following, platforms are always really keen on excluding any employment relationship from the triangulation of platform–worker–final user. However, this is happening with less and less success for 'vertically integrated' platforms, as I am going to highlight.

In this chapter I will start my investigation by giving an account of the main employment tests applied in the various national jurisdictions, in conjunction with the relevant features of contractual arrangements involving platform workers (section II). I will then move, without claiming to be all-encompassing, to the examination of the courts' decisions in a number of jurisdictions (including the US, UK, France, Spain, Italy) delivered by mid-2021, trying to work out the common patterns behind their outcomes (section III). We will see how these decisions seem to be increasingly heading towards recognition of the employment status to platform workers. However, there are good reasons to believe that this solution is pretty unstable, mainly because of the failure of traditional employment tests to understand gig-work. This will take us to the exploration of some possible solutions to move past the current uncertainty (section IV), such as that of introducing a new legislative definition of the 'employee' category (section IV.A) or that of creating new intermediate categories of 'dependent contractors' (section IV4.B). I will, finally, consider a different approach, aimed at providing universal rights beyond the employment contract (section IV.C). This last approach looks that chosen by the European Court of Justice (ECJ) over the last decade. By endorsing a broad concept of 'worker', the ECJ has been able to work out a different distribution of employment protections between 'employee' and self-employed workers (section V). This might entitle gig-workers to the protections they really need, without a counterproductive and unnecessary change of the current understanding of the 'employee' category.

II. The Toolbox Available to National Courts: Overview of the Customary Employment Tests

Before looking at the conclusion reached by national courts on the classification of the relationship between on-location platforms and workers, it would be appropriate to consider employment tests and indicia provided by judiciaries. This can allow us to understand the kind of toolbox available to national courts when making their decisions on disputes promoted by gig-workers.

In the matter of the classification of work relations, labour courts and tribunals have been in charge themselves in shaping the definition of subordinate employment all over

[4] Codagnone, Abadie and Biagi (n 1).

the world. This is because national legislations have not traditionally been really helpful in classifying work relations, rarely providing definitions of 'employee' or 'employment contract'.[5]

Legal subordination – that is to say, the employee's subjection to the employer's unilateral direction and supervision – used to be the main line of enquiry for most civil law countries.[6] Nonetheless, things have changed in the post-industrial era. The employer, especially for high-skilled or very low-skilled jobs, is often not interested in control over the manner of work, but she or he is more interested in the result of work.[7] Other indicators of subordination apart from direction and supervision, taking into consideration the changing prevailing models of employment, have then been put forward by judiciaries.

For example, French judicial authorities currently mainly use two tests to identify a legal relationship of subordination (*lien de subordination juridique*).[8] The first refers to the integration into an organised service (*service organisé*), meaning that the employer controls the execution of the work (ie, gives technical direction, establishes the place of work and the working time). The second considers the participation within one employer's business (ie, dependency on the employer's organisation), from a negative perspective: the worker does not employ anyone, he or she does not have his or her own clientele and he or she does not have to cover the business risk.

In German law, the distinction between subordinate employment and self-employment lies on the degree of personal dependence (*Persönliche Abhängigkeit*), identified by courts through a wide set of indicators, according to a classical typological method.[9] The most important refers to the integration into the employer's organisation (*Organisatorische Abhangigkeit*): workers offer their work within the frame of an organisation determined and directed by another;[10] aside from the fact that they do not have their own clientele, they do not employ anyone, they do not make investments, they are not free to determine the price of products or services, etc.

Dependency on an employer is also one of the main criteria for the recognition of an employment relationship in Spain. Significantly, employment tests are accompanied here by a rebuttable presumption of employment status provided by Article 8.1 of the Workers Statute, according to which the worker should just prove that the service is provided within the scope of the organisation and management by the client. This is a reversal of the burden of proof on employers.

In Italy, the employee's condition of technical subordination to the employer's control, functional for the organisation of the employer's business is still considered the

[5] G Casale, *The Employment Relationship: A Comparative Overview* (Oxford, Hart Publishing, 2011) 17–29.

[6] N Countouris, 'The Employment Relationship: A Comparative Analysis of National Judicial Approaches' in G Casale (ed), *The Employment Relationship. A Comparative Overview* (Oxford, Hart Publishing, 2011) 35, 57.

[7] A Supiot, 'Les nouveaux visages de la subordination' (2000) 2 *Droit Social* 131, 147.

[8] Supiot (n 7) 140; A Perulli, 'Subordinate, Autonomous and Economically Dependent Work: A Comparative Analysis of Selected European Countries' in G Casale (ed), *The Employment Relationship. A Comparative Overview* (Oxford, Hart Publishing, 2011) 137, 150; Countouris (n 6) 55.

[9] M Weiss and M Schmidt, 'Germany (Fed Rep)' in *International Encyclopaedia for Labour Law and Industrial Relations* (Alphen aan den Rijn, Wolters Kluwer, 2008) 45; L Nogler, *The Concept of 'Subordination' in European and Comparative Law* (Trento, Quaderni del Dipartimento di Scienze Giuridiche, 2009).

[10] W Däubler, 'Working people in Germany' (1999) 21 *Comparative Labor Law & Policy Journal* 77; Weiss and Schmidt (n 9); Perulli (n 8) 158.

principal characterisation of the employment status, also being expressly recognised in Article 2094 of the Civil Code. Integration (often referred as hetero-organisation) into the employer's organisation and continuity of the employee's obligation to cooperate are other common indicators of subordination.[11] The employee's duty to comply with a set working time, a fixed amount of remuneration, the absence of risk of loss, the 'label' attached by the parties to the contract are some of the subsidiary 'indicia', coming into relevance whenever the test based on the above-mentioned primary indicators are not conclusive.[12] Italian case law tends not to consider dependency on the employer's business, despite the emphasis placed on it by the Constitutional Court.[13]

The application of the above-mentioned indicators work, in all the civil law jurisdictions considered, on the primacy of facts principle: judges go beyond the description of the relationship given by the parties, looking at the way the relationship between them is carried out. Moreover, the indicators are assessed through a multifactor test/typological method, according to which the greater the number of employment indicia have been satisfied, the more likely it is that the individual will be an employee.

