ELW european lawyers for workers network

European Labour Law Conference

New forms of labour and new structures of enterprises
- Challenges for labour law -

15 and 16 February 2019

Frankfurt/M., IG Metall Headquarter, Wilhelm-Leuschner-Str- 79

Documentation

Short biographies, abstracts, presentations and speeches

(5 March 2019)

WITH LAWYERS IN 21 COUNTRIES
ELDH
European Association of Lawyers for Democracy & Human Rights

VDJ Vereinigung Demokratischer Juristinnen und Juristen e.V.

Overview

Programme (English)

Following conferences in Brussels, Paris, Berlin, Madrid and Florence in recent years, the European Lawyers for Workers network is inviting you to a conference in Frankfurt/M on 15 and 16 February 2019. We were able to win the support of IG Metall, the Hugo Sinzheimer Institute for Labour Law, the European Association of Lawyers for Democracy and Human Rights (ELDH), the Rosa Luxemburg Foundation, and the German Association of Democratic Lawyers (VDJ)- Labour Law Commission. Once again, highly topical issues will be the subject of discussion. It is about the increasing undermining of traditional individual and collective labour law by new forms of work (keywords: platform economy (e.g. Uber), crowd-working, subcontractors, freelancers) and new corporate structures in the EU-wide and international framework (keywords: matrix, letterbox companies, industry 4.0).

With reference to the alleged independence of the employees, the employee status as a prerequisite for labour law protection is to be abolished and the collective representation of the interests of the employees by trade unions and works councils is to be undermined. We want to gain a more concrete assessment of the development with speakers from trade unions, labour law studies and the legal profession from numerous EU countries and - also on the basis of already existing examples and relevant case law - discuss labour law and trade union counter-strategies.

Programme

Friday, 15 February 2019, 14h00 to 18h30 (registration starts at 13h30)

Welcome and opening:

- ELW-Network, ELDH
- IG Metall: Boris Karthaus, IG Metall headquarters, legal department, Frankfurt/M.

1. **Reconstruction of working time**: Cristina Inversi, lecturer Manchester University
2. **Occupational Health and Safety:** Aude Cefaliello, PhD Candidate at University of Glasgow

Short discussion after each speech

Moderator: Thomas Schmidt, lawyer, ELDH Secretary General, ELW-Network

Break: 15 minutes

3. **Collective Rights:** Prof. Dr. Reingard Zimmer, European and international Labour law, Berlin School of Economics and Law
4. **Employee status**: Prof. Dr. Francisco Trillo, University of Castilla La Mancha
5. **Artificial corporate entities and the circumvention of labour standards**: Dr Jan Cremers, researcher, Tilburg University

Short discussion after each speech.

Moderator: Silvia Rainone, PhD-candidate, Tilburg University, ELW-Network

Saturday, 16 February 2019, 09h30 – 13h00

New forms of labour and structures of enterprises – challenges for trade union and legal strategies

(Entrance opens at 09h00)

09h30 Key note speech

Christiane Benner, IG Metall Co-President

Panel discussion I (trade union strategies)

- ETUC: Esther Lynch, Confederal Secretary, ETUC, Brussels
- France: Emilie Durlach, Legal Department CFDT, Paris
- Poland: Ewa Podgórska-Rakiel, PhD, Legal Department NSZZ "Solidarnosc", Gdansk
- Spain: Prof. Dr. Antonio Garcia-Muñoz, Goethe Universität Frankfurt/M., for CCOO

Short discussion

Moderator: Klaus Lörcher, former ETUC legal advisor, Frankfurt

Break: 15 minutes

Panel discussion II (legal strategies)

- England: Declan Owens, solicitor, London
- Netherlands: Bas van Dis, lawyer, Amsterdam
- Italy: Elena Gramano, PhD, Goethe Universität Frankfurt/M.

Short discussion

Moderator: Dr. Rüdiger Helm, lawyer, Munich and Cape Town, ELW-Network

13h00 Closing remarks

***

Organisers:

- ELW-Network

Supported by:

- European Association of Lawyers for Democracy and World Human Rights (ELDH)
- Hugo Sinzheimer Institute for Labour Law
- IG Metall
- Rosa-Luxemburg-Foundation
- Labour Law Commission of the German Democratic Lawyers (VDJ)

Programm (Deutsch)

Das Netzwerk „European Lawyers for Workers“ lädt – nach Konferenzen in den vergangenen Jahren in Brüssel, Paris, Berlin, Madrid und Florenz – diesmal zu einer Konferenz ein für den 15. und 16.Februar 2019 nach Frankfurt/M. Als Unterstützer konnten wir gewinnen die IG Metall, das Hugo Sinzheimer Instituts für Arbeitsrecht, die Europäischen Vereinigung von Jurist*innen für Demokratie und Menschenrechte, die Rosa-Luxemburg-Stiftung und die Vereinigung Demokratischer Juristinnen und Juristen – Arbeitskreis Arbeitsrecht. Wieder werden hochaktuelle Themen Gegenstand der Diskussion sein. Es geht um die seit Jahren immer mehr zunehmende Unterminierung des herkömmlichen individuellen und kollektiven Arbeitsrechts durch neue Formen der Arbeit (Stichworte: Plattformökonomie (z.B. Uber), Crowd-Working, Subunternehmer, Freelancer) und neue Unternehmensstrukturen im EU-weiten und internationalen Rahmen (Stichworte: Matrix, Letterboxcompanies, Industrie 4.0).

Unter Berufung auf angebliche Selbständigkeit der Beschäftigten soll der Arbeitnehmerstatus als Voraussetzung für den Arbeitsrechtsschutz beseitigt und die kollektive Vertretung der Interessen der Beschäftigten durch Gewerkschaften und Betriebsräte ausgehebelt werden. Wir wollen mit Referent*innen aus Gewerkschaften, der Arbeitsrechtswissenschaft und der Anwaltschaft aus zahlreichen EU-Ländern eine konkretere Einschätzung der Entwicklung gewinnen und – auch entlang von schon bestehenden Beispielen und einschlägiger Rechtsprechung – arbeitsrechtliche und gewerkschaftliche Gegenstrategien diskutieren.

Programm

Freitag, 15. Februar 2019, 13h30 bis 18h30 (Registrierung und Einlass 13h30)

Begrüßung und Eröffnung:

- ELW-Netzwerk, EJDM
- IG Metall: Boris Karthaus, IG Metall, Hauptvorstand, Rechtsabteilung, Frankfurt/M.

1. **Rekonstruktion der Arbeitszeit:** Christina Inversi, Dozentin an der Manchester University
2. **Gesundheit und Arbeitsschutz:** Aude Cefaliello, Doktorandin an der Universität Glasgow

Kurze Diskussion nach jedem Vortrag

Moderation: Thomas Schmidt, Rechtsanwalt, EJDM Generalsekretär, Düsseldorf

Pause: 15 Minuten

3. **Kollektive Rechte:** Prof. Dr. Reingard Zimmer, Hochschule für Wirtschaft und Recht, Berlin
4. **Mitarbeiterstatus:** Prof. Dr. Francisco Trillo, Universität von Castilla La Mancha
5. **Künstliche Unternehmensformen und die Umgehung von Arbeitsnormen:** Dr. Jan Cremers, Forscher, Universität Tilburg

Kurze Diskussion nach jedem Vortrag.

Moderation: Silvia Rainone, PhD-Kandidatin, Universität Tilburg

Samstag, 16. Februar 2019, 09h00 - 13h00 (Einlass ab 09h00)

Neue Arbeitsformen und Unternehmensstrukturen - Herausforderungen für gewerkschaftliche und rechtliche Strategien

09h30 Keynote Rede

Christiane Benner, IG Metall, Zweite Vorsitzende

Podiumsdiskussion I (Gewerkschaftsstrategien)

- EGB: Esther Lynch, Europäischer Gewerkschaftsbund, Confederal Secretary, Brüssel
- Frankreich: Emilie Durchlach, CFDT Hauptvorstand, Rechtsabteilung, Paris
- Polen: Ewa Podgórska-Rakiel, Ph.D., NSZZ "Solidarnosc“, Rechtsabteilung, Gdansk
- Spanien: Prof. Dr. Antonio Garcia Munoz, Goethe-Universität Frankfurt/M., für die CCOO

Kurze Diskussion

Moderation: Klaus Lörcher, ehemaliger Justiziar des EGB, Frankfurt/M.

Pause: 15 Minuten

Podiumsdiskussion II (rechtliche Strategien)

- England: Declan Owens, Rechtsanwalt, London
- Niederlande: Bas van Dis, Rechtsanwalt, Amsterdam
- Italien: Elena Gramano, Ph.D., Goethe Universität Frankfurt/M.

Kurze Diskussion

Moderation: Rüdiger Helm, Rechtsanwalt, München und Kapstadt

13.00 Uhr Abschluss

***

Veranstalter:

- European Lawyers for Workers Network - ELW-Network

Mitveranstalter/Unterstützer:

- Europäische Vereinigung von Jurist*innen für Demokratie und Menschenrechte EJDM
- IG Metall
- Hugo-Sinzheimer-Institut für Arbeitsrecht
- Rosa-Luxemburg-Stiftung
- VDJ Arbeitskreis Arbeitsrecht, Vereinigung Demokratischer Juristinnen und Juristen e.V.

Short biographies, abstracts, speeches and presentations

(As far as available)

Dr. Boris Karthaus, IG Metall headquarters, legal department, Frankfurt/M.

Short biography

Boris Karthaus, after studies of law in Frankfurt, Germany and Lyon, France worked as a lawyer in Berlin mainly on cases concerning collective labour law issues. He joins the legal service of the German Metall workers Union IG Metall in 2009 at the moment of the economic crises when 25 % of the 2.3 Mio. union members where in in partial unemployment, he participated in the negotiation of collective agreements maintaining the employment in the perspective the experienced staff stays “on board” until the recovery of the economic situation.

Since 2014 he is working essentially on questions concerning the German model of “codetermination”, in particular on the challenges which works councils and employee representatives in supervisory boards face when it comes to major changes in working processes and employment due to digital technologies and decreased employment need in the production of combustion engines.

Speech

Dear Colleagues,

first of all I would like, on behalf of IG Metall, welcome all of you to that very interesting and promising conference. Although we are all part of the “employee oriented labour law family”, I have to excuse myself, that I am not able, for reasons of time and pronunciation, to welcome all of you by name and personally. However, please feel welcome.

In the program, there are a large number of subjects on the table, and it is quite difficult to summarise them. The invitation mentions a few of them such as

- Platform economy
- Crowd-working
- Subcontractors
- New corporate structures
- Industry 4.0

As a representative from a trade union in an industrial sector, I have a particular perspective on the before mentioned phenomes. Whereas a colleague from a trade union who’s members work in the service sector might have a different perspective, but nevertheless a perspective which is at least as valuable than as mine.

Those different perspectives are important, and therefore I am pleased that we have here also perspectives from different countries. As trade unionists, our focus is very often on the colleagues and the factory, maybe the company, but we are by our DNA not international. The capital is.

If you have read Emile Zola's novella "Germinal" , which is distracting from time to time, you will have encountered a story of an attempt and a failure of international solidarity. Since, we have not yet learned our lesson, there is still room for improvement.

Course there are European federations, ETUC and the respective international departments, which are doing a great job. But just to give you a recent example: this week at the IG Metall Headquarters, a new telephone system for desk phones will be installed. You have to fill out an extra form, on paper of course, allowing you to make international calls.

Employers instead use new structures of companies, with organisational cross-border structures which are not only completely independent from so called legal entities, but also include international collaboration, presumably even by phone.

One could describe that process as a kind of "delocalisation of management"-

Thus, work councils are confronted with "legal representatives" of their employers, but the decision makers are "elsewhere".

Those so called "Matrix Structures" lead to the fact that works councils have no counterpart.

To a certain extent we may observe here that the "employer" is fading away.

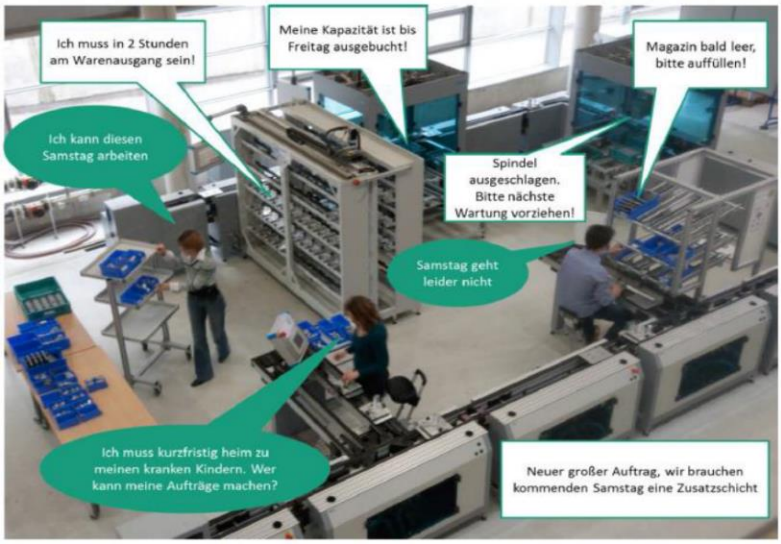
This is the exact opposite of crowed working and Platform economy or even so called "gig economy", which is more or less the idea to subdivide working tasks in tiny little pieces in order to spread them among a large number of self- employed people. Labour law is perceived in the context as "old fashioned", sometimes even by those it aims to protect.

I will refrain from going into details here, knowing that tomorrow our vice general secretary Christiane Benner will speak on this issues with by far more knowledge and experience.

All the before mentioned developments are based on technology, on digitalisation.

At the industrial sector, this translates to the "cyber physical systems" or "industry 4.0" – digital communication between work pieces and machines enables them to exchange information. The impact of that development on working conditions cannot be overestimated.

Kontextmanagement ersetzt die operative Planung
Die Smarte Fabrik organisiert sich dezentral und selbst in Echtzeit



Cyber-physische Systeme (z.B. Maschinen, Anlagen)

- haben eine Identität
- kommunizieren untereinander und mit der Umgebung
- konfigurieren sich selbst (Plug and Produce)
- speichern Informationen

dezentrale Selbst-organisation in Echtzeit

Former highly skilled workers have to survey machines doing the job, they have to follow software-driven assembling schemes and to collaborate with robots. At least a “collateral damage” of the digital technologies is that human behaviour and performance will be intensively monitored. But not only data protection issues arise, also qualifications and complexity of tasks, which are the basis of salary scales foreseen in the collective agreements, will be questioned. If the working task consist in following the instructions on a flat screen, does that still justify skilled workers salary?

There are different estimation on job losses, and nearly all of them point out that as jobs disappear, others will be created. However, where will they be located and what are the required qualifications?

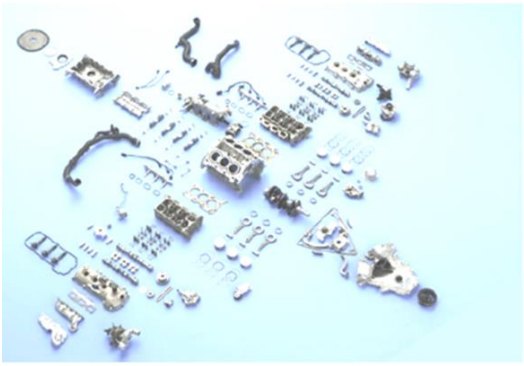
Finally, we are used to the situation that the employer by organizing his business relays on managerial prerogatives, and that labour law has the vocation just to limit those in the interest of employees.

What happens if those decisions are transferred to algorithms or even artificial intelligence?

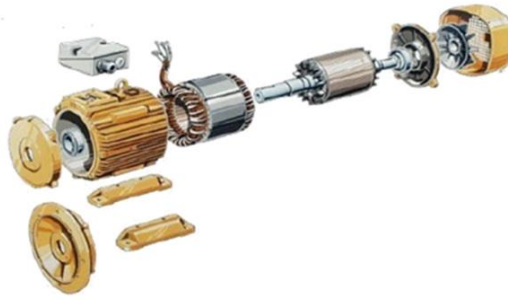
It is not very fruitful to discuss the arrangement of working time and shifts if the plant is part of a supply chain based on “production on demand”.

When talking about the impact of technology on working conditions, and on labour law in general, a representative of the Metall workers union, which has nearly 25% of its 2.3 Mio. Members in the automotive sector cannot avoid mentioning the decarbonisation process.

Kfz mit Verbrennungsmotor: ca. **1.400 Teile** im Antriebsstrang (Motor und Getriebe)



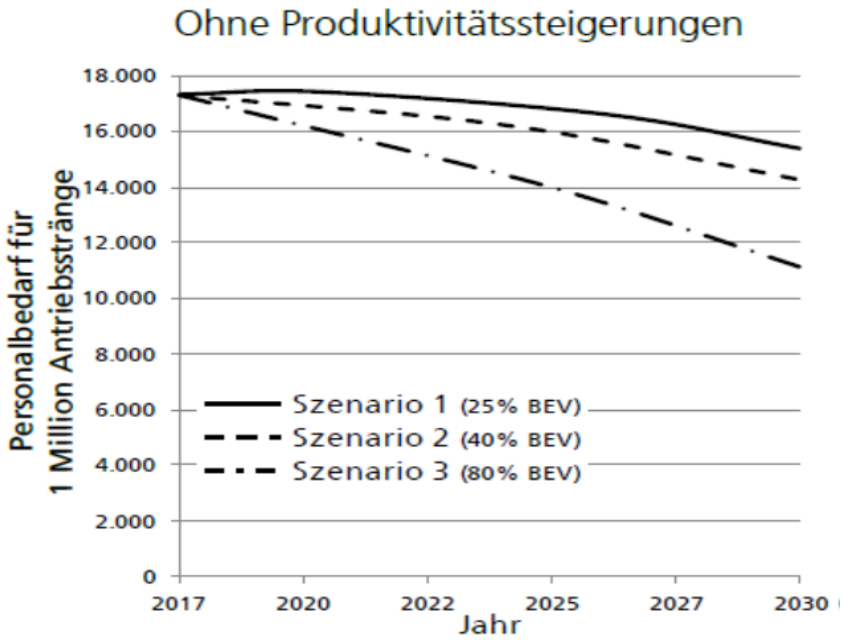
Elektroauto: ca. **210 Teile** im Antriebsstrang (Elektromotor und Getriebe)



A combustion engine contains approximately 1400 different parts, whereas an electric motor consists in 210 parts. Electric mobility is, despite of the battery management, much simpler and demands much less labour. We are facing an enormous transition process.

I will point it out clearly: the fuel combustion engine is a technology without a long-term perspective. There is no justification to maintain a polluting technology just to save employment at the cost of future generations.

But we also have to face the fact that this transition process will result in many, many job losses.



We already observe that larger groups and companies restructure themselves in a way that allows them to close or downsize combustion engine related fields of activities without a major impact on those business units less related to the production of engines and gear boxes.

And here labour law plays an imported role. The challenge is to use, at least in Germany, the limited possibilities of the so called “codetermination”, to enhance the protection against redundancies, to establish a right to re-qualify, in order to encourage employers to develop new products and technologies and to maintain jobs, instead of only paying social plan costs, considering that the party is over and that they have to move on to the next one.

In other words: Against the background of the before mentioned and necessary transition process, labour law is an important means to ensure that capital is employed also in the interest of employees and the society, instead of a short term profits. This is and was always the “reason being” (raison d’etre) of labour law since the first industrial revolution and will not change on the eve of the fourth industrial revolution.

Well, I have to admit, that this perception was not very popular for the last decades, at least not among politicians.

But if we fail to recognise the need of strengthening workers protection by labour law, social divide will reach an extent where people putting on “gilets jaunes” will be the less frightening event. A small taster of that will be probably the rise of extreme right wing parties in the upcoming European elections.

At the risk of being dramatic, please forgive me for recalling the larger picture, which we tend to forget when we are in the nitty gritty of our legal discussions.

Subjects such as “reconstruction of working time” and “occupational health and safety”, just to mention a few, are a necessary part of the whole picture.

How do we consider working time if work is dislocated and, again by digital means, possible at any time?

What impact have smart classes, cobots or autonomous on-site logistic vehicles on occupational health and safety?

So thank you for your patience you had with both me and my attempt to draft larger pictures, and I wish all of you a fruitful “closer look” at the subjects and discussion of this conference.

Thank you!

Cristina Inversi, lecturer Manchester University

Short biography

Lecturer in Employment Law and International and Comparative Labour Regulation at the Alliance Manchester Business School (AMBS), at The University of Manchester (UK); with multidisciplinary teaching experience on International HRM, Comparative Industrial Relations and Employment Relations (AMBS, The University of Manchester). Member of the Work and Equalities Institute (WEI) and PhD researcher on the themes of employment regulation and working time, with a special focus on new forms of work and the case of the gig-economy. Council member of the Manchester Industrial Relations Society (MIRS). Since January 2017, member of the Editorial Board of the international journal Diritto delle Relazioni Industriali (Giuffré).

Selected publications

Inversi, C., Buckley, L.-A. & Dundon, T., (2017) 'An analytical framework for employment regulation: investigating the regulatory space', Employee Relations, 39(3), pp.291–307

McNulty, Y., McPhail, R., Inversi, C., Dundon, T. & Nechanska, E., (2017) 'Employee voice mechanisms for lesbian, gay, bisexual and transgender expatriation: the role of Employee-Resource Groups (ERGs) and allies', The International Journal of Human Resource Management, DOI:10.1080/09585192.2017.1376221

Inversi, C. (2017) 'Forme di lavoro flessibili per i lavoratori più giovani e principio di non discriminazione in base all'età nel caso Abercrombie', Diritto delle Relazioni Industriali, 27(4), pp. 1241-1248.

Abstract

The reconstruction of working time, flexibility and other myths in the gig-economy

Proponents of new working models such as businesses operating in the so-called 'gig-economy' contends that new forms of work organisation and new regulation of the employment relationship are key elements to enhance workers preferences in terms of working time flexibility. The regulatory discussion around the gig-economy is a wide and ongoing debate that has been explored under multiple lenses: in particular, the legal challenges on the employment status of workers operating in this industry have been widely discussed (De Stefano, 2016; Todoli-Signes, 2017; Cherry and Aloisi, 2017; Prassl, 2018); more recently, a focus on the issues of collective organisation, workers voice and collective bargaining has also been addressed by researchers (Johnston and Land-Kazlauskas, 2018).

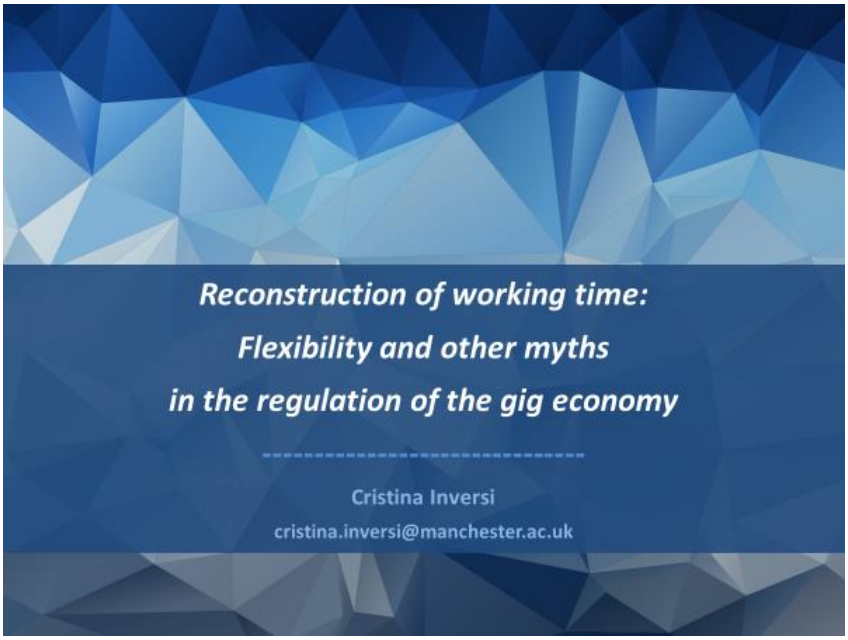
However, it appears to be a lack of empirical research on the realities of management and company regulatory practices, in particular with a focus on working time flexibility, which is at the core of the gig-economy regulatory discussion. The presentation has thus the aim to explore the workplace regulatory space of a gig-economy company operating in the food delivery industry, analysing service contracts and the realities of working time regulation for its suppliers-workers (riders) in three main UK cities.

The presentation considers a multidisciplinary theoretical approach (Inversi et al., 2017) to the topic of employment regulation, focussing on the specific process of regulating working time and how workplace relations shape the informal and formal regulatory process in practice. It considers both the role of legal regulation and contracts, integrating this dimension with aspects of collective and unilateral agency. Empirical evidence concerning actors' interpretations, adaptation and adjustments to working time rules by those employed in the gig economy will be presented. Data is being collected through semi-structured interviews with union activists and riders working in different gig economy related contexts. Furthermore, data from worker activists and trade unions in response to unilaterally

imposed working practices and employment relations' tensions surrounding employment status will be presented, adding to the debate about decent work.

The paper contributes to the understanding of changing regulatory dynamics concerning debates related to decent work. The analysis evaluates the intersectionality of formal and informal sources of regulatory coordination (e.g. law, social dialogue, negotiation, unilateral imposition) among different employment relations actors.

Presentation



The University of Manchester
Manchester Business School

MANCHESTER 1824

The analytical framework for exploring the regulation of working time

- Investigating the 'Regulatory Space' (Hancher and Moran, 1989), institutional analysis of actors and their influence on the regulatory arena.
- The analytical framework for understanding the regulation of employment (Inversi et al., 2017) and its application to the analysis on the regulation of working time (building on Berg et al., 2014): taking account of different regulatory dimensions (legal, negotiated, unilateral), levels and agency.

The University of Manchester
Manchester Business School

MANCHESTER 1824

Researching Working Time from a broader IR and HRM perspective

The University of Manchester
Manchester Business School

MANCHESTER 1824

Research questions

- How working time is regulated within the gig economy?
- How actors can influence and modify (formally or informally) the regulation of working time? (is flexibility really in the riders' control?)
- Can workers and their unions advance working time regulation within the gig-economy, and how?

The University of Manchester
Manchester Business School

MANCHESTER 1824

Methods

- Multilevel analysis of regulatory actors: supranational, national and workplace level
- Legal Analysis of the terms of employment and legal status
- Content analysis of documents created for policy making purposes
- Comparative analysis of working time organisation within 3 UK cities: London, Manchester and Brighton
- Semi-structured inverviews: respondents from multiple areas and 'levels'
- Riders' online survey (used for qualitative purposes)

The University of Manchester
Manchester Business School

MANCHESTER 1824

Respondents (deliveroo case)

Semi structured interviews:

- 4 union activists from IWGB (London & Brighton)

- 40+ riders

The University of Manchester
Manchester Business School

MANCHESTER 1824

Working time: contracts and business organisation

The 'Supplier Agreements': a tale of on-going changes and unilateral adjustments

- Different contracts for different cities (or areas within a city): varieties of pay structures and working time arrangements

- Old and new contracts, role of courts, agency of Unions and Political pressures

The University of Manchester
Manchester Business School

Contract terms	Manchester	Brighton	London
Old contract			
Pay	Pay per hour + delivery fee (6.50£ per hour + 0.50 or 1 £ delivery fee);	Pay per delivery (4£);	Pay per delivery (3.75£);
Time scheduling	Use of Staffomatic to manage working schedule and availability	Use of Staffomatic to manage working schedule and availability	Use of Staffomatic to manage working schedule and availability
Substitution clause	Presumption to perform the Service personally, but right to appoint a substitute.	Presumption to perform the Service personally, but right to appoint a substitute.	Presumption to perform the Service personally, but right to appoint a substitute.
New contract			
Pay	Pay per delivery (delivery fee not mentioned);	Pay per delivery (delivery fee not mentioned);	Pay per delivery (delivery fee not mentioned);
Time scheduling	Matching system to regulate and manage working schedules. Authorisation to work needed through the App.	Freedom of choice when and where to log in and work.	Freedom of choice when and where to log in and work.
Substitution clause	Presumption of providing the service personally removed. Easing of the requirements and obligations on the right of appointing a substitute.	Presumption of providing the service personally removed. Easing of the requirements and obligations on the right of appointing a substitute.	Presumption of providing the service personally removed. Easing of the requirements and obligations on the right of appointing a substitute.

The University of Manchester
Manchester Business School

Working time duration and organisation

Investigating riders' ability to determine the amount of hours they work and their organisation:

- Manchester: per hour pay zone – fixed hours assigned + additional online scheduling – difficulties in getting hours assigned; company unilaterally determine shifts; diversification/fragmentation of the workforce; problems with taking holidays or requesting time off.
- London and Brighton: flexibility in determineworking time , restrained by the managerial organisation of the workforce (effects on working time utilisation).
- Some areas of London (London Spitalfields): mixed regulation with workers on per-hour and others on per-drop.

The University of Manchester
Manchester Business School

'Every week you have to go on a website for the riders and they release the schedule for the whole week and you have to apply for the hours that you want to work, and when you apply basically you have a 'question mark' and that means that you have to wait for Deliveroo to approve that time that you are going to work, it means also that until they don't approve you don't know if you are going to work and usually it takes 4-5 days for them to approve so you know when you are going to work basically 2 days before when you are going to work' (Manchester rider 10).

The whole way your shifts are displayed - it's called staffomatic - is like an online website ... so every Sunday a new schedule gets posted for two weeks or a week ... So every time it came out I just used to apply for absolutely everything. If they know you, if they know you are a good driver you are more likely to get them over someone they don't know'. (Manchester rider 7)

The University of Manchester
Manchester
Business School

MANCHESTER 1824

How to get hours?

*'So… it's very much up to them [*management*], if they are in need of you to do more hours they will give them to you. Whereas if you are in need to do more hours and they don't necessarily have them or it is not a busy time, it's nearly impossible to get any sort of answer or get any sort of extra time off them because they just don't give it out'. (Manchester rider 7)*

'Nearly impossible to get more hours. But very easy to get less'. (Rider from survey, pay per hour zone)

'Deliveroo changes hours as they wish, the drivers have very little influence on the hours we are offered and most people are offered significantly less hours than they want'. (Rider from survey, pay per hour zone)

The University of Manchester
Manchester
Business School

MANCHESTER 1824

Fragmentation of workforce and time: full timers and part timers

'A lot of people, a lot of the riders are all young, that's the image that they want to show as well, you know "all young people that work part time, studying"… when the actual fact is that the majority the people do full time work, lot of them have families, people who they care of, so they have to work. Some of them used to do 12 hours, 13 hours a day every day in the week and some of them still do it just because you can earn a lot of money if you do many hours' (Manchester rider 7).

'So we had I think maybe 30 to 40 people who did the majority of the work, you know these are all the 'full timers' who maybe make up at least 50% if not close to 60-70% of all of the workload' (Manchester rider 7).

'So there was a few of us that we were there the longest… because now you have to apply for hours but we did not at the beginning, I always had accepted set hours, they kept giving me how many hours I wanted so like 38-40 hours a week'. (Manchester rider 2)

The University of Manchester
Manchester
Business School

MANCHESTER 1824

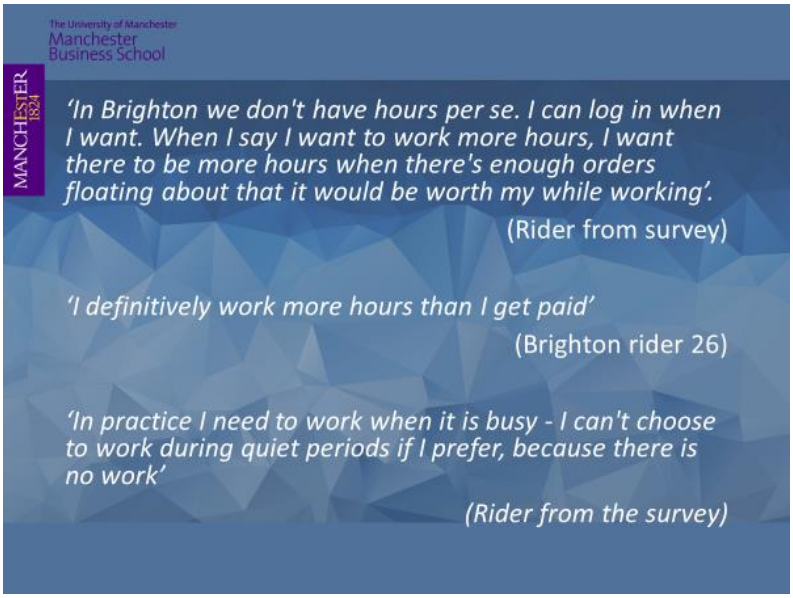
Variation of contract and pay per delivery and the fexibility myth

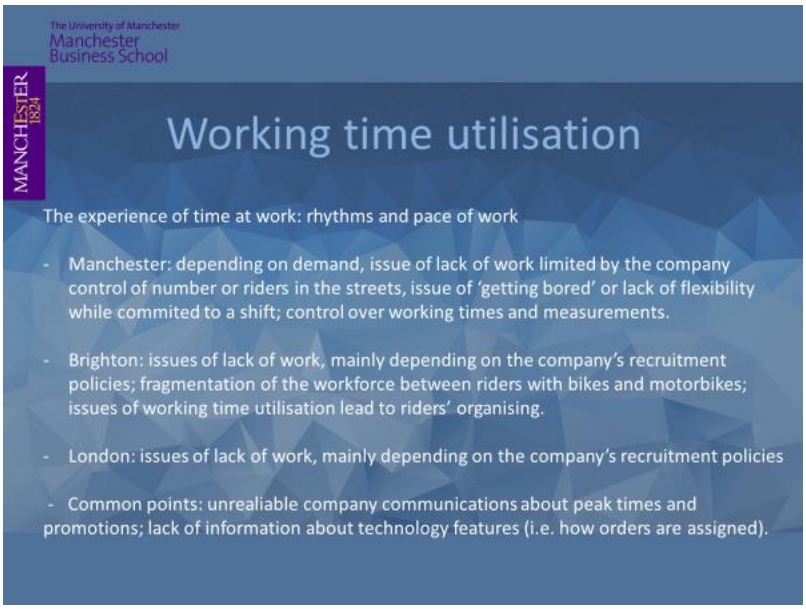
'That never changes [the amount of hours, ndr.]… (laughs) *is not real. Because Deliveroo has changed the way they are working, because Deliveroo is thinking about this work and about changing to this "job per drop". So, many drivers changed to shifting their hours to working per job. They think is better. I think no. Because you have to work more hours and receive the same money. For Deliveroo is better because they have more drivers in the streets for more hours'*

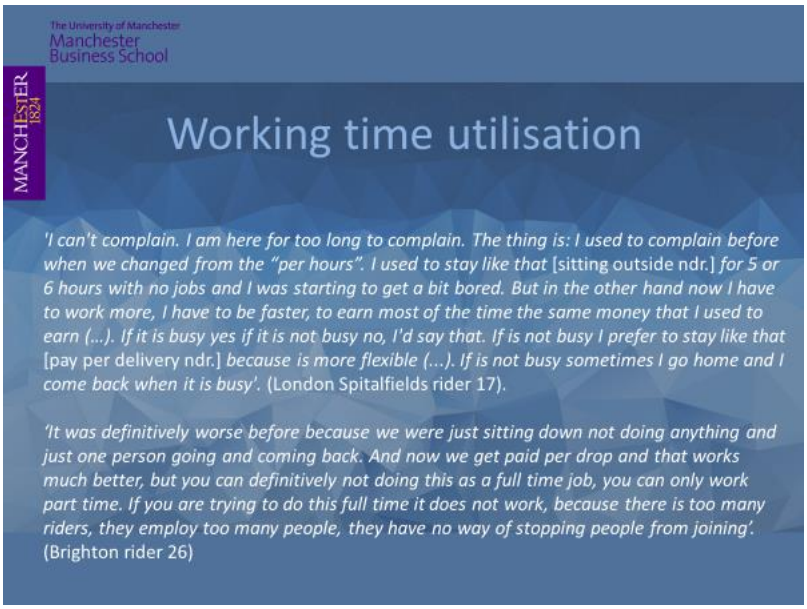
(London Spitalfields rider 16)

'The hours I work depend on when it will be busy. As I get paid per delivery it means that when it's quiet I might get 0/1 order an hour, which is well below the minimum wage. Therefore if I want to survive I need to work really unsociable hours like Friday/Saturday and Sunday evenings'.