As far as the UK and other common law countries are concerned, the 'control test' was at the beginning the only test, according to which employment is a relationship of control, where the employer gives orders, plans out jobs in minute detail and monitors the employees' work. Other tests have then been developed by English courts: integration test, economic reality test and mutuality of obligation test. Integration corresponds exactly to the considered namesake indicator developed by civil law courts. Even the economic reality test, aimed at assessing whether the individual is not working for his own account, does not differ much from the negative tests used in civil law countries. Mutuality of obligation – looking for a promise by both parties to provide and accept future work – is known in other countries as continuity of obligation, and has had a strong and controversial impact.[14] Currently, UK courts tend to use the so-called 'multiple' test, taking into consideration the above-mentioned tests and all aspects of the relationship, no single feature being in itself decisive.[15] Eventually, courts still consider control and mutuality of obligation the 'irreducible minimum criteria' for the establishment of a contract of employment.[16]

The 'control' test is also at the core of the common law test in the US.[17] According to the Supreme Court, it applies to defining an 'employee' under statutes not providing their own definition. It does not concern the Fair Labor Standards Act (FLSA) – providing a wide range of employment rights, including the minimum wage – which has introduced a broader definition of employment in comparison to that based on the common law 'control' test. In that way, the FLSA definition of 'employ' includes

[11] Perulli (n 8) 144–49; Nogler (n 9) 88–89.

[12] L Spagnuolo Vigorita, 'Impresa, rapporto di lavoro, continuità (riflessioni sulla giurisprudenza)' (1969) I *Rivista di Diritto Civile* 570.

[13] Constitutional Court, sentence n 30 of 1996.

[14] Supiot (n 7) 141.

[15] Countouris (n 6) 51–52.

[16] S Deakin, 'Does the "Personal Employment Contract" Provide a Basis for the Reunification of Employment Law? (2007) 36 *Industrial Law Journal* 68, 79.

[17] K Dau-Schmidt et al, *Legal Protection for the Individual Employee*, 4th edn (St Paul, MN, West Academic Publishing, 2011) 31–45.

'suffer or permit to work' (section 203(g)), ie, the work that the employer directs or allows to take place. On the basis of the 'suffer or permit' concept, the Supreme Court and Circuit Courts of Appeal have developed the multifactorial 'economic realities' test: workers who are dependent on the business of the employer are considered to be employees. This shall be determined from several factors, none alone determinative, including that relating to an employer's control. In opposition to the multifactor test, State legislatures and administrative agencies (adopted by many legislations starting in Massachusetts in 2004, for employment insurance and protective statutes)[18] have increasingly made use of the so-called ABC test, based on a rebuttable presumption of employment. According to this, a worker is considered an employee, unless the hiring entity satisfies all three of the following conditions:

1. The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact (*control test*).
2. The worker performs work that is outside the usual course of the hiring entity's business.
3. The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

Since it is not a multifactorial test, it is simpler, less vague and more predictable. It does not involve any balance between employment indicators, but leads to straightforward conclusions. This turned out to be very useful for the classification of gig-workers, and thus adopted by California legislation (as we will see later).

Despite the different labels, employment indicators and tests look remarkably similar across the above-mentioned countries. To sum up, judiciaries normally start their investigation from legal subordination, or in common law jurisdiction from the very similar control test. Whenever these have little relevance or no relevance at all in assessing the employment status, they tend to resort to a set of indicators/tests that, again, do not substantially differ from country to country: integration into the organisational framework created by the employer, dependency/economic reality test, legal continuity/mutuality of obligations.

III. The Gig Economy Workers in National Courts

Bearing in mind the highlighted employment tests, the analyses of the judicial investigation should start from clearing the field of the ambiguous nature of the relationship between platforms and workers. In that regard, it should be remembered that the degree of control varies widely depending on the model of business on which the platform is based: some platforms just match workers and final users, others have strict control over the workers, as is typical of platforms providing ride-hailing and food delivery services.

[18] Session Law, Act, 2004, c 193, 'An Act Further Regulating Public Construction in the Commonwealth', amending chapter 149, § 148B of the Massachusetts General Laws, on 'Employee Status; Exceptions; Penalties'. It can be consulted here: www.malegislature.gov/Laws/SessionLaws/Acts/2004/Chapter193.

As far as the latter are concerned, it is interesting to quote the North California District Court in *O'Connor*, acknowledging that 'Uber does not simply sell software; it sells rides', by harnessing its drivers' performance. Similar conclusions have been reached by the ECJ in *Élite Taxi*[19] and *Uber France SAS*.[20] Asked to ascertain whether the services provided by Uber should be regarded as transport services, information society services or a combination of both, the ECJ concluded that: Uber provides 'more than an intermediation service', it 'simultaneously offers urban transport services'; 'Uber exercises decisive influence over the conditions under which that service is provided by drivers', determining 'at least the maximum fare' and exercising 'a certain control over the quality of the vehicles, the drivers and their conduct, which can, in some circumstances, result in their exclusion'.

It has therefore to be excluded that the relationship between the ride-hailing platform and the drivers – and, more generally, that involving a vertically integrated platform (including food delivery) – can be considered as a business-to-business relationship. On the contrary, workers should be seen as an integral part of the service provided by the platform. Thus, can platforms be considered as employers in the light of the employment tests shown above? The answer to that question has been at the core of the legal disputes raised all over the world by gig-workers. The outcome has been rather conflicting, even if apparent stabilisation looks on the way.[21]

Some decisions, especially the first to be delivered, when the phenomenon was probably still small and pretty unknown, have confirmed the 'independent contractor' status of the gig-workers. Among these decisions:

- District Court for the Northern District of California in *Lawson v Grubhub* (a British and US version of Foodora).[22]
- District Court for the Eastern District of Pennsylvania in *Razak v Uber Technologies*.[23]
- Torino Labour Court in *Pisano v Digital Services XXXVI Italy* (*Foodora*).[24]
- Conseil de prud'hommes de Paris (Labour Tribunal) in *Florian Menard v SAS Uber France and Societe Uber BV*.[25]
- Cour d'appel de Lyon (*Uber*).[26]
- Cour d'appel de Paris (*Deliveroo*).[27]

[19] Case C-434/15 *Asociación Profesional Elite Taxi v Uber Systems Spain*, SL ECLI:EU:C:2017:981 [2017].

[20] Case C-320/16 *Criminal proceedings against Uber France* ECLI:EU:C:2018:221 [2018].