(Rider from survey, pay per delivery zone)


The University of Manchester
Manchester
Business School
MANCHESTER 1824
'In Brighton we don't have hours per se. I can log in when I want. When I say I want to work more hours, I want there to be more hours when there's enough orders floating about that it would be worth my while working'.
(Rider from survey)
'I definitively work more hours than I get paid'
(Brighton rider 26)
'In practice I need to work when it is busy - I can't choose to work during quiet periods if I prefer, because there is no work'
(Rider from the survey)


The University of Manchester
Manchester
Business School
MANCHESTER 1824
Working time utilisation
The experience of time at work: rhythms and pace of work
- Manchester: depending on demand, issue of lack of work limited by the company control of number or riders in the streets, issue of 'getting bored' or lack of flexibility while commited to a shift; control over working times and measurements.
- Brighton: issues of lack of work, mainly depending on the company's recruitment policies; fragmentation of the workforce between riders with bikes and motorbikes; issues of working time utilisation lead to riders' organising.
- London: issues of lack of work, mainly depending on the company's recruitment policies
- Common points: unrealiable company communications about peak times and promotions; lack of information about technology features (i.e. how orders are assigned).


The University of Manchester
Manchester
Business School
MANCHESTER 1824
Working time utilisation
'I can't complain. I am here for too long to complain. The thing is: I used to complain before when we changed from the "per hours". I used to stay like that [sitting outside ndr.] for 5 or 6 hours with no jobs and I was starting to get a bit bored. But in the other hand now I have to work more, I have to be faster, to earn most of the time the same money that I used to earn (...). If it is busy yes if it is not busy no, I'd say that. If is not busy I prefer to stay like that [pay per delivery ndr.] because is more flexible (...). If is not busy sometimes I go home and I come back when it is busy'. (London Spitalfields rider 17).
'It was definitively worse before because we were just sitting down not doing anything and just one person going and coming back. And now we get paid per drop and that works much better, but you can definitively not doing this as a full time job, you can only work part time. If you are trying to do this full time it does not work, because there is too many riders, they employ too many people, they have no way of stopping people from joining'.
(Brighton rider 26)

The University of Manchester
Manchester Business School

MANCHESTER 1824

Fragmentation matters?

'I found work in London more dynamic, it is busier, here [in Manchester ndr] *sometimes is very quiet. (…) In my case at the beginning in London* [with the pay per hour system] *it was ok for the money but I was allowed to work only 6 hours per day. When it changed with the per drop I could work as long as I wanted, I could work eventually for 12 hours a day, so for me it worked better this way. (…) When I came to Manchester I was a little bit disappointed because here you get paid 50 pence per drop for four days a week, which is think is not enough (…) here I could set my schedule for 40 hours but then I could not be so flexible to choose when I want to work'.* (Manchester rider 10)

'We are often staying around waiting for orders and not getting paid, so now I think that to be paid hourly is better because no matter what you do you are still getting paid, I think it is more reliable' (Brighton rider 27)

'There is a bit of a split between cyclists and scooters. It is not a personal split, it is a technical split. The way Deliveroo allocates orders to riders: they have a clear preference for motorised vehicles. So while it is not very busy but it is still ok, for the scooters they are still making a living but it is really really difficult for cyclists' (Brighton rider 12)

The University of Manchester
Manchester Business School

MANCHESTER 1824

'We always had our little community within the riders. Since I started we had our social media chats to keep connected. But by the beginning of 2017 we have started to talk about weather we should think about the union idea, because the unions were in the Bristol situation (…) and then something funny happened, a completely different group of people, mostly motorcyclists, just became frustrated because of the way things were working at the time and the reason behind that it was largely because it was a very quiet period, there was not much work, but Deliveroo was using quite an aggressive hiring strategy, they were always promoting with the claim "we need more riders" but at the same time the people actually working were not getting enough work (…). So this different group of people just became so frustrated that said "ok, we should strike" and they organised that within the space of few days (…). When they came down [the IWGB ndr.] and talked to people the majority of us raised their hands and were in favour of joining the Union' (Brighton rider 12)

The University of Manchester
Manchester Business School

MANCHESTER 1824

'The monitoring stimulates me to be more productive however to do this it means I have to take more risks while cycling to meet Deliveroo's deadlines'. (Rider from survey)

'They used to give us our stats on performance but they stopped in the interest of trying to defeat our (the union's) claim against riders being independent contractors. They still measure our performance but we don't see it. They will fire you if you don't meet the standards. We don't have a good chance of challenging any discipline without knowing what our stats are. The app does mess up, and errors can happen in a number of ways out of our control…' (Rider from survey)


The University of Manchester
Manchester
Business School
MANCHESTER
1824
Conclusions
Evident (unilateral) fragmentation of working time regimes and the workforce
Working time organisation and duration strictly connected and interdependent with utilisation
Very strong unilateral power from the management
Fragmentation of regulatory sources, extent of control and unilateral power of the company affects the institutional nature of representation and collective responses (producing fragmentation of agency).

Aude Cefaliello, PhD Candidate at University of Glasgow

Short biography

Aude graduated with Honours from the Université d'Auvergne School of Law (France) in 2012. She completed her first Masters in Employment Law at the same University in 2014. On that occasion, she wrote her Masters thesis on "Psychosocial risks at work in French and British Law under the influence of European Law". Subsequently, she obtained an LL.M degree at the University of Glasgow in 2016 where she conducted research on "Collective bargaining: a single European concept? – Comparative study France and United Kingdom". Then, from November 2015 to July 2016, she was a visiting scholar at the Max Planck Institute in European Legal History in Frankfurt (Germany). There, she worked on "Lessons from the European Occupational Health and Safety mobilisation in the 1970s to analyse present challenges". She started her PhD at Law School of the University of Glasgow in October 2016, where she is currently working on "Towards Improvement of the Occupational Health and Safety Legal Framework in the European Union". At the occasion of her PhD research, Aude has been an intern at the European Trade Union Institute (ETUI) in June and September 2018 investigating the possibility to develop a litigation strategy before the CJEU in the OHS field.

Abstract

Most of the Occupational Health and Safety (OHS) legal frameworks in the Western European countries have been built on the model of standardised employment relationships with individuals providing services exclusively to one employer, on a predictable work week schedule, at the employer's place of business with the mutual expectation of long-term career development (Brschak and Davis-Blake, 2006). This model was predominant in the 1970s, time where most of these countries reformed their OHS Legal Frameworks from an individual compensation approach to a focus on collective prevention, from a quantitative approach to a qualitative understanding of OHS. Since then – and on this basis, a consequent protective framework has been built including a duty for the employer to take care of the health and safety of his workers and being held responsible if he fails. However, from the end of the 20th century, the traditional employer-employee relationship started to be challenged by nonstandard work arrangements. The problem is that – as much at the standardised employment relationship follow common trends – nonstandard work arrangement does not follow a single pattern and it is impossible to uniformly describe it (Bernhardt, 2014). The nonstandard work arrangements are not only more precarious, but they also come with a loss of access to legal protections and social benefits enjoyed by standard arrangement workers (Howard, 2017). One kind of atypical employment relationship is currently raising a significant interest: the gig-workers. They are usually qualified as independent contractors, which means that they do not have a legal right to a safe workplace and are not legally eligible for worker's compensation benefits if they are injured during the performance of their work (Berkowitz and Smith, 2016). Some authors have noticed that the fast development of the gig economy has increased the number of workers who do not seem to fit into either category of worker or self-employed (Pinsof, 2016).

Therefore, this presentation provides an overview of the impacts of the gig economy on the Occupational Health and Safety legal framework. After a review of the current literature and the INRS (Institut national de recherche et de sécurité) Report published in January 2018 on "Platformisation 2027", it was possible to identify three main challenges that the current OHS legal approach has to face due to the gig economy. Thus, the paper is structured in three parts around the challenges regarding (1) the nature of the OHS risk, (2) the application of the core concept of prevention to the

functioning of the gig economy, (3) the application and enforcement of the traditional OHS legal framework.

This paper shows that the gig economy does not create new jobs as such but changes the management-process of existing jobs such as food carrier. Thus, regarding OHS risks the physical hazards already known are present, but the functioning of the platform exposes the gig-workers to additional risks, i.e. Psychosocial risks. The study will also highlight that the concept of prevention – which is the core of the current OHS approach – might not be suitable with the way the platforms are operating, even if some improvements can already be made. Finally, the presentation will cover briefly the problem of the legal qualification of the gig-worker which raise the bigger problem of the distinction between worker and self-employed individual in the current labour market and society. To conclude, the gig-economy does not challenge the OHS legal framework by underlining the need for an in-depth reform: the protection of the risks they are exposed to exists and preventive mechanisms could already be put in place. The problem is that the protective framework is not applicable due to a broader problem of qualification in Labour Law.

Speech

By Aude Cefaliello – PhD Candidate at the University of Glasgow

Work has always been dangerous, and – most likely – will always be. All we can do is to minimise to what extent it is dangerous. What changes over time is the nature of the work, the nature of the risk, and so the legal protection regarding Health and Safety at Work.

During the 19th century, when people were working in mines what was in stake was their lives. They did not know if they were coming back alive at night. If you were lucky, a small monetary compensation could have been given to your family. Then in the 20th century and the development of factories – and the Taylorism – the risk was less to lose your life, but more to lose your hand. However, there was still an improvement of the working conditions but also the development, and the recognition, of new risks with the repetition of the same movement again and again. Then, in the 21st century, we moved from the factory to the offices with the development of new technology (e.g. the open space). Overall it was an improvement of the working conditions, but there was the development of the psychosocial risks, the musculoskeletal risks and all the risks linked with the new technology. Recently, for the past years, we have seen the new technology impacting the traditional way of performing work with the "gig economy"; which is hard to define and is challenging the evolution we had so far.

Legally, the evolution has been to take in consideration only the physical risk (i.e. working accident), to the physical risk with the working accident **and** the occupational disease. Later, the psychosocial risks, the musculoskeletal disorders have been taken into consideration. There is also the scientific progress with the improvement of knowledge on the nanoparticles for example. There was also an evolution of the approach of health and safety at work; at first, the priority was given to the individual compensation in case of a work accident, and then – from the middle of the 20th century – the focus was on a collective prevention of the risk.

The legal reforms that embodied these changes and are the current basis of our legal framework – at least in Europe and North America - happened in the 1970s. The reforms developed the general principles of prevention which are the cornerstone of the OHS legal framework. In my point of view,

the development of the gig economy is challenging these approaches on three grounds. It is challenging: the **nature of the risks**, it is challenging **the approach of health and safety at work**, and it is challenging its **legal application**.

1. The Gig Economy as a challenge for the nature of the risks at work

It is important to underline that the gig economy does not necessarily add new physical risk while performing the work or the task. Indeed, these physical risks already existed because the job existed. For example, for the Deliveroo riders delivering with a bike existed before. The risk of riding a bike is not new. What is new is the "extra layer" of risk that the algorithm adds. Indeed, the fact to perform the work based on an app adds or increases the psychosocial risks.

In that respect, a report published last year by the INRS – *Institut National de Recherche et de sécurité* – called "Plateformisation 2027" illustrated this idea perfectly[1]. The authors of this report investigate the impact of the platform on the work, and in particular on occupational health and safety. They reported a few elements that increase the psychosocial risks.

First, they notice an intensification of the working time. Indeed, the working hours can be considered as unexpected because you never know when you are going to work or for how long. There is also an increase in the atypical working hours, most likely during evenings, nights and weekends. But what adds the pressure is the unrealistic or unclear goals set by the platforms such as the number of dishes or customers they expect you to serve, how fast you should be on a bike or with your car etc.. The AI imposes the rhythm, and that is the significant difference compared to what we have known so far.

Secondly, the authors of the report notice an increase in the emotional pressure. The gig workers have an obligation of being positive under every circumstance due to the notation and rating system. To some extent, we can find the same element in the retails sector. However, the major difference is that under the gig economy every customer rates the service, and the AI will analyse it. According to these data, the platform can log you off if your results are not good enough. It is a constant and intense phenomenon.

Thirdly, there is also the lack of autonomy which is noticeable and plays an important role. Everything is monitored and scanned by the AI. However, more importantly – when it comes to Uber and Deliveroo riders – it is the way, the routes they have to take, that sometimes can be quicker on the screen but it far more dangerous in real life. Most of us have already used Google Map to find their ways, and most likely some of us have experienced some surprising way that the app recommended. As users we can use our common sense and our appreciation of the environment to say no and take another route; the riders and drivers might have to justify themselves why they are not following the instructions.

Fourthly, there is also the lack of social interaction which plays an important factor in the increase of the psychosocial risks. Indeed, the gig workers are isolated in the sense where there is no close management in case of a problem, and no collective workforce (at least officially). If their bikes break down, they are on their own. Deliveroo won't help them. They have an accident on the road; they are on their own. Uber won't help them. There are informal networks that start to get more structured, but the platform does not organise them.

[1] Accessible at: http://www.inrs.fr/media.html?refINRS=PV%208

Finally, there is the insecurity of the work, also called the precarity of the work. The workers do not know how the platform is performing. They do not know if there are still going to have some work the day or the week after. The allocation of the work depends on the platform. Additionally, there is always the risk to be log off for no reason – or no official reason. It is the precarity of its highest, especially because so far these workers are mostly considered as self-employed, so they cannot benefit from any employment protection.

2. The Gig Economy as a challenge for the approach of Occupational Health and Safety

Beyond the additional risks that the platforms are creating, the way the platforms are organised is challenging the general approach of health and safety at work. The report put in perspective the general principles of OHS with the organisation of the platforms.

We can list the general principles as follow:

- Avoiding the risk – which means finding the source, the origin of the risk and suppressing it.
- Assessing the risk – also known as the risk assessment or evaluating the risk. Which is crucial in the legal framework; it is an obligation for the employer to assess the risk. It is the first step to prevent the risk. It is one fundamental element to prove the responsibility of a potential employer within the current legal framework.
- Acting at the origin of the risk – either to suppress it or to minimise it.
- Planning the prevention – it is what I said earlier; usually, the employer has to evaluate the risk to design the prevention.
- Taking collective protective measures – according to the European law[2], the focus has to be on collective measures, then individual measures and only if none of this is possible it would be possible to plan a system of monetary compensation.
- Giving precise instruction to the workers – which can also be found in the European obligations for the employer to inform, to consult and to train the workers and/or their representatives.

According to the report published by the INRS, it is complicated to suppress all the risks for the job performed via the apps. It is not possible for Uber or Deliveroo to avoid or to control the behaviours of other drivers on the roads, that can lead to an accident. Regarding the evaluation of the work, currently, the platforms tend to place the responsibility of the prevention (and the assessment) on the shoulders of the individual. However, the algorithms could integrate some aspect of prevention and start some mechanism of prevention. For example, if one Deliveroo rider notices a car accident somewhere, or if he/she has an accident because the road is dangerous; the rider can send the information to the platform that enters it into the algorithm and the other riders avoid this path. Same for the aggressions; Dr Karen Gregory reported that in Edinburgh some Deliveroo riders are attacked by teenagers in the street so they can have the food and the smartphones. If one rider notices such a group, it can be sent to the platform and be taken into consideration for the other riders. It means that it is possible even in the current context.