[21] For a comprehensive review of the decisions delivered by courts and administrative tribunals in Europe, see C Hießl, 'Case Law on the Classification of Platform Workers: Cross-European Comparative Analysis and Tentative Conclusions' (2022) *Comparative Labor Law & Policy Journal*, available at SSRN: www.ssrn.com/abstract=3839603 or http://dx.doi.org/10.2139/ssrn.3839603.

[22] www.courthousenews.com/wp-content/uploads/2018/02/grubhub-ruling.pdf.

[23] www.isdc.ch/media/1591/14-razak-v-uber.pdf.

[24] www.globalworkplaceinsider.com/2018/05/italian-labour-court-hands-down-landmark-decision-on-foodora-case-with-potentially-far-reaching-implications-for-any-company-active-in-italys-growing-gig-economy.

[25] www.diritto-lavoro.com/wp-content/uploads/2018/02/sentenza-del-29-gennaio-2018.pdf.

[26] www.doctrine.fr/d/CA/Lyon/2021/C302A25A2F9007470EB8F.

[27] www.iuslaboris.com/insights/deliveroo-riders-are-independent-contractors-not-employees-in-france-confirmation-from-the-paris-court-of-appeal/.

- Firenze Labour Court (*Deliveroo*).[28]
- Australian Fair Work Commission in *Kaseris v Rasier Pacific*.[29]

Other decisions, which have become the majority over time, have qualified gig-workers as 'employees', including in the Supreme Courts sentences of three different countries:

- Cour d'appel Paris in *Florian Menard v SAS Uber France and Societe Uber BV*.[30]
- Cour de cassation on food delivery company *Take eat Easy*.[31]
- Cour de cassation, on 4 March 2020, n°19-13316 (*Uber*).[32]
- Corte di Cassazione on 24 January 2020, no 1663 (*Foodora*).[33]
- Valencia Tribunal in *Jose Enrique v Roofoods Spain SL* (*Deliveroo*).[34]
- Fair Work Commission in *Klooger v Foodora Australia*.[35]
- Tribunal Supremo Spanish Supreme Court (*Glovo*).[36]

A different outcome concerned Courts in countries where a third intermediate category, between employment and self-employment, is given by the legislature, variously referred to as dependent contractors, quasi-subordinate workers, economically dependent workers. These are:

- Central London Employment Tribunal in *Aslam, Farrar & Others v Uber*,[37] confirmed by the Employment Appeal Tribunal[38] and the Court of Appeal.[39]
- Madrid Labour Court in *Beatriz Victoria Prada Rodriguez v Glovo*.[40]
- Torino Court of Appeal in *Pisano v Digital Services XXXVI Italy* (*Foodora*).[41]

The varied solutions offered by courts seem not to depend on the diverging terms and conditions of platform work from country to country, which are on the contrary very similar. Sporadically, peculiar terms of the engagement emerged in one given country, such as the 'batching system' in the Australian Fair Work Commission decision in *Kloger v Foodora*.[42] Different outcomes do not correspond to different legislative definitions

[28] www.bollettinoadapt.it/ancora-sui-riders-cosa-dice-concretamente-il-tribunale-di-firenze.
[29] www.fwc.gov.au/documents/decisionssigned/html/2017fwc6610.html.
[30] www.legalis.net/jurisprudences/cour-dappel-de-paris-pole-6-ch-2-arret-du-10-janvier-2019.
[31] www.soulier-avocats.com/en/reclassification-of-the-contract-between-a-delivery-rider-and-a-digital-platform-a-strong-message-sent-by-the-cour-de-cassation/.
[32] www.courdecassation.fr/IMG/20200304_arret_uber_english.pdf.
[33] www.lexology.com/library/detail.aspx?g=fc305f7a-0c7b-4d7f-8cb2-1d2fd359616e.
[34] www.euronews.com/2018/06/04/judge-rules-against-deliveroo-in-landmark-decision-in-spain.
[35] www.fwc.gov.au/documents/decisionssigned/html/2018fwc6836.htm.
[36] www.eldiario.es/economia/tribunal-supremo-falla-primera-vez-caso-riders-concluye-falso-autonomo_1_6240803.html.
[37] www.judiciary.uk/judgments/mr-y-aslam-mr-j-farrar-and-others-v-uber/).
[38] www.assets.publishing.service.gov.uk/media/5a046b06e5274a0ee5a1f171/Uber_B.V._and_Others_v_Mr_Y_Aslam_and_Others_UKEAT_0056_17_DA.pdf.
[39] www.judiciary.uk/wp-content/uploads/2018/12/uber-bv-ors-v-aslam-ors-judgment-19.12.18.pdf.
[40] www.jurisprudencia.vlex.es/vid/740259545.
[41] wwww.ichinobrugnatelli.it/en/foodora-riders-comment-by-atty-marco-paoletti-on-the-judgment-of-the-court-of-appeal-of-turin/.
[42] As illustrated by the Fair Work Commission (n 35) it 'introduced a ranking of individual delivery riders/drivers as part of the process by which available shifts were offered and subsequently selected'.

and employment tests available in the considered jurisdictions either. As shown above, the employment tests elaborated by Labour Courts and Tribunals are remarkably similar, no matter whether civil law or common law systems are concerned, and they are applied on the basis of a primacy of facts principle and a multifactor test.

The combination of these employment tests can be summarised with regard to a selection of significant decisions shown in the following tables.

Table 1 Spain

Court and platform	Valencia Labour Court – food delivery[43]		Madrid Labour Court – food delivery		Supreme Court – food delivery	
Employment test	Control	YES	Control	NO	Control	YES
	Integration	YES	Integration	NO	Integration	YES
	Dependency	YES	Dependency	NO	Dependency	YES
	Mutuality of obligations	Not considered (NC)	Mutuality of obligations	NO	Mutuality of obligations	NC
Classification	EMPLOYEES		INTERMEDIATE CATEGORY		EMPLOYEES	
Main points of reasoning	'The final decision on the work schedule was on Deliveroo … The company gave specific instructions about the way in which delivery had to be carried out, setting time and behaviours that they had to comply with … The worker lacked the freedom to refuse orders. The rejection of offers and repeated lack of availability led to the extinction of the relationship between the parties'.		'Plaintiffs decided how, where and when to provide services, they had full control of their activity and could even desist from a service previously accepted without suffering any penalty'.		'Riders who do not have their own and autonomous business organization, who provide their services within the employer's organization of work, subject to the management and organization of the platform, as evidenced by the fact that Glovo establishes all aspects related to the form and price of the collection and delivery service of said products'. 'The claimant did not have a true capacity to organise his work provision, lacking autonomy to do so. It was subject to the organizational guidelines set by the company'.	

(continued)

[43] ibid.

Table 1 ***(Continued)***

Classification	EMPLOYEES	INTERMEDIATE CATEGORY	EMPLOYEES
			'Glovo has the power to sanction its distributors for a plurality of different behaviours, which is a manifestation of the managerial power of the employer'. 'Through the digital platform, Glovo carries out a real-time control of the provision of the service, without the delivery person being able to carry out his task unrelated to said platform'.

Table 2 Italy

Torino Labour Court – food delivery		Torino Court of Appeal – food delivery		Supreme Court – food delivery	
Control	NO	Control	NO	Control	NO
Integration	NO	Integration	YES	Integration	YES
Dependency	NO	Dependency	NO	Dependency	NO
Mutuality of obligations	NO	Mutuality of obligations	NO	Mutuality of obligations	NC
INDEPENDENT CONTRACTORS		INTERMEDIATE CATEGORY		EMPLOYEES	
'Workers did not have to show up for work and the platform did not have to provide work … That is enough to exclude they were under legal subordination'.		'What looks relevant in order to exclude employment status is the circumstance that employees were free to give their availability for the shifts proposed by the company'. However, according to Legislative Decree no 81 of 2015, the same regulation of the employment relationship shall also apply to hetero-organised relationships. Namely those relationships 'functionally integrated in the client productive organization, so that the work performance ends up being structurally linked to that (the organisation)'.		Legislative Decree no 81/2015 extended 'the application of the legal discipline of the subordinate employment to forms of continuous and personal collaboration, carried out with the functional interference of the organization unilaterally prepared by the person commissioning the service'.	

(continued)

Table 2 ***(Continued)***

INDEPENDENT CONTRACTORS	INTERMEDIATE CATEGORY	EMPLOYEES
	Those are the work relations involved in food delivery where 'the riders worked on the basis of a shift, in areas and on routes established by the client … as well as the delivery times (30 minutes from taking charge of the product)'.	The worker is not autonomous since the 'methods of work are substantially determined by a digital platform and a smartphone application'.

Table 3 France

Paris Labour Tribunal – Uber		Paris Court of Appeal and Supreme Court – Uber		Supreme Court – food delivery	
Control	NO	Control	NO	Control	YES
Integration	NC	Integration	NC	Integration	NC
Dependency	NO	Dependency	NO	Dependency	NC
Mutuality of obligations	NO	Mutuality of obligations	NC	Mutuality of obligations	NC
INDEPENDENT CONTRACTORS		EMPLOYEES		EMPLOYEES	
'Total liberty of organisation enjoyed by the driver sets up an obstacle to acknowledging an employment contract'.		'The freedom for the driver to connect to the application … is not likely to exclude the existence of a relationship of subordination, since it has been demonstrated that when the driver connects to the Uber platform, he integrates a service organised by the company, which gives him directives, monitors the execution of work and exercises a power of sanction'.		'The application was equipped with a system of geolocation allowing the real-time monitoring by the company of the position of the courier … and, secondly, that the company Take Eat Easy had the power to sanction the courier'.	
Supreme Court – ride hailing			Paris Court of Appeal – food delivery		
Control	YES		Control	NO	
Integration	YES		Integration	NC	
Dependency	YES		Dependency	NC	
Mutuality of obligations	NC		Mutuality of obligations	NO	

(continued)

Table 3 ***(Continued)***

EMPLOYEES	INDEPENDENT CONTRACTORS
'The driver worked with the ride-hailing service created and entirely organised by the Uber platform which did not enable the driver to build up his own clientele, set his rates freely or establish the conditions under which he provides transport services. The fares were set by Uber by means of a predictive mechanism based on a route over which the driver has no control and the final destination of the journey is sometimes not known to the driver'. 'Uber had the ability to temporarily disconnect the driver from the application after he had refused three trips and the driver could lose access to his account if a defined order cancellation rate was exceeded or if he had been reported for "problematic behaviour"'.	A permanent legal subordination is excluded by: 'the freedom to choose whether or not to perform services according to their own convenience'; 'the possibility of collaborating with other platforms, which was the case in this instance for the delivery partner, who collaborated with several platforms directly competing with Deliveroo;' 'the ability to subcontract their delivery services'. Geolocation system was considered 'inherent to the service requested', therefore not conflicting with the independent contractors status.

Table 4 Australia

Fair Work Commission – Uber		Fair Work Commission – food delivery	
Control	NO	Control	YES
Integration	NO	Integration	YES
Dependency	NO	Dependency	YES
Mutuality of obligations	NO	Mutuality of obligations	NC
INDEPENDENT CONTRACTORS		EMPLOYEES	
'The Applicant was able to choose when to log in and log off the Partner App, he had control over the hours he wanted to work, he was able to accept or refuse trip requests (with some caveats) and he was free to choose how he operated and maintained his vehicle. All of these factors weigh in favour of an independent contractor relationship'.		'The level of control that might be exercised in employment situations was obtained by Foodora by virtue of the operation of, inter alia, the batching system. As a matter of practical reality, the applicant could not pick and choose when and where to work, or how fast or slow to make deliveries'.	

Table 5 United States

District Court for the Eastern District of Pennsylvania – UBER		Fair Work Commission – food delivery	
Control	NO	Control	NO
Integration	YES	Integration	NO
Dependency	NO	Dependency	NO
Mutuality of obligations	NO	Mutuality of obligations	NO

(continued)

Table 5 ***(Continued)***

INDEPENDENT CONTRACTORS	INDEPENDENT CONTRACTORS
'Because UberBlack drivers can work as little or as much as they want – the hallmark of a lack of "relationship permanence" with an alleged employer – this factor weighs heavily in favor of Plaintiffs' independent contractor status … Opportunity for profit or loss depending upon his managerial skill since they can concentrate their efforts around certain "high times" of the day, week, month, or year, in order to capitalise on "surge pricing"'.	'Grubhub did not control the manner or means of Mr Lawson's work, including whether he worked at all or for how long or how often and neither Grubhub nor Mr Lawson contemplated the work to be long term or regular, but rather episodic at Mr Lawson's sole convenience'.