To summarise the observations, at the moment the general principles of prevention does not apply or are hardly applicable considering the functioning of the platform. One point is essential – the 4th bullet point in the observation – "*Platforms do not integrate the prevention in their organisation*". Sometimes they value the individual compensation of the risk. Indeed, when it is raining or particularly packed on the road, the platform might give the riders a bonus. It is an incentive to place the workers in a dangerous situation. However, it does not have to be this way. In terms of prevention, the platform could send some notifications such as "you have been riding X numbers of km; time to check the

[2] The main directive in EU law regarding OHS is the framework directive 89/391/EEC

pressure of your wheels and to change your breaks", or something similar. Alternatively, even when they have an accident, having a button where the app can quickly provide them with a phone number of a place that fixes bikes, and potentially the contact of a doctor around. The platforms are constantly in touch with these workers for the moment only for the worst; we can try to use this connection for the best, or at least the better.

However, even if some solutions or improvements are possible, the real underpinning problem is the general lack of incentive for prevention. In the current or traditional system of health and safety at work, there is a system of responsibility/ of liability if there is a breach of prevention by the employers. Here, even if there is a working accident or the recognition of an occupational disease, the way by which the platform would be held responsible is uncertain. Even without taking in consideration the liability aspect of the problem; we can assume that employers would like to "invest" on the health and safety of their workers because it takes time to train someone, and they have an interest to keep them into their business. It is not necessarily the case here; there is a high turnover; these workers arrived already skilled and with their own material. There are no needs to "take care of them" – the importance is given to the short-term benefice, where the prevention of health and safety at work focused on a long-term benefice.

3. The Gig Economy as a challenge for the Legal Framework of Occupational Health and Safety

Currently, individuals can be classified as "Employee", "Worker" or "Self-employed". Only if the individual falls within the two first categories, he can benefit from the protections under the OHS legal framework – and labour law to a certain extent. The self-employed are also concerned by the Occupational Health and Safety legal framework, but from the other side with duties and no major protection. It is the reason why I emphasise on the protective aspect. The employee and the worker are in a relationship with the "Employer", and they have mutual obligations. Then, these protections and duties are enforced by labour inspectorates (or the equivalent structure depending on the national legal systems), the courts and the workers' representatives and Trade Unions (variations might apply depending on the national legal systems). The problem is that the gig workers are at the border of this protective framework. It is crucial because if they are workers they benefit from the existing Occupational Health and Safety Frameworks, and if there are self-employed it is not the case.

Thus, we arrive at a more general question which is not specific to Health and Safety at work – but which impacts it: "What is the legal status of the « gig worker »? (i.e. Worker or Self-employed) and "Who is responsible for all the OHS Legal duties and consequences?". This contribution does not cover the details of these questions, it is highly debated, and it is not the point here[3]. There are jurisprudences going on everywhere on this question – in the UK with Uber[4], and in France with "Take it Easy"[5].

The problem is that the platforms try everything to escape the field of labour law, and so Health and Safety. They argue that they are connecting customers with self-employed individuals and they are

[3]. *See for example*: Stewart, A. and Stanford, J., 2017. Regulating work in the gig economy: What are the options?. *The Economic and Labour Relations Review*, *28*(3), pp.420-437 ; Pinsof, J., 2015. A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy. *Mich. Telecomm. & Tech. L. Rev.*, *22*, p.341 ; Lobel, O., 2017. The gig economy & the future of employment and labor law. *USFL Rev.*, *51*, pp.51-74 ; Aloisi, A., 2018. Facing the Challenges of Platform-Mediated Labour: The Employment Relationship in Times of Non-Standard Work and Digital Transformation.

[4] Uber v Aslam [2018] EWCA Civ 2748

[5] Cour de Cassation, Chambre sociale, arrêt n°1737, 28 Novembre 2018

providing a service. It touches to the more general problem of the definition of the gig-workers and the reality of their work. In that respect, there is a quote from an article published by Lobel[6] in 2017 which is really interesting.

> *"Gig workers are drivers, delivery-people, personal assistants, handymen, cleaners, cooks, dog-sitters, and babysitters but increasingly are also more specialised professionals, including nurses, doctors, teachers, programmers, journalists, marketing specialists and, well yes, lawyers too. For example, the rising startup InCloudCounsel, offers an army of lawyers providing on-demand, routine legal services.*
>
> *The technology is here: as long as you have the time, skill, knowledge, and empty couch, and unoccupied vehicle, or an idle lawnmower, you can swiftly become a corporation. The platform economy channels anything and everything sitting idle into the market and monetizes it."*

This quote underlines that the challenge of the gig economy is not in the creation of new risks, or new jobs – but the way the traditional jobs are treated. The risks are known, and there is a legal framework to address most of these risks and these professions (with of course some flaws). However, the real challenge might not be to change in depth the approach but to find a way to apply it to this new "process" of the jobs.

We are facing the old problem of the misclassification of the workers – that we know for years with the sham-contract. It is just the proportion of the gig economy that makes it more complicated. Indeed, even if they are recognised as workers – how can we enforce the labour law and the health and safety standards to the gig workers? It might be possible to a certain extent for the "offline"/"grounded" workers who are physically performing somewhere. However, how do we ensure the application of the law to the "online"/"cloud" workers who are working exclusively online? The more general problem of the geographical competences of the labour inspectorates and the court that are facing the digital era have to be addressed.

CONCLUSION

As a conclusion, I would like to come back on the three challenges that the labour law and the health and safety at work legal framework have to face with the development of the gig economy.

First, in terms of the risks; there are no new risks, but a new association of risks due to the functioning of the platform. Secondly, regarding the approach of OHS; the gig economy is challenging the general principle of prevention by focusing on the individual. However, there are ways that the platforms can use to improve and to prevent collectively the health and the safety of their workers/users. The question is the motivation and the willingness to do so. Finally, about the legal framework; there is the global challenge of the classification of the workers and its consequences in terms of protection. However, we need to think a step ahead and think about the conditions to enforce the legal framework if we find a way to make it applicable.

What can be done next? It might be possible to fight before the courts to obtain the classification of workers for the gig workers. It might be a solution, but it will be a case by case approach and might take some time. Of course, there is a high chance that the platform will try to adapt to the

[6] *See* Lobel, O., 2017. The gig economy & the future of employment and labor law. *USFL Rev.*, *51*, pp.51-74

jurisprudence to avoid the classification[7]. Some researchers are trying to work on the general understanding and definition of the concept of "employer" and redefining the working relationship – which can be interesting. Some other researchers are also currently advocating for a "floor" of standards rights applicable to everyone regardless of the classification. All these approaches are interesting and worth further investigations. I just would like to say that the gig workers are putting in the light the working condition of the self-employed also called independent workers that existed before, just with a new dimension. One way might also for the States to improve the situation of the self-employed workers (which will make the "misclassification" less appealing). As an example, there has been a reform adopted in France last January – so in 2018 – regarding the independent workers (self-employed) and which merge them with the general system of social security. This led to an improvement of the compensation in case of working accident or occupational disease. It is compensation and not prevention, but it can be a way to pursue as well. I don't think one should be chosen and not the other; we need to work on every path to improve the situation.

Presentation

[7] See the case of Deliveroo in M Ford, 'Pimlico Plumbers: Cutting the Gordian Knot of Substitution Clauses?', UK Labour Law Blog, 19th July 2018, available at https://uklabourlawblog.com/2018/07/20/pimlico-plumbers-cutting-the-gordian-knot-of-substitution-clauses-michael-ford-qc/

The Challenges of the Gig Economy for the Occupational Health and Safety

The Change of Occupational Health and Safety Over Time

19th Century | **20th Century** | **21th Century**



The Challenges of the Gig Economy for the Occupational Health and Safety

The Change of Occupational Health and Safety Over Time

	19th Century	20th Century	21th Century
1 Challenging **the risks** of OHS	• Physical Risks	• Physical Risks • Psychosocial risks	• Physical Risks • Psychosocial risks • Musculoskeletal Disorders
2 Challenging **approach** of OHS	Priority to the **individual compensation** in case of a work accident		Priority to the **collective prevention of the risk** – both working accident and occupational disease
3 Challenging OHS **Legal application**		1970s – Reforms of OHS (Europe & North America)	

The Challenges of the Gig Economy for the Occupational Health and Safety

1 Challenging the OHS Risks

Not necessarily **new physical risks** while performing the work (the task already existed), but the process through an algorithm **add/increase the psychosocial risks**

INRS Report – *Plateformisation 2027,* published January 2018

- **Intensification of the working time** – unexpected & atypical working hours; unrealistic or unclear objectives. Rhythm imposed by AI, remuneration "at the task"
- **Emotionally** – Obligation to be "positive" due to the notation by customers, and have to deal with the customers' moods
- **Lack of autonomy** – Work prescribed and monitored by the AI
- **Lack of social interactions** – isolated worker, no close management in case of problem, no collective workforce
- **Conflict of value** – Work fragmented, lack of visibility on the purpose of the work
- **Insecurity of the work** – Hight dependency towards the platform with no stability or protection

The Challenges of the Gig Economy for the Occupational Health and Safety

2 Challenging the OHS Approach

INRS Report – *Plateformisation 2027,* published January 2018

Focused on the **general principles of prevention** that are the cornerstones of the OHS Approach and Legal Framework, and it 'linked' these principles to the **organisation of the platforms**.

GENERAL PRINCIPLES	OBSERVATIONS
• Avoiding the risk	• Avoiding all the risks will be complicated
• Assessing the risk	• Problem: Platforms tendency to place the responsibility of the prevention and the assessment of the risk towards the (self-employed) worker
• Acting at the origin of the risk	• Fragmentation of the work does not make a global vision easy
• Planning the prevention	• Platforms do not integrate the prevention in their functioning – sometime value the individual compensation of the risk
• Taking collective protective measures	• Work often performed by (self employed) worker individually
• Giving precise instructions to the workers	• The platforms are constantly in touch with the (self-employed) worker

The Challenges of the Gig Economy for the Occupational Health and Safety

2 Challenging the OHS Approach

INRS Report – *Plateformisation 2027,* published January 2018

Focused on the **general principles of prevention** that are the cornerstones of the OHS Approach and Legal Framework, and it 'linked' these principles to the **organisation of the platforms**.

OBSERVATIONS	Remarks
• Avoiding all the risks will be complicated	
• Problem: Platforms tendency to place the responsibility of the prevention and the assessment of the risk towards the (self-employed) worker	• Algorithms could integrate it and start some mechanisms of prevention
• Fragmentation of the work does not make a global vision easy	
• Platforms do not integrate the prevention in their functioning – sometime value the individual compensation of the risk	• If analyse before hand of risks, platform can avoid the exposition
• Work often performed by (self employed) worker individually	
• The platforms are constantly in touch with the (self-employed) worker	• Can use this connection to give some preventive information

The Challenges of the Gig Economy for the Occupational Health and Safety

2 Challenging the OHS Approach

INRS Report – *Plateformisation 2027,* published January 2018

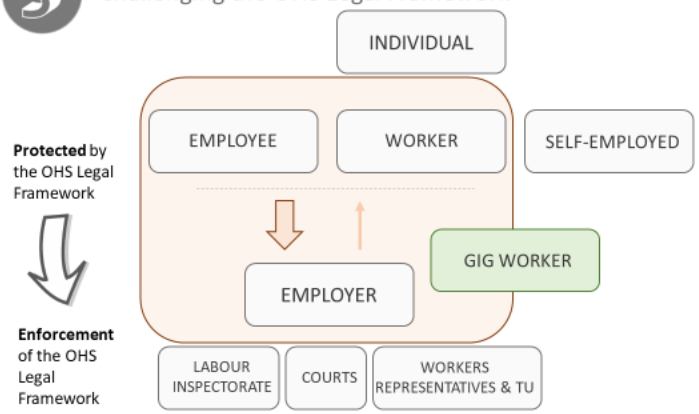
Focused on the **general principles of prevention** that are the cornerstones of the OHS Approach and Legal Framework, and it 'linked' these principles to the **organisation of the plateforms**.

The general problem: **Lack incentive for prevention**

- No responsibility if there is an accident or development of a disease
- Important turn-over; importance giving on the short-term benefit
- Highly competitive; focusing on the profit

The Challenges of the Gig Economy for the Occupational Health and Safety

3 Challenging the OHS Legal Framework



The Challenges of the Gig Economy for the Occupational Health and Safety

3 Challenging the OHS Legal Framework

- What is the legal status of the « gig worker »? (ie Worker or Self-employed)
- Who is responsible for all the OHS Legal duties and consequences?

- The plateforms do everything to « escape » the field of labour law (and so OHS) – they argue that they are connecting customers with self-employed individuals providing a service.
- The big problem of the definition of the gig-workers and the reality of their work.

The Challenges of the Gig Economy for the Occupational Health and Safety

3 Challenging the OHS Legal Framework

"Gig workers are drivers, delivery-people, personal assistants, handymen, cleaners, cooks, dog-sitters, and babysitters but increasingly are also more specialized professionals, including nurses, doctors, teachers, programmers, journalists, marketing specialists and, well yes, lawyers too. For example, the rising startup InCloudCounsel, offers an army of lawyers providing on-demand, routine legal services.
The technology is here: as long as you have the time, skill, knowledge, and empty couch, and unoccupied vehicle, or an idle lawnmower, you can swiftly become a corporation. The platform economy channels anything and everything sitting idle into the market and monetizes it." - (Lobel, 2017)

The Challenges of the Gig Economy for the Occupational Health and Safety

3 Challenging the OHS Legal Framework

Old problem of the misclassification of the workers, with the difficulty that some of them might actually be « real » self-employed people.

Enforcement:

- Even if recognised as "worker" – might be possible for the "offline" workers (delivering, transportation, caring). They are physically performing somewhere. However, it might be problematic for the workers performing online, especially if they are not in the same country.
- Problem applicable both for the Labour Inspectorate & the competences of the Court

General problem of the non adaptation of the Labour Inspectorate to the new form of work, and the problem of a globalized labour market.

The Challenges of the Gig Economy for the Occupational Health and Safety

CONCLUSION –

3 mains challenges:

- Risks – there is no new risks, but a new association of risks due to the functioning of the platform.
- Approach – challenging the general principle of prevention, focusing on the individual. However, there are ways that the platforms can use to improve and to prevent collectively the health and the safety of their workers/users. The question is the motivation and the willingness to do so.
- Legal Framework – there is the global challenge of the classification of the workers and its consequences in terms of protection. However, we need to think a step ahead and think about the conditions to enforce the legal framework if we find a way to make it applicable.

The Challenges of the Gig Economy for the Occupational Health and Safety

Thank you
Danke
Merci

a.cefaliello.1@research.gla.ac.uk

Prof. Dr. Reingard Zimmer, European and international Labour law, Berlin School of Economics and Law

Short biography

Fields of Research (during academic career):

precarious working conditions; collective bargaining law; law on industrial action; European labour law; internationalization of industrial relations; international labour law; social standards; Research activities: research projects (see below); scientific lectures (among others: at the invitation of the European Parliament in Strasbourg; in China, Gdansk, Paris, Vienna, Oslo, the Philippines, Delhi, …); participation in scientific conferences in Germany and abroad

Research projects (selection)

- Legal research project: Building an Enabling Environment for Voluntary and Autonomous Negotiations at Transnational Level between Trade Unions and Multinationals Companies
- Interdisciplinary Research Project: European Action on Transnational Company Agreements (EUROACTA)
- Juridical Research Project: Characteristics and legal effects of transnational company agreements
- Interdisciplinary Research Project: International Framework Agreements: a stepping stone towards the internationalization of industrial relations?
- Interdisciplinary Research Project on social regulation of European transnational companies (ESTER)

Presentation

Hochschule für Wirtschaft und Recht Berlin
Berlin School of Economics and Law

Collective Rights

in the European Union

ELW-Conference 15.2.2019
Prof. Dr. Reingard Zimmer
Prof. für Arbeitsrecht

Hochschule für Wirtschaft und Recht Berlin
Berlin School of Economics and Law

Structure of the presentation

I. Trade union rights in the EU – points of reference
II. Trade union rights in the sphere of the Council of Europe - points of reference
III. Ruling of the CJEU since the treaty of Lisboa
IV. IV. Social dialogue – in crisis?
V. Trade union collective activity besides a legal frame

Preliminary remark:

Hochschule für Wirtschaft und Recht Berlin
Berlin School of Economics and Law

- 17.11.2017: **Proclamation of the European Pillar of Social Rights** – Chapter 8 (Social dialogue and involvement of workers)

a. "The social partners shall be consulted on the design and implementation of economic, employment and social policies according to national practices. They **shall be encouraged to negotiate and conclude collective agreements** in matters relevant to them, while **respecting their autonomy** and the right to collective action. **Where appropriate,** agreements concluded between the social partners shall be implemented at the level of the Union and its Member States."

c. "**Support for increased capacity of social partners to promote social dialogue** shall be encouraged."

- No legally binding document!

I. 1. Trade union rights in the EU – points of reference

Hochschule für Wirtschaft und Recht Berlin
Berlin School of Economics and Law

- The right to strike: CJEU (2007) Viking and Laval:
  - Violation of freedom of establishment (Art. 49) & the freedom to provide services (Art. 56)
  - Proportionality test: justification only (+) if:
    - legitimate aim,
    - justified by overriding reasons of public interest,
    - suited to attaining the objective pursued and
    - does not go beyond what is necessary in order to attain it.

2. Strenghtening of collective rights since the treaty of Lisbon

- Art. 28 CFR: The right to CB & the right to strike
  '*the right to negotiate and conclude collective agreements at the appropriate levels' for 'workers and employers or their respective organisations*' and, in addition, '*in cases of conflicts of interest, **to take collective action to defend their interests, including strike action***' (in force since Dec 2009).
- Art. 6.2 TEU: Provisions of the Charter are of "*the same legal value as the Treaties*".
- But: Art. 16 CFR guarantees "*the freedom to conduct a business in accordance with Community law and national laws and practices is recognized*" and the CJEU relys upon this provision.

3. Lets summarize: The right to strike in the EU

- The EU has no legislative competence concerning the right to strike (see 153.5 TFEU), this is reserved to national courts.
- Nevertheless, the CJEU in its rulings gives determined specification on the legality of strike practices in EU member states.
- Article 28 EU-Charter guarantees the Right of collective bargaining and industrial action.
- The EU-Charter has to be interpreted in line with the ECHR and the rulings of the ECtHR.

4. The interlinking of EU-law with the legal instruments of the Council of Europe

EU-Charter of Fundamental Rights:

- Article 52(3) Charter: „*In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the **meaning and scope of those rights shall be the same as those laid down by the said Convention**.*"
- "*Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and **international law** and by **international agreements** to which the Union or all the Member States are party, including the **European Convention for the Protection of Human Rights and Fundamental Freedoms**, and by the Member States' constitutions*".

Hochschule für Wirtschaft und Recht Berlin
Berlin School of Economics and Law

II. Council of Europe

- Legal sphere wider than EU: 47 member states.
- Two legal documents:
  - European Convention on Human Rights (ECHR).
  - (Revised) European Social Charter (ESC).
- Violation of rights of the ECHR can be asserted at the European Court of Human Rights (ECtHR).
- Competent authority for violations of the ESC is the European Committee on social rights (ECSR).

Hochschule für Wirtschaft und Recht Berlin
Berlin School of Economics and Law

1. European Convention on Human Rights (ECHR)

- **Article 11: Freedom of assembly and association**

1. Everyone has the right to freedom of peaceful assembly and to **freedom of association** with others, including the right to **form and to join trade unions** for the protection of his interests.

2. No **restrictions** shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

- The right to strike is not explicedly mentioned.

2. ECtHR-case: Demir & Baykara

12/11/2008 –No 34503/97

Influence of international standards by the ECtHR in *Demir and Baykara*

The Court, in defining the meaning of terms and notions in the text of the Convention, **can and must take into account**

- **elements of international law other than the Convention,**
- **the interpretation of such elements by competent organs, and**
- the practice of European States reflecting their common values (ECtHR 12/11/2008 –No 34503/97, *Demir and Baykara*, § 85).
- The decision was confirmed by the great chamber.

3. ECtHR: Acknowledgement of the right to strike

- Using the same method as in Demir & Baykara, in the decision Yapi Yol Sen (21/04/2009 - 689, 59/01), the ECtHR acknowledges the right to strike (of teachers in Turkey) by Art. 11 ECHR.
- The limitation of the right to strike was not considered to be necessary in a democratic society.
- The trade-offs are different than the ones from the CJEU, the right to strike is interpreted much broader.
- The approach of the ECtHR produced some controversy, because the court referred not only to international standards as ILO C. 87 and 98 or Art. 6 of the ESC (rev.), but also to the comments of the respect. supervisory bodies.

4. but: the RMT-case contained restrictions as well:

National Union of Rail, Maritime and Transport Workers –vs - United Kingdom
(ECtHR, 8 April 2014, no. 31045/10)

The RMT case:

- The case was presented by a trade union to challenge the prohibition of solidarity action (in Section 244 of the Trade union and Labour Relations (Consolidation) Act of 1992) in the UK.
- The main question was, whether such interference with the right to strike can be justified:
  - Is the restriction necessary in a democratic society?
- The EctHR answered the question more restrictively (in comparison to the *Yapi Yol Sen* case).
- The Court distinguished between direct action strikes and 'secondary' strike action, where it acknowledged a wide margin of appreciation for the state.

4. Further cases of the ECtHR on the right to strike

- Trofimchuk v Ukraine (28.1.2011): no reference to the ILO-committee of experts or to the Committee on Social Rights is made.
- In Hrvatski Liječnički Sindikat v Kroatien (27.11.2014) the right to strike is acknowledged as well for TU of doctors; limitations of the right to strike must not leed to an overlong prohibition of strike activity. Nevertheless, no reference to the committee of experts or of social rights is made.
- In Tymoshenko v Ukraine (2.10.2014) the legitimacy of a strike planned by 150 employees of AeroSvit was affirmed (failure of legal reservation).

Further cases of the ECtHR on the right to strike

- Junta Rectora del Ertzainen Nazional Elkartasuna (Er.N.E.) v Spanien (21.4.2015): The absolute ban on strikes for policeofficers is accepted.
  - The decision ADEFDROMIL v France is ignored.
  - The findings of the Committee for Social Rights are ignored (*EuroCOP v Irland:* an absolute ban of the right to strike for the police is not admissable).
- Ognevenko v Russland (20.11.2018): Whereas the absolute ban on strikes for (specific) railway workers is not lawful (dismissal of striking railway worker is unlawful); railway transport is not considered to be an essential service.

Cases of the ECtHR on the right to form a union

- In Păstorul Cel Bun v Rumänien (9.7.2013) restrictions concerning the establishment of a (free) trade union by employees of the orthodox church is considered as „necessary in a democratic society“ (para. 159-172).
- ADEFDROMIL v France (2.10.2014): in principle FoA must also be guaranteed for military and police; limitations of Art. 11 ECHR have to be interpreted narrowly.

III. Ruling of the CJEU since the treaty of Lisboa

- **CJEU 04.12.2014 (C-413/13 FNV):** The application of competition law was rejected (admissibility of provisions for freelancers in a CBA for orchestral musicians).
  - Extent of the exception for CBAs (→ Albany decision of the CJEU)
- **CJEU 08.07.2014 (C-83/13 Fonnship):** legality of strike actions by Swedish dockworkers,
  - The Swedish employment tribunal only submitted the issue of the applicability of the EEA law for clarification.
  - May a shipowner based in an EEA country who flagged out the vessel (Panama) rely upon the fundamental freedoms (arguing therefore that the strike is not admissible)? CJEU: (+), it is directly regulated in Regulation 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport.

EFTA Court 19.4.2016 (Holship)

- Not a decision by the CJEU, but the Court of Justice of the European Free Trade Association States (EFTA Court).
- Legality of strike actions taken by dockworkers for a CBA.
- The CBA requires the users of a Norwegian port to engage the dockworkers of the port's Administration Office for loading/ unloading operations (not their own dockworkers).
- Key question: is competition law applicable to CBAs (CJEU's Albany judgment, exemption of CBAs).
- EFTA Court: abuse of a dominant position (of TUs) is possible; limitation of access to market through CBA and related boycott – CBA is invalid → strike activities illegal.
- Norwegian Supreme Court: TU has to pay damages → lawsuit filed at ECtHR.

IV. Social dialogue: history of origins (1)

- With the treaty of Amsterdam the option for the Social Partners to conclude collective agreements was included into Art. 139.2 EC (now: **Art. 155.2 TFEU**).
- The text traces back to the identical wording of the Social Partners (ETUC, UNICE and CEEP).
- The SP-agreements are transposed into directives.

2. EU-Directives based upon agreements of the Social Partners

- Directive 96/34/EG, 03.06.1996 (parental leave).
- Directive 99/70/EG, 28.06.1999 (fixed-term-employment).
- Directive 97/81/EG, 15.12.1997 (part-time-work).
- The content of the SP-agreement has to be accepted, no changes admissible.
- In case of failure of the SP-negotiations, the Commission may take over, example: directive on agency work.

Further activities of the social partners

- Framework agreement on work related stress (Oct 2004).
  - Implementation by social partners in MS (not as a directive = wish of SP).
- Framework agreement on harassment and violance at work (2007).
  - Implementation by social partners in MS.
- Framework of actions on youth employment (June 2013).
  - Implementation by social partners in MS.
- Joint Declaration of SP on better involvement of SP in economic governance process (October 2013).

Legal value of SP-agreements

Hochschule für Wirtschaft und Recht Berlin
Berlin School of Economics and Law

- SP-agreements are not directly legally binding, they have to be implemented.
  - Either in the MS (in accordance with the procedures and practices specific to the SP of the MS).
  - Or, in matters covered by Art. 153 TFEU (where EU has legislative power), at the joint requestof the signatory parties by a council decision (on proposal by the Commission).
- Art. 155(1) TFEU in conj. with Art. 152 TFEU might be a basis for authorization for trade union confederations to conclude transnational company agreements with single employers.

Hochschule für Wirtschaft und Recht Berlin
Berlin School of Economics and Law

3. Social dialogue in crisis:

- The Social Partners of the hairdressing sector (UNI Europa and Coiffure EU) concluded a framework agreement on OSH (occupational safety and health) in April 2012 (after 2 years of negotiation).
  - Up to 70% of hairdressers suffer from work-related skin damage, which is at least ten times more than the average for workers generally.
- Arguing with its “REFIT – fit for growth” Communication from October 2013, the Commission blocked the request of the SP to pass the agreement to the Council of the EU which has to take the formal decision of a legal act (directive).
  - Censorship!

Social dialogue in crisis:

Hochschule für Wirtschaft und Recht Berlin
Berlin School of Economics and Law

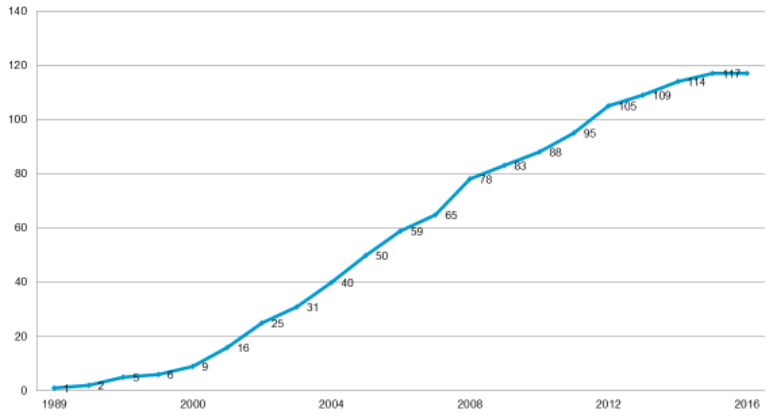
- Next Case: Social Partner agreement from 21.12.2015 on the rights of information and consultation for civil servants and employees of central government administrations between TUNED (EPSU, CESI) and the employers' organisation EUPAE.
- The Commission again did not pass the agreement to the council – this time a lawsuit against EU-COM was filed in May 2018.

V. Trade union collective activity besides a legal frame

1. International level

- In the past 20 years > 140 international framework agreements (IFAs) have been concluded between global trade union confederations (GUFs) and transnational companies or groups.
- Partly with participation of national trade unions and/or (European) Works Councils.
- The lack of a legal frame has not been an obstacle to the development of IFAs.
- IFAs are the product of negotiations and thus instruments of industrial relations (not just CSR).

Increasing development of IFAs



Content of IFAs

- Main topic: social standards.
- Early agreements contain little more than ILO-core conventions; later, further standards were included.
- IFAs developed further and now usually contain dedicated rules on implementation and monitoring, like:
  - Complaints mechanisms;
  - annual meetings of signatory parties (partly expanded circle);
  - decentralized social dialogue.
  - reporting of management & indicators;
  - hardly any monitoring by externals.
  - In addition, some IFAs contain provisions on access to premises or neutrality in case of organizing campaigns, etc.

2. European Framework Agreements

- Content of TCAs with European scope differs (compared to IFAs):
  - Restructuring
  - Social dialogue
  - CSR
  - Data protection
  - Training
  - Equal oportunities
  - Business relation with subcontractors
  - Financial participation
- Disputes about the mandate – sectoral confederations reject mandate for EWC.

For further reading:

Zimmer, Reingard:

- **From International Framework Agreements towards Transnational Collective Bargaining,** forthcoming, in: EYIEL 2019
- **Corporate responsibility in the »Bangladesh Accord«. Which regulations are transferable to other supply chains?** Expertise on behalf of the FES, Dec 2016, http://library.fes.de/pdf-files/id-moe/13072.pdf
- **Unternehmensverantwortung im »Bangladesh-Accord«. Welche Regelungen sind übertragbar auf andere Lieferketten?** Gutachten im Auftrag der FES, Dezember 2016, http://library.fes.de/pdf-files/id-moe/13040.pdf
- **The right to take collective action: Prospects for change in European Court of Justice case law in light of European Court of Human Rights decisions,** in: Trebilcock, A./ Blackett, A. (Hrsg.), Research Handbook on Transnational Labour Law, Edward Elgar 2015, S. 194-203.
- **Study on the characteristics and legal effects of agreements between companies and workers' representatives** (together with: Rodríguez, R./ Ahlberg, K./ Davulis, T./ Fulton, L./ Gyulavári, T./ Humblet, P./ Jaspers, T./ Miranda, J.M./ Marhold, F./ Valdés, F.), on behalf of the EU-COM, 2012: http://ec.europa.eu/social/main.jsp?catId=707&langId=en&intPageId=214

Thank you very much for your attention!

Reingard.Zimmer@hwr-berlin.de

Prof. Dr. Francisco Trillo, University of Castilla La Mancha

Short biography

Francisco Trillo is Associate Prof. of Labour Law at Castilla-La Mancha University. Researcher and Academic Secretary of European and Latin American Labour Law for the Social Dialogue Institute.

Author of many publications among the highlights: “Impact of the euro crisis on wages and collective bargaining in southern Europe - a comparison of Italy, Portugal and Spain” (2015); Digitized economy and labour relationships (2016); “Uber, information society or transportation service provider?” (2017); “The Spanish experience of work in the digital age” (2018); “Working on digital platforms” (2018).

Abstract

Since 2010 there have been many phenomena related to the condition of employee. Without a doubt, the most important, from a quantitative point of view, has to do with unemployment. But also, the process of expelling a large proportion of workers to the borders of autonomous Labour must be highlighted as a result of the public employment policies developed in the last decade. Figures like that of the entrepreneur explain this phenomenon hardly described.

Lastly, the impact that austerity policies have caused in terms of quality of employment cannot be unrecognized. Job precariousness has been installed in the Spanish labour market, consolidating a trend that dates back to the early nineties of the twentieth century.

Without a doubt, the most intense impact on the determination of labor status has come to Spain by the so-called work on digital platforms.

The digitalization of traditional economic sectors such as the transport of passengers in city, The Courier, the rent of houses has caused, at first, a wave of autonomous work as a result of which the entrepreneurs understood of Yes themselves who were not providers of the underlying service, but rather information society.

Resolved this issue on the character and business function of some of the best known and controversial digital platforms, Uber, we are at a time when entrepreneurs insist on the autonomous nature of the working relationships that exist. They are in the midst of those.

The work of the labour Inspectorate and the judicial decisions produced have put in crisis some of the elements or indications with which it was traditionally developed to the work of qualification of the working relation.

Therefore, the presentation tries to give an account of the phenomena that have occurred around the worker status, analysing with a little more detail the part concerning the determination and qualification of the working relations that are developed within the platforms Digital.

Speech

“EMPLOYEE STATUS”

SUMMARY: 1. Some methodological premises and preliminary analysis of the subject. 2. An overview of the Spanish experience, beyond the current crisis. 2.1. Different legislative techniques adopted to recognize the employee status, since the first Estatuto de los Trabajadores (1980). 2.2. Degradation /

precarization of work as the other phenomenon of trivialization of the employee status. 3. Working on digital platforms and Employee status. 3.1. Employee status juridical conflicts in the Spanish experience.

1. Some methodological premises and preliminary analysis of the subject

Once again, the economic crisis has put Labour Law in crisis. Nothing new on the horizon. Economic crises have been, almost since the capitalism origins, travelling companions of the regulation of labour relations (Labour Law).

In this occasion, Labour Law is seen not only as an obsolete juridical system, closer to the 19th century than to the 21st, according to the ideological current that supports these arguments, but also as an obstacle to economic recovery, and then, to employment creation. These political ideas, hegemonic nowadays, have generated two interrelated effects.

The first of them consists of a sort of blaming Labour Law for the social and economic precariousness suffered by the working classes in Europe -and not only- . This has made it possible to relegate attention to the social effects of the productive model. The same productive model that caused the 2008 crisis is still well alive and the political priority has been located in the regulation of labour relations instead of in the excesses of the economic system.

The second one, understood as a cultural factor, is related to the acceptance by the working classes of the economic principles that have presided over the management of the 2008 crisis. One of the relevant factors to take into consideration to understand and to explain the current crisis of the union and political representation of the workers.

Both effects are producing a reformulation on the field of the social, economic and political Governance, in which the collective dimension seems to have no place.

Most of the political, union and academic reactions usually insist on demonstrating the ideological fallacy behind those arguments. They usually understand that Labour Law does not have the capacity to create employment, even less to generate economic activity. What Labour Law determines is the quality of the employment created by economic activity!! I do totally agree with these arguments.