What emerges from the analysis of the above-mentioned decisions is that, generally speaking, the application of the traditional employment tests has been fairly complicated. Quoting the District Court of California in a case concerning Lyft (Uber's main competitor in the US): it is like handling 'a square peg and asked to choose between two round holes', because the 'test the California courts have developed over the 20th Century for classifying workers isn't very helpful in addressing this 21st Century problem'.[44] The same conclusion can be true for all the jurisdictions considered here.

More precisely, while the personality of work is usually confirmed by gig-economy arrangements, which do not normally permit the worker to send along a replacement, the traditional control test, as many decisions seem to confirm, is more difficult to meet.[45] Even if a certain control was recognised, for example in the relationship between Uber and its drivers, they 'retain very little freedom to determine their working conditions since ride fees are not negotiable and they have to comply with a detailed performance protocol';[46] platforms do not seem to have the same control over workers' performances for a 'traditional' employer.[47] The fact that the workers retain the freedom to set up their own work schedule, deciding when, for how long and where they wish to work time after time, is for some courts also significant of a not complete integration of gig-workers into the organisation set up by platforms.[48] As far as the more comprehensive economic reality test is concerned, the degree of dependency of the worker on the platform again looks quite blurred. Let us consider for a moment again the example of Uber drivers. On the one hand, they seem to work for Uber, which decides the market strategies, deals with the clients, coordinates the result of workers' performances; on the other hand, the drivers do not get a fixed remuneration, they own the car – which is the relevant asset for the service at stake; all related expenses are for them, and if something goes wrong, they can even run a loss.

[44] United States District Court, Northern District of California, *Cotter et al v Lyft Inc*, Order Denying Cross-Motion for Summary Judgment, 11 March 2015, Document 94.

[45] Conseil de prud'hommes de Paris (Labour Tribunal), *Florian Menard v SAS UBER FRANCE and SOCIETE UBER BV*.

[46] United States District Court, Northern District of California Case No C-13-3826 EMC, *O'Connor v Uber Technologies, Inc et al*, available at: www.cand.uscourts.gov/home.

[47] O'Connor quote above and United States District Court, Northern District of California, Case No 13-cv-04065-VC, *Cotter et al v Lyft Inc*, available at: www.cand. uscourts.gov/home.

[48] This was, for example, the conclusion of Torino Labour Court *Pisano v Digital Services XXXVI Italy* and Australian Fair Work Commission, *Kaseris v Rasier Pacific*.

Though the employment tests so far considered can somehow be adapted to gig-economy workers, completely out of line is the legal continuity/mutuality of the obligations test. Platform workers do not have any obligation to show up for work if they do not want to and, in turn, platforms do not have any obligation to provide gigs to the workers. Thus, if the employment tests available have been very similar, the different classification of workers in the considered decisions should depend on the way they have been used. At the end of the day, it looks like that the decision to consider or ignore mutuality of obligations test/legal continuity has been the decisive factor. When judges have taken it into account, they attributed primary importance to it, and went on to say that other factors were also weighted in favour of an 'independent contractor' status. On the contrary, when they neglected it, they moved in the opposite direction.

It seems that in some jurisdictions (ie, France and Spain) there is a trend towards the adaptation of employment tests to the reality of gig-workers, giving little credit to the casual/on-call nature of the work relationship. For food delivery, especially, the reclassification of gig-workers has become very common. This is particularly true for Spain where dozens of sentences have been ruled in favour of workers in recent years.[49] However, this is in all probability the effect of the above-mentioned rebuttable presumption of employment status provided by the Spanish Workers Statute).[50]

Nonetheless, there is still a great deal of uncertainty and issues to be addressed about the classification of gig-workers for a variety of reasons.

By and large, judicial subjectivism – that is to say, a decision based on the judge's own value and conception of the good, rather than on objective application of the law – looks more widespread than usual here, mostly because of the poor guidance provided by traditional employment tests. This has created legal uncertainty, which is never good for the legal system and its legitimacy, and for the players here involved: platforms and workers.

And in fact, in some cases Supreme Court decisions have not been followed by subsequent lower courts decisions. That was, for example, the case in recent decisions by labour courts in Lyon[51] and Paris.[52]

In reaction to courts' decisions and legislative interventions, the organisation of platforms is constantly adapting in relation to the exclusion of the employment status.

Some platforms have applied the ruling only to the plaintiffs, without extending it to other employed workers. In some cases, arbitration clauses or choice of foreign courts are a way of preventing lawsuits.

IV. How to Move Past Uncertainty?

The analyses of the relevant case law confirms that, despite the stabilising trend of decisions, there is still an urgent need to provide regulatory solutions aimed at granting

[49] A Todolí-Signes, 'Comentario a la Sentencia que consideraa los Riders empleados laborales' (2020) 6 *Labour & Law Issues* 2.

[50] Hießl (n 21).

[51] www.courthousenews.com/wp-content/uploads/2018/02/grubhub-ruling.pdf.

[52] www.isdc.ch/media/1591/14-razak-v-uber.pdf.

gig-workers access to employment and social protection when appropriate. The opinions of scholars on the possible regulatory approaches to the issue of classification of platform workers can be gathered around three main options explained in the following section.[53]

A. New Legislative Definition of 'Employment'

One option could be that of elaborating a new broader legislative definition of 'employment' which is able to include gig-economy workers. This new definition should probably follow those court decisions which have given no relevance to mutuality of obligations. In this way, many forms of casual work would end up in the 'subordinate employment' category, receiving full employment rights.

One example is California Assembly Bill No 5 (AB5). It codifies the commonly known 'ABC test', following the ruling of the Supreme Court of California in *Dynamex Operations West Inc v Superior Court of Los Angeles*.[54] The ABC test makes easier the classification of a worker as 'employee'. And this is particularly true for gig-workers. Bringing back the above-mentioned requirements of the ABC test, while the ride-hailing and food delivery companies may be able to prove that workers are not under their control and direction, it seems almost impossible for 'vertically integrated' platforms to prove that the work performed is outside the usual course of the hiring entity's business. It is also very difficult, in most of the cases, to argue that the workers are engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity. This could just, for example, be the case of a taxi driver working at the same time for Uber, but never that of food delivery rider.

Another example is the Spanish Riders Law (Real Decreto-ley 9/2021). It has introduced a rebuttable presumption of employment status for 'the activities of distribution of any type of product or merchandise, when the employer exercises its faculty of organisation, direction and control, directly, indirectly, or implicitly, through the algorithm management of the service or working conditions, via a digital platform'. Basically, the presumption already provided by Article 8.1 of the Spanish Workers Statute (see above, section II) has been extended to the case where work relations are managed by algorithm. The reversal of burden of proof is less broad than in AB5. In California legislation it can potentially apply every time a service is provided, while in Spanish law riders are requested to prove that the service is proved within the scope of the platform's organisation.

I believe that such a solution might create more problems than it would solve, especially in legislations that, unlike in the US, provide a broad range of employment rights to those who are employees. First, a detailed legislative identification of the precise boundary between 'employment' and 'self-employment' can create problems because judiciaries will lose room for adapting, as they have done so far, the 'employment status'

[53] On the possible ways for solving platform workers' issues, not only involving classification, see Tamás Gyulavári ch 7 and Martin Gruber-Risak ch 5 in this volume.

[54] *Dynamex Operations W v Superior Court and Charles Lee, Real Party in Interest* 4 Cal 5th 903 (Cal 2018), available at: law.justia.com/cases/california/supreme-court/2018/s222732.html.

to the social prevailing model of 'employee'. So, if the legislative definition turns out to be too broad or too strict at a precise moment in time, there will be little they can do to adapt it.

At the end of the day, we must then ask ourselves if it is really worth changing the current understanding of the employment relation because of a very small minority of workers. We must not forget that, thanks to the judicial adaptation of the concept, subordinate employment corresponds to the prevailing social model of it. This model is still based on the control granted by the employment contract to the employer over the employee, in order to allow the employer a smooth and efficient organisation of his or her business. Legal continuity is essential to this end as well, because the employer is (quite) sure that employees will regularly show up for work. Therefore, when a worker can decide whether and when to work, it is hard to say that he or she is nonetheless under an employer's control and so a subordinate worker.

In this regard, we should not confuse, as some judges have done, between:

a. 'subordination' (control) which means subjection to the employer's power to give instruction on how, when and where to do the work, also changing his or her mind at any time, even in an unpredictable way; and
b. a very detailed, but rather 'stable', work organisation set up by a client, which leaves to the worker the decision on if, when and for how long to join in. This does not correspond to the common understating of 'subordinate' work, but rather to 'coordinated' work, typically performed by genuine self-employed or, where existing, intermediate category workers.

Therefore, the argument that even if on-demand workers have no obligation to show up for work, they are nonetheless 'employees' because at a time when they are performing gigs they become an integral part of the platform's organisation, looks unacceptable. A certain degree of integration and coordination between client and contractor is quite normal even for 'genuine' independent contractors. The District Court for the Eastern District of Pennsylvania in *Razak v Uber* made a good example for this:

> [T]he homeowner may impose certain requirements while the carpenter/plumber is in the house, such as not permitting certain fumes, footwear, music, or other conditions – but all of these conditions apply only while the carpenter/plumber is in the home – and they certainly do not suffice to conclude that the carpenter/plumber is an employee.

Also, penalties for delays, shortcomings, low-quality performances are a rather customary characteristic of an independent contractor's relationship with his or her client.

Even the fact that the platform may push the worker to work more, by increasing the rate of pay or by giving him a preference in the selection of gigs, does not look like a decisive indicator of employment status. Again, even genuine self-employed persons are very likely to face similar situations: they should accept working proposals to make a living, and this does not make them employees. I believe that a relationship of subordination may be excluded as long as the worker does not have a formal legal obligation to accept the gigs. In short, we should not confuse 'legal obligations' with matter-of-fact reality. More particularly, we should not confuse legal continuity with factual continuity. If a worker on-demand performs for days, months, years for the same client-platform while he or she has no legal obligation to do so, this reflects a choice. It can certainly be

imposed by necessity, but the same necessity concerns every worker, no matter whether he or she is an employee or an independent contractor.

These might sound like rather formal arguments, but they are not. They also bring very substantial implications, suggesting that a new definition of employment, just to include those workers, is not really something desirable.

First, many employment rights are customised on the traditional model of employment, and hence difficult to adapt to a model of work based on casual engagements. The adaptation customary employment rights would require if they were to be applied to gig-workers is the subject of the chapters by Gyulavári and Kártyás. Let us here just refer to the example of certain working time limitations: they assume the unilateral determination of the working hours by the employer, so they limit it in order to safeguard employees' health. But what if employees can determine their own working time? New interests come into play and the rule should be different.

But even assuming that the above-mentioned employment rights can somehow be adapted to gig-workers, there is another major, less theoretical, objection to consider: are we really sure that by considering gig-workers as 'employees' we would be doing them a favour? The employment status comes with employment rights but also duties. For instance, multiple jobs undertaken for competing platforms (ie, Foodora and Uber Eats), not unusual for gig-workers, will probably not be admitted.[55] Moreover, if platforms were forced to consider all workers as 'employees', they would probably change the contracts with the workers in order to reflect the mandatory employment status. Gig-workers would then become 'standard' employees and platforms would start behaving as 'standard' employers. Workers could lose flexibility – they perhaps could not decide any longer if and when to work – and decide to abandon gig-work. But, before that many platforms would probably quit the market, because their business model can only be competitive and profitable as long as it is based on independent contractors' cooperation.

All things considered, including gig-workers in the 'employment' category in an a-selective way could be counterproductive: for platforms, likely to be forced out of the market; for consumers, losing access to good quality cheap services; for workers, losing job opportunities.

B. Creation of Intermediate Categories for Gig-Workers

A less radical solution is suggested by the British, Spanish and Italian experience. When an 'intermediate' category is given in legislation, it probably represents the most appropriate category for platforms workers; at least for those operating for 'vertically integrated' platforms.

Some authors have recently advocated for the creation of a new intermediate category, based on the concept of economic dependence,[56] which accurately describes the

[55] The topic is more deeply analysed by Tamás Gyulavári ch 7 and Tihamér Tóth ch 10 in this volume.