However, the assertions made about the Labour Law as an obstacle to economic growth and the employment creation are, to a large extent, certain. I mean, Labour Law has traditionally combated the social and economic inequalities of the working classes, as well as the economic system that promotes them. This is, Labour Law is opposed to the current economic growth model, in the origin of the current social inequalities. In the same sense, registered employment since the beginning of the economic recovery (2015), extremely precarious, does not compatible with (a protective idea of) Labour Law.

Thus, analysing the Employee status in the Spanish case, or in any other national State, implies, first of all, reflecting on the relationship between the current economic model of growth, especially about the quality of employment that it generates, and the Labour Law. This reflection cannot despise the social function(s) of Labour Law, as socioeconomic integration and guarantee to ensure an acceptable balance of the structural conflict between work and capital.

i) Thus, our issue is being addressed incorrectly, from the moment when the legal and political debate is limited to resolve the ability of adaptation -or not- of Labour Law to the “new” economic and productive demands (enough flexible or too rigid?). In our view, the question is whether these “new”

economic and productive demands are compatible and respectful with the political concept of Decent Work, promoted by ILO, more intensely in his 100th anniversary, and with the social and democratic system behind that concept, still in force, at least from a Constitutional point of view.

ii) Lastly, related to the most recent trends in Employee status regarding the so-called digital platforms, this presentation seeks to highlight the social, labour and economic context in which those are promoted: the austerity policies (set of rules for a new production and consumption model). In the same way, the dominant descriptions of these digital business models, which emphasize the autonomy, voluntariness and freedom of the producers that are inserted in these production processes, will be highlighted. All of this, through the analysis of the Spanish Court decisions known until now.

2. An overview of the Spanish experience, beyond the current crisis

Generally speaking, the evolution of the employee status in the Spanish labour legal system finds its origins in an institutional interpretation about the political value of work, and in the role of Labour Law.

It is a construction of certain politics of Law that has been blocked since the 80s of the 20th century. This process has been shaped through two types of legislative interventions. The first relates to the techniques accepted by the legislator to accommodate the social function of Labor Law. The second legislative intervention consisted on the degradation/precarization of work as a sine qua non condition to satisfy the economic and productive demands.

2.1. Different legislative techniques adopted to recognize the employee status, since the first Estatuto de los Trabajadores (1980)

In effect, since the entry into force of ET`80, the first alterations of the employee status took place, through the exclusions from the field of application of Labour Law (article 1.3 ET) and the appearance, shortly after (the first ones in 1985), of the so-called special labour relations (professional athletes, artists in public shows, senior management staff, religion teachers ...).

The common labour relationship, determined by the constitutive elements of personal work, paid, dependent and employed, suffered a first assault as a result of certain exclusions especially controversial as the road hauliers. To this was added an open list of economic activities that, due to their special characteristics, were framed in specific regulations that differed from that envisaged for the common labour relationship. In many cases, the creation of certain special labour relations, such as that of lawyers who provide services in individual and/or collective offices, was harshly criticized for responding only to business interests. This was also the case of the religion teachers.

Another normative situation that has impacted on the employee status has to do with the regulation of the so-called special working time regulations -RD 2001/1983, repealed by RD 1561/1995-. Most of these special working time regulations respond to common labour relations, however, their work activity has particular characteristics (transport by road, rail, agriculture, livestock ...). The main characteristic of these lies in the greater flexibility of the regulation of working time, especially in relation to the concept of working time. The distinction between effective working time, waiting time or guard duty implies a prolongation of the subordination of these workers. In addition, as of the entry into force of the aforementioned regulation, there was a phenomenon of extending this flexibility to various productive sectors.

A new attack on the employee status was the entry into force of Law 20/2007, which created the figure of the economically dependent autonomous worker. Their distinction with subordinate work, on the one hand, and with autonomous work, on the other, was based on the facts that the TRADE obtained at least 75% of their income from the same employer - called client by the Law 20/2007 - and that he will contribute his own work tools to the work activity. The assumptions of fraud in this sense were immediate. Ultimately, a call should be made about the most recent situation, where the unemployed, normally long-term unemployed, have taken the "decision" to become self-employed workers - entrepreneurs - as a result of the inability of the economic system to offer them a job for others. All this, framed in an institutional impulse of the autonomous work, accompanied by fiscal advantages - sometimes of doubtful utility- (Among others, Law 14/2003).

2.2. Degradation / precarization of work as the other phenomenon of trivialization of the employee status

The other phenomenon of banalization of the function assigned to the employee status has to do with the legislative reforms implemented from 1984 until today, so many times promoted and elaborated by the Executive Power in response to the extraordinary and urgent need(s) created by each economic crisis (Article 86 Spanish Constitution). This have resulted in more than 60 labour reforms, from 1984 to today, sharing two common characteristics.

The first has to do with the force-idea that the flexibilization (degradation) of working and employment conditions is totally necessary and functional to the activation of the economy, especially in times of crisis. In this regard, it is important to draw attention to the atypical Spanish situation in terms of the duration of the employment contract. Since the years 80 of the 20th century, the rate of temporality is around 30%. It means, among other things, that one third of the workers in Spain have a weakened protective status. To a large extent, this situation is due to the consolidated phenomenon of productive decentralization, whose regulation allows unequal treatment when the activity contracted does not coincide with the nuclear activity of the main company.

The second lies in the public employment policies implemented on the occasion of massive unemployment that have produced in Spain the successive economic crises. These have been based, on the one hand, on the creation of contractual pseudo-modalities with a legal status lower than that foreseen for the common labour relationship. In this regard, the more obvious example was Temporary Contract to promote Employment Creation (1984-1997) (lastly, Indefinite Contract of support for entrepreneurs, implemented by Law 3/2012, that provides until one-year trial period). On the other, in the segmentation and degradation of the protective status of certain groups of workers with “special difficulties” of access and permanence in employment -mainly women, young people and migrant workers-. In this way, common labour relations have different protective statutes simply because they are women, young people or migrant workers.

To sum up, the Spanish experience clearly shows the factors that have motivated an intense trivialization of the function of the employee status, related ultimately to the social function of Labour Law, in form of a fragmentation of workers through the creation of pseudo-employee status, and the intense degradation of rights that gave meaning to the employee status as a guarantee of full citizenship for workers.

The precariousness in which work has been installed is, with great probability, the factor that has most contributed to the devaluation of the employee status .

a) The poverty risk rate in Spain is almost 30% (Eurostat); b) the first tranche of 20% of the Spanish population with more income, perceives 12.2 times more than the last tranche of 20% lower income (Eurostat); c) Spain has a rate of temporality in the recruitment of 26.71% (Eurostat); d) high speed of rotation of the temporary contracts. In only four months, 4.748.542 "initial contracts" have been registered; e) 1.268.625 contracts have a duration equal to or less than 7 days; f) 30.96% of the temporary contracts - almost a million and a half of contracts - are (no volunteering) part-time and; g) in Spain, 14.1% of workers are at risk of hardship. "Unemployment is not what defines poverty". "The largest group is that of the people employed." (European Network for the fight against poverty and social exclusion).

It is essential to point out, for the purposes of the analysis of the employee status in digital platforms, the fact that the Spanish judicial doctrine has satisfactorily redressed those corporate outrages, based on the fraudulent employer conduct of denying the employee status to workers whose work activity complied with the constitutive requirements of that employee (Article 1.1 ET).

3. Working on digital platforms and Employee status

The impact of digital platforms in the recognition of employee status is more sensationalist than real. The incorporation of digital technologies to recent business models has not significantly altered the way in which the work activity is executed, in relation to the classic criteria of personal work, paid, dependent and alienated.

At a general level, the most relevant legal debate was on the real role of the entrepreneur of digital platforms. That is, to inquire about the true nature of the business subject, as an intermediator in a certain market - connecting demand and supply - or as a provider of a service. This question was solved by the Court of Justice of the Union in the Uber Case (December 20th, 2017), stating that "the intermediation service is an integral part of a global service whose main element is a transport service from which the business profit" .

The importance of this matter lies, in our view, in the ability to consolidate the model of labour regulation imposed by austerity policies, still in force in Spain. The work in digital platforms aims to consolidate and expand a productive model where business profit is obtained mainly from the intensification of working conditions (internal devaluation / salary devaluation). But also, digital platforms propose a consumption model that allows the expansion of that one. For this, after almost a decade of experimentation with this model, it is essential to allow workers stable access to consumption. A consumption model that does not differ from the "traditional" in terms of the supply of goods and services, but of the quality of these. In this sense, the employee status constitutes an obstacle to the achievement of such economic and business purposes.

It is in this key that, in our opinion, the subject matter of this presentation must be analysed.

Again, the Spanish experience is interesting because it clearly shows the business idea (dream?) of reduction / elimination of labour costs. The way that has been understood most effectively has been the expulsion of workers from the field of application of Labour Law. The current employment situation in Spain provides favourable conditions (precariousness and unemployment) for the achievement of these ends.

3.1. Employee status juridical conflicts in the Spanish experience

In order to explain juridical conflicts in the field of employee status it has decided to describe, firstly, the facts of both cases, Deliveroo and Glovo. The purpose of the description of the facts is none other

than to point out the concomitance between both cases. This will allow us, in a second moment, to analyse conflicting points in relation to the employee status doctrine of the Spanish Supreme Court.

Deliveroo Case Facts:

- The contractual relation is expressly qualified by the parties as a self-employment relation, stipulating the price of each delivery. Deliveroo makes the payment every two months.
- Deliveroo offers weekly services to each vendor that will be determined (days and times) by the company. Usually, timetables are unilaterally fixed by the company, but “riders” could participate in choosing timetables when they had a suitable level of excellence.
- “Riders” may accept or reject the offers using an app provided by the company.
- “Riders” provide their own tools and materials and, specifically, a bike, a mobile phone and a Data connection.
- They are urged to be part of an instant messaging group managed by the company that aims to solve the problems that they can occur during the service.
- To carry out the deliveries, “riders” must remain in a control point, so-called "centroid", waiting for company authorization (mobile message) to start their working day. In addition, they must register each delivery made using the app provided by the company, noting the possible incidents (“distortion of metrics”).
- Deliveroo also imposes other obligations related with the clothing they must wear, dealing with the customer or the maintenance of the work instruments.

Glovo Case Facts:

- In this case, the contractual relation was qualified, at first, as a self-employment relation, and later as self-employed economically dependent (TRADE) once the TRADE informed to the company that he received more than 75% of his income from it.
- After booking the time slot in which the TRADE wants to work, this activates the auto-assignment position (available) on your phone mobile. Once the order is accepted the TRADE must carry it out in the place required by the customer. It is also possible to reject a pre-order accepted half-run.
- To carry out the activity the TRADE uses his own motorcycle and the connection of his cell phone through which he is «geolocated» by the company. If he had to buy products for the client, he pays by (Glovo) credit card.
- The TRADE could refuse orders, though the company has established a “glovers" scoring system, classifying in three categories on which the preference for access to services depends.

As examined, both cases have concomitant assumptions in fact. However, the similarity between both cases, Deliveroo and Glovo, has not been sufficient for judicial decisions have coincided in the qualification of the contractual relationship.

So, how was it possible?

Each Court, Valencia and Madrid, have made a different interpretation about the more relevant requirements to qualify the contractual relation as subordinate work. In order to analyse both, it is essential a synthetic description of the doctrine in this regard, unified by the Spanish Supreme Court.

Principle of reality (principio de realidad)

"The qualification of contracts does not depend on the denomination given by the parties but the effective configuration of the obligations in the contractual agreement» (Spanish Supreme Court criteria).

- Non-disputed by SJS (Valencia), 1st June 2018:
    - "Employee status qualification is something unavailable by the contract-parties".
- Disputed by SJS (Madrid), 3 September 2018:
    - "The will freely expressed in the contract by the parties should be taken into consideration, at least, as a point starting for the exam of the contractual relation qualification".

Personal work: "It is admitted in this way that worker can decide his own replacement on sporadic occasions" (Spanish Supreme Court criteria). So, entrust work activity execution to a third party does not constitute a sufficient argument to deny the employee status".

- Non-disputed: "This is a possibility needed of the company acceptance, but nevertheless has never been verified. Therefore, this aspect (personal work) has not disputed" (SJS Valencia).

Paid work: "Periodic remuneration/ calculation in accordance to criterion that keeps certain proportion to the work activity".

- Non-disputed.

Dependent work: "Assistance to the work center of the employer or another work place decided by employer/ insertion in the productive organization planned by employer" (Spanish Supreme Court criteria).

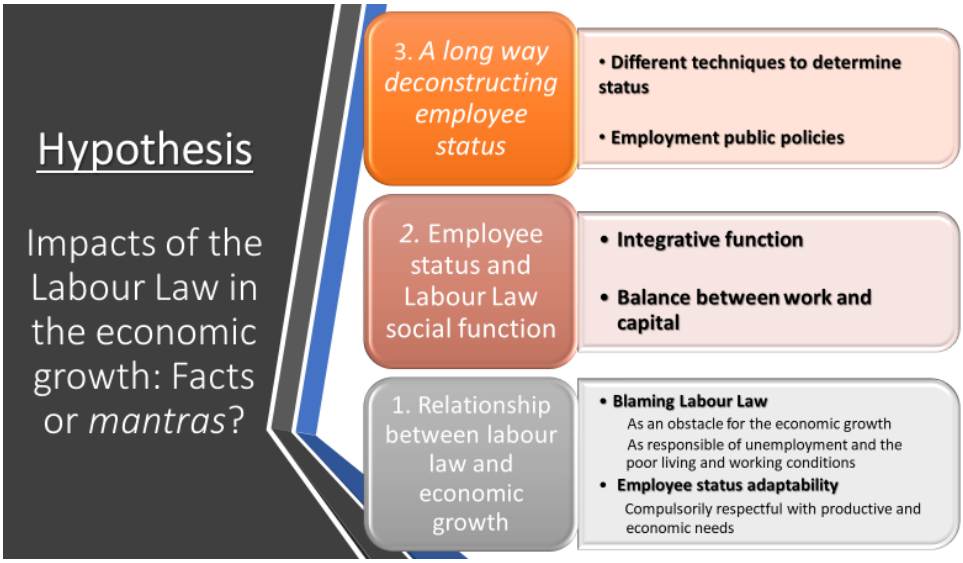
- Disputed by Madrid Court of Justice in the follow terms:
    - "Vendor decides fringe time he wished and had no obligation to justify his absences, just communicate".
    - "He chooses his periods of rest, as well as the annual interruption of the activity".
    - "Work activity is autonomously organized by vendor, choosing the number of orders he wants to make. Vendor even could reject company's orders in the middle of work activity execution".

Aliened work: "Employer's disposition of goods or services produced by workers/ market relations decisions adopted by employer, as rates or clientele selection" (Spanish Supreme Court criteria).

- Non-disputed.

Last week, we have known another two Court decisions about employee status in Glovo company. The first one, deny the employee status conditions in the same terms examined above (Juzgados de lo Social nº 37 y 17 de Madrid). The second one (Juzgado de lo Social nº 33 de Madrid), more interesting in our view, includes a long reflection about the relations developed between client -qualified as employer by the Court- and the TRADE -qualified as employee by the Court- related to new digital technologies. In this regard, the judge, however, recalls that there are circumstances that the use of digital technologies does not change the employee status. Thus, the fact that Glovo unilaterally drafts the contract of employment to which the worker adheres indicates the working nature of the working relationship. In the same way, the use of one or other technologies by the employer does not avoid qualifying as null the dismissal of a worker as a result of exercising the right to strike in defense of the improvement of his working conditions.

Presentation



Economic growth, Labour Law & Employee status

- Factors of Employee status evolution-*trivialization*
  - Working conditions precarization
  - Transformation of the economic structure (*from the industry to the services*)
  - Interpretation of the content of the enterprise freedom
  - The cultural hegemony of individual freedom

- Unresolved relationship between labour law and economic growth
  - Cultural hegemony: "Excessive protection is contrary to economic growth"
  - Economic growth and Labour Law
    - *Almost all the reforms have been implemented after the "explosion" of each crisis*
      - *Economic growth and Labour Law to combat mass unemployment (up 20% in times of crisis)*
  - Permanence of the labour market reforms contents after the economic crisis
    - *Estatuto de los Trabajadores, an incomprehensible Monster!*
  - Since 1984, more than 60 labour market reforms in the Spanish legal system

Labour Law social function & Employee status

Social function of Labour Law (Employee status)

- Integrative function/ Structural balance

- Legitimizing the social system and its economic order

Juridical techniques to ensure Labour Law social function

Juridical techniques for employment status recognition

- Common labour relations *(Relación laboral común)*

- Special labour relations *(Relaciones laborales especiales)*

- Self-employed *(Trabajador autónomo)*

- Economically dependent self-employed *(Trabajador autónomo dependiente económicamente)*

An overview of the Spanish case (…beyond the current crisis)

Crisis, unemployment and labour reforms

- Decade 1980s:
  - Temporality as the most important employment public policy (1984-1997)
    - Public subsidies/ Tax incentivies/ Reductions Social Security fee
    - Temporary Employment Agencies/ Multiservice Companies
- Decade 1990s:
  - Working conditions unilaterally modified
    - Derogations *in peius*
  - Unjustified dismissal effects over *stability principle*
    - Employers has the right to choose between readmission or compesation (since 1994 till nowadays)
- Decade 2000s:
  - Reducing dismissal compesation (*Processing salaries suppression)*
  - Trivialisation of the dismissal (Employer recognition unjustified dismissal in the worker`s communication)
    - *Express dismissal* /No judicial control
- Labour market reforms during the current crisis: (under the austerity policies/ salary devaluation)
  - *New fix-terms contracts types*
  - *Flexibilization of the economic dismissal reasons/ Cheapening dismissal compesation*
  - *Intervention of the Collective Autonomy principle* (aplication preference of the company collective agreement)
  - Replacement representative bodies by workers *ad hoc commissons*

Precarization of work & Employee status

- The poverty risk rate in Spain is almost 30% (Eurostat)
- According to Eurostat, the first tranche of 20% of the Spanish population with more income, perceives 12.2 times more than the last tranche of 20% lower income (Eurostat)
- Spain has a rate of temporality in the recruitment of 26.71% (Eurostat)
  - High speed of rotation of the temporary contracts. In only four months, 4.748.542 "initial contracts" have been registered
  - 1.268.625 contracts has a duration equal to or less than 7 days
  - 30.96% of the temporary contracts – almost a million and a half of contracts – are part-time
- In Spain, 14.1% of workers are at risk of hardship (European Network for the fight against poverty and social exclusion)
  - "Unemployment is not what defines poverty"
  - "The largest group is that of the people employed".

Working on Digital Platforms & Employee status

- A **productive and consumption model** for the *austeriry age*
  - *Attention!!* The *austerity policies are still well alive*

- How improving competitiveness?
  - Goods and services quality
  - Intensification of working conditions

- Information societies or services providers?
  - Self-employees or workers?

- Deepening the model of productive decentralization
- Not with self-employed or small employers, but with unemployed and poor workers

Working on Digital Platforms and Employee status: the Spanish experience

- Glovo, Deliveroo, Uber…
  - Economical, social and juridical conflicts
    - Unfair competition/ Poor working & *social dumping/* Entrepreneur and workers legal nature
- Academic doctrine, Work Inspection and Court decisions
  - *What controversy?*
    - *A buried political fight*
- Political interventions
  - *The Great Absent*
- Trade union action, *intentionally hidden*
  - Economic and Social Conflict
    - *Everywhere, trade unions have been main protagonists (social movilization/legal defense)*
  - Workers organization
    - Studies/ Publications/ discussion forums promotion (Fundación 1º Mayo CCOO, TURI)
    - Advicing and organizing workers
  - Collective Bargaining
    - *An union to the offensive, CCOO Industry Federation*
      - *Including these workers in the scope application of many sectoral collective agreements*

Brief review: employee status juridical conflicts

- **Deliveroo case**

  - Contractual relation is expressly qualified by the parties as a self-employment relation, stipulating the price of each delivery. Deliveroo makes the payment every two months.
  - Deliveroo offers weekly services to each vendor that will be determined (days and times) by the company. Usually, timetables are unilaterally fixed by the company, but "riders" could participate in choosing timetables when they had a suitable level of excellence.
  - "Riders" may accept or reject the offers using an *app* provided by the company.
  - "Riders" provide their own tools and materials and, specifically, a bike, a mobile phone and a Data connection.
  - They are urged to be part of an instant messaging group managed by the company that aims to solve the problems that they can occur during the service.
  - To carry out the deliveries, "riders" must remain in a control point, so-called "centroid", waiting for company authorization (mobile message) to start their working day. In addition, they must register each delivery made using the app provided by the company, noting the possible incidents ("distortion of metrics").
  - Deliveroo also imposes other obligations related with the clothing they must wear, dealing with the customer or the maintenance of the work instruments.

Brief review: employee status juridical conflicts

- Glovo case
  - In this case, contractual relation was qualified, at first, as a self-employment relation, and later as self-employed economically dependent (TRADE) once the TRADE informed to the company that he received more than 75% of his income from it.
  - After booking the time slot in which the TRADE wants to work, this activates the auto-assignment position (available) on your phone mobile. Once the order is accepted the TRADE must carry it out in the place required by the customer. It is also possible to reject a pre-order accepted half-run.
  - To carry out the activity the TRADE uses his own motorcycle and the connection of his cell phone through which he is «geolocated» by the company. If he had to buy products for the client, he pays by (Glovo) credit card.
  - The TRADE could refuse orders, though the company has established a "glovers" scoring system, classifying in three categories on which the preference for access to services depends.

Brief review: employee status juridical conflicts

- ***Principle of reality*** **(principio de realidad)**
  - *"The qualification of contracts does not depend on the denomination given by the parties but the effective configuration of the obligations in the contractual agreement» (Spanish Supreme Court criteria).*

    - *Non-disputed by SJS (Valencia), 1st June 2018:*
      - *"Employee status qualification is something unavailable by the contract-parties".*

    - *Disputed by SJS (Madrid), 3 September 2018:*
      - *"The will freely expressed in the contract by the parties should be taken into consideration, at least, as a point starting for the exam of the contractual relation qualification".*

Brief review: employee status juridical conflicts

- ***Personal work:*** *"It is admitted in this way that worker can decide his own replacement on sporadic occasions" (Spanish Supreme Court criteria).* So, entrust work activity execution to a third party does not constitute a sufficient argument to deny the employee status*".*
  - *Non-disputed: "This is a possibility needed of the company acceptance, but nevertheless has never been verified. Therefore, this aspect (personal work) has not disputed" (SJS Valencia).*

- ***Paid work:*** *"Periodic remuneration/ calculation in accordance to criterion that keeps certain proportion to the work activity".*
  - *Non-disputed.*

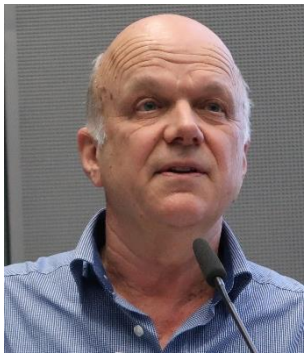
Brief review: employee status juridical conflicts

- ***Dependent work:*** *"Assistance to the work center of the employer or another work place decided by employer/ insertion in the productive organization planned by employer"* (*Spanish Supreme Court criteria*).
  - *Disputed by Madrid Court of Justice in the follow terms:*
    - *"Vendor decides fringe time he wished and had no obligation to justify his absences, just communicate".*
    - *"He chooses his periods of rest, as well as the annual interruption of the activity".*
    - *"Work activity is autonomously organized by vendor, choosing the number of orders he wants to make. Vendor even could reject company's orders in the middle of work activity execution".*

- ***Aliened* work:** *"Employer's disposition of goods or services produced by workers/ market relations decisions adopted by employer, as rates or clientele selection"* (*Spanish Supreme Court criteria*).
  - *Non-disputed.*

"The history of labour law is in all national scenarios, certainly, the very nature of its content mobility, including the permanent subjective variation of its field of application, but there is no doubt that these regulatory operations are but other so many political translations in the exercise of the social function attributed to this branch of the legal system".

Dr Jan Cremers, researcher, Tilburg University



Short biography

Dr. Jan Cremers, University of Tilburg, is an experienced scholar in the field of labour market and irregular labour in particular. His main activities focus on the impact of the internal market on workers' rights, labour mobility, free movement of workers, worker's participation and corporate governance issues, the change of employment patterns and other European labour market items. He is the coordinator of the database Labour Migration at the Law School of the Tilburg University: INT-AR Database. This database is one of the results of the INT-AR project, a long-term analysis of cross-border labour recruitment and migration.

He was a European trade union leader in the period 1988-2000 and a MEP in 2008-2009. In November 2013 he received the honorary degree of Doctor of Letters from the University of Westminster for his work related to European Social Policy.

Some relevant publications:

- Labour arbitrage on European labour markets: Free movement and the role of intermediaries (2018)
- Cross-border recruitment and artificial arrangements: INT-AR Paper 9 (2017)
- Economic freedoms and labour standards in the European Union (2016)
- Letter-box companies and abuse of the posting rules: How the primacy of economic freedoms and weak enforcement give rise to social dumping (2014)
- In search of cheap labour in Europe: Working and living conditions of posted workers (2011).

Abstract

Artificial corporate entities and the circumvention of labour standards

The liberalisation of the European labour market that intensified after the introduction of the Single Market led to an unprecedented externalisation of labour recruitment. Companies used increasingly new forms of outsourcing that went far beyond the classical division of labour between main companies and specialised suppliers. The recruitment of cheap labour became an end in itself and led to the introduction of 'flexible' layer of workers. The industry of labour supply, in different forms (agency work, service provision with posted workers, pooling and offering of self-employed), grew to record highs. In recent years, the increase of the so-called gig economy adds new forms to the phenomenon of externalised workers.

In my contribution, I want to explore the development of shell companies (or artificial corporate arrangements) as a specific vehicle that can be used in supply chains, with the consequence that labour relations are blurred. Therefore, it is necessary to look at the developments in the area of company law. The main competence to create companies lies in the hands of the Member States. Nevertheless, there is a long list of European company law directives that have been concluded resulting in a vast package of company law acquis that includes rules on the formation, registration, merger and division of companies, financial and non-financial reporting and auditing. From the very beginning, the business environment perspective was dominant in these European company law initiatives. What mattered was the identification of 'unnecessary administrative burdens', which should be removed and simplification and deregulation of the entrance to the market.

Moreover, the Treaty on the Functioning of the European Union (TFEU) explicitly recognises the freedom of establishment of corporate entities and the freedom to provide services across the whole European Union. As a consequence, the mobility of companies is promoted and guaranteed. The EU's reasoning in this area, as expressed in several documents, is simple and it seems that many countries follow the same reasoning: companies will benefit from reduced procedural requirements, as well as simplified and harmonised rules for accreditation, verification and registration. However, the EU acquis says little about the possible abuse of these freedoms. In an overall assessment of the developments since the mid-1990s in the area of national and EU company law, the conclusion was that the deregulation policy appears to stimulate regime-shopping inside the European Union rather than to contribute to a more sustainable legal setting resulting in well-governed companies that are accountable and transparent (Cremers & Wolters 2011).

There are no straightforward regulations or instruments that define or prescribe requirements for genuine corporate activities. Ready-made-companies are for sale on the Internet and everyone can become the director of a corporate entity through e-registration (current price level is 39 euro). Once established in one constituency, you can start to provide services across the EU. In recent years, the labour market consequences of this deregulation have led to more focus on the abuses of simple entrance (ETUC 2017).

In my contribution, I will report about ongoing research in the area of cross-border activities of artificial arrangements as a method to circumvent the national regulatory frame of industrial relations.

Presentation

Background

Developments since the mid-1990s:

- Implementation of Single Market gives absolute priority to freedom of establishment and freedom to provide services.
- Although creation of companies is still a national matter, once established, corporate legal entities can provide services across the whole EU.
- Harmonisation of company law shifted to a national agenda dictated by competition - company law has become a production factor.
- In parallel, a massive externalisation/outsourcing of cross-border recruitment of labour started.

Commonalities in complex cases

- The use of artificial arrangements: legal corporate entities claiming to engage in economic activities that do not reflect the operational reality.
- Dispersed competences hinder effective tackling.
- Incubators advise on avoidance opportunities and provide 'substance' and regulatory compliance.
- Labour relations and employer responsibility are blurred.
- Ownership is denied; the use of go-betweens.
- Bankruptcy is widely used as an effective means to lead compliance control into a dead-end street.

Artificial corporate entities

- Artificial entities are set up for circumvention purposes or financial manoeuvres, or are kept dormant for future use.
- The entities generally exist only on paper and are often used for mala fide activities.
- Features are multiple companies having the same address; no physical existence at the given address; high ticket transactions inconsistent with the business of the firms; and rotational transactions with no apparent legitimate business group.

Business models

The methods consist of well-established and designed business models, often thought through in all legal details, which lead to distortion of competition based on wage costs with genuine companies that comply with the legal and conventional frame.

- Savings on direct wage costs;
- Savings on employers' costs;
- Savings on social security contributions;
- Savings on income tax, turnover tax and corporate income tax.

Advertising

What Is A Ready Made Company?

A ready-made company has never done any business, however it is registered in the Commercial Register and it has its own Company ID No., but no business history. All of our ready made companies **are ready for sale and for immediate use**.

The Benefits Of Purchasing A Ready Made Company?

Ready made companies may have been registered for a number of years, and this shows longevity, **making your business appear more established than it might be**. This is great for increasing trust with new or prospective clients **as it gives the impression that you have been trading for longer than you have**.

The incubators

- Organise the establishment of the legal entity
- Arrange a company registered office address
- Take care of registration duties
- Open banc accounts
- Draw (fake) proceedings of general assemblies or shareholder meetings
- Assist in accounting matters
- Suggest substance
- Overall, they guarantee the facade that is necessary to keep the artificial arrangement upright (all 'perfectly legal').

How to tackle?

Item	a. Social security	b. Working conditions	c. Freedom of establishment	d. Company law	e. Taxation	f. Sectoral regulations
	Regulations 883/2004 and 987/2009	Posting of workers Directive; Enforcement Directive; Revised Posting Directive	Services Directive	A series of 12 EU Directives and respective revisions, codified in Directive (EU) 2017/1132	Parent-daughter	Transport; Agency work Others?
Genuine undertaking defined						
Fraudulent activity defined						
Registration criteria and/or obligations						
Compliance control and enforcement mechanism						
Sanctioning						

Christiane Benner, IG Metall Co-President

Short biography

Christiane Benner is the Vice President of IG Metall. She is responsible for the union's organizational and personnel policies as well as its target group work. In addition to women's and equal opportunities policy, migration and participation and the Junge IG Metall (Young IG Metall), she is also responsible for employees, IT and students. In this area, current social trends and new forms of changed forms of work come together. IG Metall uses these to develop assertive answers for the working society of the future - always with a direct reference to company practice. Christiane Benner also launched the IG Metall "Crowdsourcing Project" in 2015 to this purpose.

She studied sociology in Chicago and at the Goethe University in Frankfurt am Main, and graduated with a diploma.

Abstract

Contracts are increasingly being assigned outside the company. Today, this is possible along the entire value chain. This entails considerable risks for employees because this form of work is not regulated. In the case of external crowdworking, for example, platform operators determine the working conditions according to their own requirements.

The interests of the employees there can no longer be effectively represented by the existing co-determination instruments and by traditional trade union policy. Digitalisation and Big Data are further accelerating this development. The place and time at which the necessary work is carried out is becoming increasingly irrelevant. Christiane Benner develops perspectives on how trade unions and their active company representatives can effectively represent employees even under these conditions.

Speech

Christiane Benner

Zweite Vorsitzende

Keynote

Neue Arbeitsformen und Unternehmensstrukturen - Herausforderungen für gewerkschaftliche und rechtliche Strategien

European Labour Law Conference – New forms of labour and new structures of enterprises – challenges for labour law

Frankfurt, 16.2.2019

Sperrfrist Redebeginn! Es gilt das gesprochene Wort!

[Titelfolie mit Symbolbild KI und 2 Folien Infos IG Metall]

Sehr geehrte Damen und Herren, liebe

Kolleginnen und Kollegen,

Herzlich Willkommen bei der IG Metall. Ich freue mich, dass heute ein so fachkundiges und internationales Expertengremium bei uns zu Gast ist.

Das brauchen wir auch. Es geht um eine der größten Herausforderungen, mit der Gewerkschaftspolitik aktuell konfrontiert ist. Das Arbeitsrecht natürlich ebenso.

Innerhalb der IG Metall diskutieren wir den derzeitigen Wandel unter dem Begriff Transformation.

Globalisierung, Digitalisierung, Klimapolitik und daraus resultierende technische Veränderungen ergeben im Zusammenspiel eine sehr große Veränderungsdynamik.

Dazu hat Boris Karthaus gestern referiert.

Dazu kommen – und das ist ja Thema dieses Wochenendes – neuartige Unternehmensstrukturen, dadurch verändert sich auch die Organisation der Arbeit insgesamt.

Ein ganzheitliches Bild erhält man aber erst, wenn man sich komplette Wertschöpfungsketten ansieht.

Selbst wenn in einem tarifgebundenen Betrieb die Zahl der fest angestellten Beschäftigten über einen längeren Zeitraum gleichbleibt, können sich im Hintergrund fundamentale Veränderungen vollziehen.

Ich will Ihnen das gleich an einem Beispiel erläutern. Und gehe dann zu der Frage über, die uns natürlich alle bewegt:

Wie können wir Arbeitnehmerrechte, Mitbestimmungsstrukturen und eine zeitgemäße Gewerkschaftspolitik so gestalten, dass wir gestaltungsfähig bleiben?

Und wie können wir dort – wo unser Einfluss schon geschwunden ist – wieder gestaltungsfähig werden?

Gelingt es in Zeiten der Globalisierung und Informatisierung nationale Antworten zu finden?

Bevor ich hier in die Analyse einsteige oder Maßnahmen vorschlage, möchte ich aber noch einmal das Ziel vergegenwärtigen, für das wir uns gewerkschaftlich engagieren.

Ich bin mir sicher, es ist auch oberste Maxime für viele Juristinnen und Juristen hier im Raum:

Im Mittelpunkt aller Debatten müssen die Menschen stehen! Und es muss uns darum gehen, aus technischem Fortschritt sozialen Fortschritt zu machen.