[56] S Harris and A Krueger, 'A Proposal for Modernizing Labor Laws for Twenty-first Century Work: The "Independent Worker"' (2015) Brookings Institute, Washington DC, available at: www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf.

situation of on-demand via app workers providing a personal service mainly for one platform. According to these proposals, the main client of a dependent contractor should be considered responsible for some employment protections.

It is a very evocative possibility. Nevertheless, it reveals considerable problems in practice. First, as the attempts made by some legal systems testify, it is really difficult to find a suitable definition for this category, a definition able to identify the 'weak' contractors.[57,58] Thus, rather than providing a secure solution to the issues affecting gig-workers, a new category would probably lead to more uncertainty and litigation.[59] The empirical analysis of existing intermediate categories raises a second major counterargument. As a matter of fact, they have often created a good opportunity for a misclassification of workers hitherto considered 'employees' into a category of atypical and under-protected workers.[60] In most of the legislation where they exist, very few protections tend to be provided for these workers.

In sum, the creation of new intermediate categories appears to be a lose–lose solution, not able to solve the problems for workers of the gig economy and possibly creating new ones for 'regular' employees.

C. Universal Rights for Personal Work Relations

A third option deals with the issue from a reverse perspective: rather than proposing a change in employment categories, it proposes a different distribution of rights between employment and self-employment.

The whole idea behind it is that 'gig' work is not 'paradigm shifting'[61] and does not bring anything really new, since some of its features can be traced back to the earliest days of capitalism[62] and they exist widely in other forms of non-standard work. It is rather a further confirmation that the all or nothing dichotomy attached to employment/self-employment is outmoded. More precisely, platform work does not seem to be putting into question the employment contract as the main gateway to employment protection. It challenges the idea, prevailing for a large part of the twentieth century, of providing protections only for those who, in order to make a living, had to accept subordinate employment and ignoring those who, for the same purpose, had invested in their self-organisation. But this idea has already become outdated, passing into obsolescence over the course of the 1980s. Over the last 30 years or so, self-employment has clearly become a survival strategy for those who are not able to get a 'regular' job through an employment contract, typically those belonging to the weakest segments of the labour

[57] De Stefano (n 1).

[58] MA Cherry and A Aloisi, '"Dependent Contractors" in the Gig Economy: A Comparative Approach' (2017) 66 *American University Law Review* 637.

[59] Perulli (n 8).

[60] N Countouris, *The Changing Law of the Employment Relationship: Comparative Analyses in the European Context* (Basingstoke, Ashgate Publishing, 2007).

[61] G Davidov, 'The Status of Uber Drivers: A Purposive Approach' (2017) 6 *Spanish Labour Law and Employment Relations Journal* 6.

[62] MW Finkin, 'Beclouded Work in Historical Perspective' (2016) 37 *Comparative Labor Law & Policy Journal* 603.

market (migrants, young workers, disabled, etc).[63] Gig-economy workers are just the latest example of low-income persons being particularly attracted by self-employment. It would now be appropriate and desirable to equip all workers performing personal work, whether employees or not, with some 'core rights'. This has already been proposed by highly authoritative scholars, like Marco Biagi with the 'Statuto dei lavori' ('Jobs Statute'),[64] and Mark Freedland with the 'personal employment contract' construction.[65]

In order to decide which employment protections could be extended beyond the employment contract, it is possible to make use of a purposive approach,[66] applying it to possible future legislation. If we consider, for example, the right to a minimum wage, it is necessary to understand whether, according to its justifications and purposes, the right can be provided with a scope broader than just 'employees'. Since the goals of the minimum wage are commonly intended to be a reduction of in-work poverty and respect for human dignity, there is merit in extending the right to the minimum wage to all personal work relations.[67] These goals are clearly appropriate for everyone who personally performs any work or service for another party, no matter whether he or she is an employee under the employer's control and integrated to his or her business or an independent contractor self-organising his or her work. Many independent contractors as well as employees obtain their livelihood by means of their personal work, selling their energies, often to just one client. Therefore, they might have dignity only if their work receives fair compensation. Otherwise, they might fall into in-work poverty and not be able to participate in society.

V. EU Law is Moving Towards a Quasi-Universalisation of Core Employment and Social Security Rights

The Court of Justice of the European Union (CJEU) appears to be pushing EU labour law precisely in the direction of universalisation of employment and social protection beyond the employment contract. To this end, starting from the field of the free movement of workers, it has built a broad concept of worker, broader than that endorsed by national courts, according to the employment tests considered above. In particular, the concept of 'worker' has been further developed for the purpose of extending the scope of employment protection directives, and eventually for refining the boundaries of the so-called labour exception to antitrust law.[68] Following the development of the

[63] D Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Cambridge, MA, Harvard University Press, 2015).

[64] M Biagi, 'Le ragioni in favore di uno statuto dei nuovi lavoratori' [1998] *Stato e Mercato* 46.

[65] M Freedland, 'Application of Labour and Employment Law Beyond the Contract of Employment' (2007) 146 *International Labour Review* 3; M Freedland and N Kountouris, *The Legal Construction of Personal Work Relations* (Oxford, Oxford University Press, 2011).

[66] G Davidov, *A Purposive Approach to Labour Law* (Oxford, Oxford University Press, 2016).

[67] E Menegatti, 'A Fair Wage for Workers On-Demand via App' in E Ales et al (eds), *Working in Digital and Smart Organizations: Legal, Economic and Organizational Perspectives on the Digitalization of Labour Relations* (Cham, Palgrave Macmillan, 2018) 67.

[68] Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* ECLI:EU:C:2014:2411 [2014]. For a comment about the implications of the case, see V De Stefano and A Aloisi, 'Fundamental Labour

ECJ jurisprudence the concept of worker can be summarised on the basis of three traditional employment tests.

1. Direction/control: the employer dictates the manner in which the work is to be carried out (this includes the time and place of work).
2. Integration into the employer's business organisation.
3. Economic reality: the worker does not bear any risk of loss, does not employ anyone, and does not act directly in the market concerned.

Even if this concept seems very similar to that of employee which many different national jurisdictions share, it differs from the latter in two very important respects: (i) *direction* has been significantly watered down by the Court of Justice so as to coincide with the idea of coordination; and (ii) the fact that little, if any, relevance attaches to the commitment to an ongoing engagement, either understood in light of the mutuality of obligation test developed by English courts or as the continuity of the employment relationship in other countries.

These differences make the EU notion of worker much broader than that of employee commonly used by national courts, to the point of including intermediate category workers – variously referred to in different jurisdictions as dependent contractors, economically dependent workers, 'para-subordinate' workers, or employee-like persons – and, more generally, all workers who (i) are engaged in 'effective and genuine activities'; (ii) are economically, functionally, and/or operationally dependent on a client/principal; and (iii) receive some kind of remuneration in exchange for such activities.

As discussed, there is a wide variety of atypical work arrangements – not properly falling within the purview of what in national law is deemed 'employment' – that in the case law of the CJEU have already been found to be encompassed within the single EU notion of worker, such as casual work, where work is irregular or intermittent, with no expectation of continuity, as in the case of lecturers paid by the hour (*Allonby*).[69] This list can be expanded, by analogy, so as to include various forms of casual work such as gig-work or zero-hour contracts, where workers perform their activity within the business cycle of a single main client.

The capacious 'container' that is the single EU concept of worker can be applied to workers 'without adjectives', excluding only genuinely self-employed workers and entrepreneurs, that is to say, workers with 'direct' access to the markets they work in, where they normally perform services for multiple clients, without any functional and operational subordination to any other business entity. In this way, the CJEU's jurisprudence has wound up entitling dependent contractors, including casually engaged ones, to a good share of the employment protections provided for in EU primary and secondary law.

Rights, Platform Work and Human-Rights Protection of Non-Standard Workers' in JR Bellace and B Ter Haar (eds), *Labour, Business and Human Rights Law* (Cheltenham, Edward Elgar Publishing, 2018); M Biasi, '"We will all laugh at gilded butterflies". The shadow of antitrust law on the collective negotiation of fair fees for self-employed workers' (2018) 9 *European Labour Law Journal* 354.

[69] Case C-256/01 *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment* ECLI:EU:C:2004:18 [2004].

These are protections the Court has so far expressly located in matters relating to pay equality between male and female workers (*Allonby*),[70] pregnant workers (*Danosa*),[71] the organisation of working time (*Fenoll*),[72] the regulation of collective dismissal (mass layoff) procedures (*Balkaya*),[73] temporary agency workers (*Betriebsrat der Ruhrlandklinik*),[74] and the right to collective bargaining, which may work in derogation of antitrust law (*FNV Kunsten*).[75] The process of extending employment protections beyond the employment contract has probably not run its full course yet: the CJEU's case law still seems to be moving towards extending the single EU concept of worker to other EU social welfare laws. A process supported by the Charter of Fundamental Rights of the European Union (CFREU) and ultimately reinforced by the Commission's initiative on a European Pillar of Social Rights. The legislative initiative stemming from the Pillar, such as the Directive on transparent and predictable working conditions[76] and the recent Proposal for a Directive on adequate wages in the EU[77] endorse the expansion of the scope of application of the rights by recalling the concept of 'worker' proposed by the ECJ jurisprudence.

Precisely focused on the challenges relating to working conditions in platform work is the recent consultation started by the European Commission under Article 154 of the Treaty on the Functioning of the European Union (TFEU), in view of enacting a common EU regulative framework. The initiative is aimed at granting gig-workers the correct employment status in the first place. To that end, the European Commission proposed the provision of a rebuttable presumption of an employment relationship, which can be countered in court.[78] However, unlike the very broad and perhaps too generous ABC test, its scope of application would be narrowed by a number of criteria to be met in order to trigger the presumption or by limiting it to relationships with a certain stability.

A 'lighter' solution may consist in the shift in the burden of proof: very basic facts from which it can be presumed that an employment relationship exists (ie, remuneration as well as specific rules unilaterally established by the platform), in which case it would be for the platform to prove that she or he is a self-employed. Both solutions, as considered by the Commission would require starting legal proceedings before courts. This would not be the case of an administrative procedure to be opened by the parties or worker's representative, aiming at providing a certification of the work contracts

[70] See www.jurisprudencia.vlex.es/vid/740259545.

[71] Case C-316/13 *Dita Danosa v LKB Līzings SIA* ECLI:EU:C:2010:674 [2010], para 41.

[72] Case C-316/13 *Gérard Fenoll v Centre d'aide par le travail 'La Jouvene' and Association de parents et d'amis de personnes handicapées mentales (APEI) d'Avignon* ECLI:EU:C:2015:*200* [2015].

[73] Case C-229/14 Ender *Balkaya v Kiesel Abbruch- und Recycling Technik GmbH* ECLI:EU:C:2015:455 [2015].

[74] Case C-216/15 *Betriebsrat der Ruhrlandklinik GmbH v Ruhrlandklinik GmbH* ECLI:EU:C:2016:883 [2016].

[75] See above (n 68).

[76] Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union [2019] OJ L186/105.

[77] 'Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union' COM(2020)682 final.

[78] European Commission, 'Second-phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work' C(2021) 4230 final.

by labour authorities or independent bodies, as happens in the Italian work contracts certification. Either binding or purely indicative criteria or indicators valid only for platforms (and not with the general notion of 'employee') can be provided by legislation in order to support the tools above described.

VI. Conclusion

The controversial classification of platform workers, also emerging from the conflicting labour courts and tribunal decisions from all over the world, is supporting the idea that legislative intervention is needed to protect workers and move past the judicial subjectivism which seems to be pervading courts' approach.

I considered three different options and shared the opinion that it is not worth changing our understanding of employment relations because an increasing but still small minority of workers (gig-workers) are difficult to include in current customary boundaries of the 'employee' category. The best way to protect workers involved in the gig economy is thinking bigger and thinking about the extension of some suitable employment rights and social protections beyond the employment contract, towards all those who personally perform any work or service for another party, from whose business they are functionally and operationally dependent. The European Court of Justice has been very active over the last decade in extending some core employment protections beyond the employment contract (ie, maternity leave, right to rest periods, right to annual paid leave, right to collective bargaining). To this end, the Court has endorsed a broad concept of workers for the purpose of determining the scope of several pieces of EU social legislation. It includes not only those who are normally considered as 'employees' under national employment tests, but workers commonly regarded as 'quasi-subordinate', whose work is precisely characterised by a functional and operational dependence on a principal's business.

This broad concept of worker should include all those employment rights and social protections which, looking at their justifications and purposes, appear appropriate to all those who work in the described condition of dependence.