Ich habe den Eindruck, das wird bei allen Diskussionen über Digitalisierung, Künstliche Intelligenz oder sonstige Veränderungstreiber oft vergessen!

Das dürfen wir nicht akzeptieren und müssen offensiv dagegenhalten!

Und für uns als Gewerkschaften kann das nur heißen: wir kämpfen weiter dafür, dass alle Beschäftigten eine gute und sichere Arbeit haben, von der sie ihren Lebensunterhalt bestreiten können!

Das können wir nicht oft genug wiederholen!

Diese Maxime leitet auch die Politik der IG Metall. Wir werden die Transformation nicht erdulden oder vielleicht ein wenig abfedern!

Nein, wir wollen sie im Sinn der Menschen verändern! Wir wollen, dass die Menschen morgen und übermorgen besser leben, nicht schlechter!

[Folie 4: KI-Symbolbild II]

Meine Damen und Herren, liebe Kolleginnen und Kollegen,

Die IG Metall hat hier ein ganzes Maßnahmenbündel aufgelegt.

Die besondere Form der Mitbestimmung in Deutschland ermöglicht es uns, in unternehmerische Prozesse einzugreifen.

Ich will hier gar nicht über das Für und Wider des deutschen Modells sprechen. Ich will es nur darstellen.

Wir versuchen aktuell, viele neue Berufe zu entdecken, die morgen und übermorgen gefragt sind. Weil klar ist, dass es eine Verschiebung von Kompetenzen geben wird. Dass neue Berufsbilder entstehen.

Kennen wir diese, können wir die Beschäftigten dorthin qualifizieren. Und zwar vor allem diejenigen, deren Arbeitsplatz bedroht ist oder in einigen Jahren zu verschwinden droht. Meine Damen und Herren, was unternimmt hier die IG Metall?

KI-Anwendungen halten in den Betrieben Einzug - zum Beispiel als intelligente Softwareroboter in den Büros oder als künstliche Endkontrolle in der Produktion.

Wir müssen von Anfang an und Anwendung für Anwendung genau hinsehen.

Wir müssen verstehen, was dahintersteckt und welche Dominoeffekte sie auslösen.

Ich selbst habe als Fremdsprachenkorrespondentin technische Spezifikationen übersetzt.

Heute würde ich durch Google Translate oder zumindest durch komplexere Spezialprogramme ersetzt werden. Ich bräuchte dringend eine Perspektive.

Die Antwort kann nur lauten: Qualifizierung, Qualifizierung, Qualifizierung!

Wir analysieren aktuell in allen Betrieben die Arbeitsplätze.

Wir wollen genau wissen, welche davon bedroht sind. Und wenn wir diese Daten haben, dann werden wir die Arbeitgeber treiben!

Es ist ihre Aufgabe, den Beschäftigten eine Perspektive zu bieten und sie rechtzeitig auf die Veränderungen vorzubereiten.

Das fordern wir flächendeckend ein!

Das ist unser Ansatz bei den Beschäftigten, der Betriebe über gute Mitbestimmungsstrukturen verfügen und wo die IG Metall noch einen hohen Einfluss hat.

Aber was tun wir dort, wo Mitbestimmung und gewerkschaftliche Strukturen überhaupt nicht mehr greifen?

Ich erläutere das Vorgehen der IG Metall am Beispiel Crowdworking.

[Folie 5: Crowdworking]

Die Digitale Transformation verläuft rasant. Und viele Veränderungen sind auf den ersten Blick nicht sichtbar, aber sehr folgenschwer!

So sind ganz neuartige Arbeitsformen entstanden, die in dieser Form erst durch den heutigen Stand der Digitalisierung möglich sind.

Ein sehr schnell wachsender Bereich ist das so genannte Crowdworking.

Beschäftigte bieten ihre Arbeitskraft als Solo- Selbständige auf digitalen Plattformen an. Rund um den Erdball. Oft zu völlig unregulierten Bedingungen.

Aktuelle Erhebungen von unserem Arbeits- und Sozialministerium gehen von 3,2 Mio. Menschen aus, die in Deutschland Geld mit Crowdworking verdienen. Die wenigsten bislang hauptberuflich.

Sie sehen das hinter mir: Crowdworkerinnen und Crowdworker „arbeiten“ in allen Bereichen unserer Unternehmen.

[Folie 6: Erfolge Crowdworking-Projekt]

Wenn man etwa Crowdwork regeln will, ist eine differenzierte Betrachtung notwendig:

Internes „Arbeiten im Schwarm“ ist etwas ganz Anderes als externes Crowdworking – auch wenn die Technik teilweise dieselbe ist.

Deshalb schließen wir nicht nur neuen Vereinbarungen in Betrieben ab, sondern sind auch im Dialog mit den Plattform-Betreibern und mit den externen Crowdworkern.

Es ist uns gelungen, auf einem völlig unregulierten Feld mit den Plattformen Regeln zu vereinbaren.

Dafür haben wir 2016 gemeinsam mit Plattformbetreibern den „Code of Conduct“ weiterentwickelt und z.B. bei Entgeltfragen konkretisiert. 2017 wurde er veröffentlicht.

Acht Plattformen haben ihn unterzeichnet, davon sieben aus Deutschland und eine mit Sitz in England.

Die Arbeitgeber verpflichten sich ausdrücklich, kein Lohn- und Sozialdumping anzustreben.

Vielmehr bekennen sie sich dazu, dass bei der Bezahlung der Crowdworker „lokale Lohnstandards“ zugrunde gelegt werden sollen.

Seit 2016 können Soloselbständige Mitglied der IG Metall werden. Im November 2017 wurde eine Ombudsstelle zur Beilegung von Streitigkeiten auf den Plattformen ins Leben gerufen.

Crowdworker, Mitglieder, können sich dort beschweren. Da geht es um Themen wie „Zurückhaltung von Entgelt“ oder „Auftragsvergabe“ auf den Plattformen.

Die Ombudsstelle ist paritätisch besetzt: Neutrale Vorsitzende (Arbeitsrichterin in Frankfurt), Plattform (Content.de), Crowdsourcing-Verband, IG Metall, ein Crowdworker.

Bislang gab es rund 35 Fälle, in jeweils rund der Hälfte wurde ein Kompromiss gefunden.

Die andere Hälfte endete mit einem Spruch der Ombudsstelle – teils zugunsten des Crowdworkers, teils zugunsten der Plattform.

Wir sind natürlich auch gegenüber der Politik tätig. Arbeit 4.0 braucht einen Sozialstaat 4.0.

Wir wollen technische Innovation auch für soziale Innovation nutzen.

Wir haben das Ziel, vor allem gute digitale Arbeit zu schaffen.

Einen ersten Erfolg für Crowdworkerinnen und Crowdworker haben wir mit einer besseren Krankenversicherung für Solo-Selbständige bei der Regierungskoalition in Deutschland schon erreicht.

Ebenso ist in der Politik angekommen, dass es einen Sozialstaat braucht, der auf veränderte Beschäftigungsformen und Erwerbslebensläufe eine Antwort gibt. Neben Krankenversicherung ist auch eine Rentenversicherung nötig.

Aktuell beraten wir auch auf der europäischen Ebene, um bessere Regulierung von Arbeit auf Plattformen.

“The Economist“ hat unsere Initiative im November 2018 jedenfalls gelobt. Die “Financial Times” bezeichnete uns sogar als “Some of the world’s smartest trade unions”.

Das zeigt mir: wir sind zumindest auf einem guten Weg.

Wir wollen aber noch mehr. Und da sind wir auch auf juristische Unterstützung angewiesen. Ich bin gespannt auf die Ideen, die heute dazu entwickelt werden.

[Folie 7: Mitbestimmung und Beteiligung]

Meine Damen und Herren, liebe Kolleginnen und Kollegen,

Neue gesetzliche Regelungen brauchen wir auch, um die Mitbestimmung zu stärken.

Sie muss beispielweise bei Sitzverlagerungen ins Ausland gestärkt werden.

Die deutschen Großkonzerne haben von den Steuertricksern wie Apple oder Google gelernt.

Mit windigen Konstruktionen verlagern sie ihren Sitz in andere europäische Länder und fliehen so vor der Mitbestimmung.

Arbeitnehmervertreter in den Aufsichtsräten gibt es dann nicht mehr.

Bestenfalls sitzen wir mit 2 oder 3 Leuten am Katzentisch der Arbeitgeber.

Und wir wollen eine Garantie, dass Tarifverträge bei Ausgliederungen weiterhin gültig bleiben.

Mitbestimmung ist der Garant für mehr soziale Gerechtigkeit!

Und damit auch Garant für unsere Demokratie. Ich werbe dafür auch bei den Kolleginnen und Kollegen aus den anderen europäischen Ländern.

Wir haben unterschiedliche Kulturen, auch bei unserem Verhältnis zwischen Kapital und Arbeit.

Aber ich bin überzeugt: wir müssen uns gemeinsam gegen jede Form von internationalem Unterbietungswettbewerb stemmen!

Ein Cherry-Picking der Kapitalseite dürfen wir nicht zulassen!

Mitbestimmung und Beteiligung, so meine Überzeugung, sind der Schlüssel. Das gilt im Transformationszeitalter ganz besonders.

Arbeitnehmervertreter in Aufsichtsräten und Betriebsräte treten strukturell immer für langfristige Unternehmens- beziehungsweise betriebliche Interessen ein.

Und warum? Weil sie daran interessiert sind, möglichst viel Beschäftigung zu sichern.

Sie haben also immer den wirtschaftlichen Erfolg im Blick.

Sie sind aber gleichzeitig der natürliche Gegenpol zu renditegetriebener Kurzfristökonomie.

Ich behaupte: Das hat schon viele Arbeitsplätze gerettet! Es hat sogar ganze Unternehmen erhalten, die vorschnell zur Disposition standen.

Unsere Erfahrung zeigt: ohne Beteiligung der Beschäftigten wird die Transformation in den Unternehmen und Betrieben nicht gelingen!

Ab dem ersten Tag, an dem neue Produktionssysteme eingeführt werden, müssen alle betroffenen Kolleginnen und Kollegen nach ihrer Meinung gefragt werden.

Jeder Betrieb hat einzigartige Herausforderungen, Abläufe und Arbeitskulturen.

Deshalb ist Beteiligung hier unerlässlich!

Das vermeidet unnötige Fehler und erspart viel Frustration in den Belegschaften.

Wir erleben sehr oft, dass digital gestützte Prozesse – von der einfachen Urlaubsplanung bis hin zu digitalen Kanban-Boards für Projektsteuerung – in Blitzgeschwindigkeit einfach übergestülpt werden.

Der Produktivitätsverlust durch Frust und aufwendige Nacharbeiten ist in der Regel sehr hoch.

Und es passt ja auch nicht zu den Erwartungen an die Beschäftigten.

Sie sollen bei neuartigen Systemen wie agiler Arbeit flexibel und ergebnisoffen arbeiten. Dann erwarten sie das natürlich auch umgekehrt – von ihren Arbeitgebern und von ihren Gewerkschaften!

Deswegen richtet sich meine letzte Forderung, nicht nur an sie, sondern an uns selbst: Wir alle – und das heißt auch die IG Metall - müssen viel offener und adaptiver werden.

Deshalb beziehen auch wir die Beschäftigten regelmäßig ein.

Die IG Metall hat das 2017 bei einer großen Beschäftigtenbefragung in 2017 vor der Tarifrunde Metall/Elektro getan – über 680.000 Menschen haben sich beteiligt.

Der Erfolg war gigantisch. Unsere Forderung war so breit getragen, dass wir sie gut durchsetzen konnten.

Meine Damen und Herren, liebe Kolleginnen und Kollegen, nur mit dem großen Wissen der Arbeitnehmerinnen und Arbeitnehmer gelangen wir wirklich in die Kapillare der Wertschöpfung.

Ich bin überzeugt: das kann unser großer europäischer Vorteil bei der Transformation gegenüber anderen Gesellschaftsmodellen sein.

Und, das ist mir bei allem Verständnis für ökonomische Interessen wichtig: So können wir unsere kostbare Demokratie erhalten und weiter gestalten.

Das mag bisweilen anstrengender sein als glattes Durchregieren.

Für uns sind aber weder der chinesische Weg, der sich nahe am Totalitarismus bewegt, noch der US-amerikanische Neoliberalismus eine denkbare Alternative.

Wir brauchen ein eigenes europäisches Modell. Und das kann nur mit einer demokratischen Perspektive verbunden sein.

Nichts ist so erfolgreich wie gemeinsam erarbeitete und anschließend gemeinsam getragene Ergebnisse.

Das müssen wir auch gegenüber den Arbeitgebern und der Politik deutlich machen.

Am 26. Mai sind Europawahlen. Es geht um sehr viel. Auch darum, einen Rechtsruck zu verhindern.

Die Menschen und die Beschäftigten müssen Vertrauen in die Politik zurückgewinnen.

Wir sehen es als unsere Aufgabe, mit Mitbestimmung unseren Beitrag zu leisten. Heißt, konkret zu zeigen: Beschäftigte brauchen Perspektiven von Sicherheit, gerade in Umbrüchen wie durch die Transformation.

Danke!

Presentation

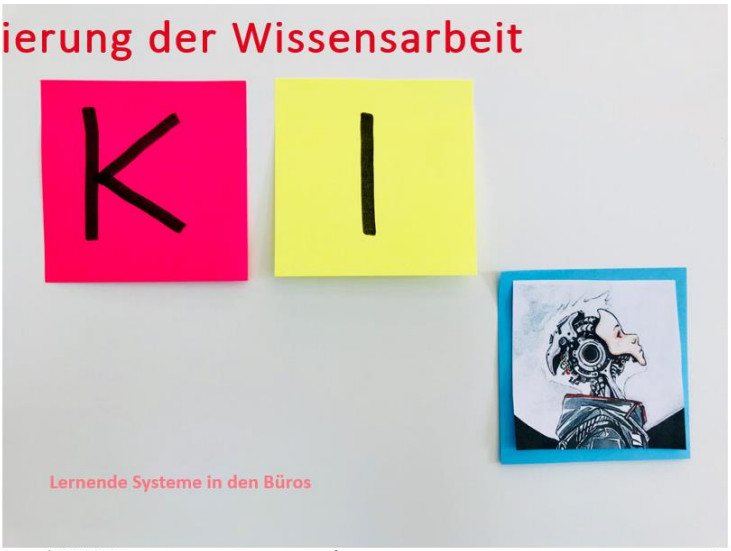
About IG Metall

- Largest trade union in Europe
- Founded in 1891, “re-founded” in 1949
- Represents German manufacturing workers:
  Daimler, BMW, Volkswagen, Siemens, Philips, etc.
- Blue- and white-collar workers
- 2.2 million members
- Self-employed can join

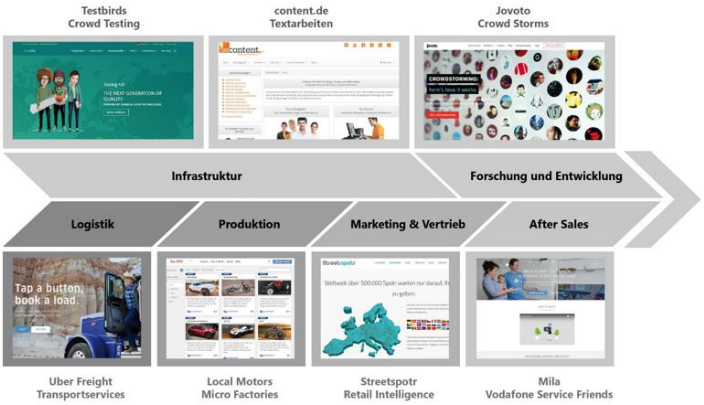
What We Are Very Good At

- **Negotiating collective agreements**
  2018: 7.7% pay raise for 26 months
  Option to temporarily reduce working hours
  1.5 million workers in “warning strikes”
- **Shaping policies at company level**
  Over 80,000 works council members are IGM members
- **Influencing national policy**
- **Coordinated, holistic crisis response with employers and policy makers**

Digitalisierung der Wissensarbeit

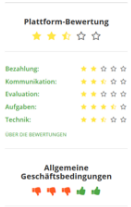


Crowdsourcing-Plattformen – Beispiele



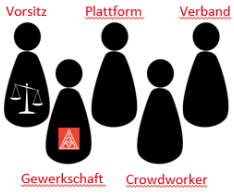
Die IG Metall in der Crowd

2015
Satzungsänderung: Solo-Selbständige können Mitglied werden



2016
Bewertungsplattform „FairCrowdWork.org“

2017
Der „Code of Conduct“ wird bei Beteiligung der IG Metall konkretisiert. 8 Plattformen sind dabei

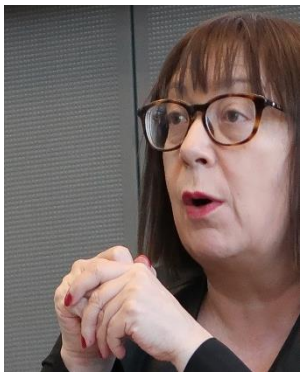


2017
Gründung der Ombudsstelle zur Umsetzung des „Code of Conduct“ in Streitfällen

2019
EU-Parlament will Regulierungsstrategie für Arbeitsplattformen entwickeln

Mitbestimmung und Beteiligung

Esther Lynch, Confederal Secretary, ETUC, Brussels



Short biography

Esther Lynch was elected as ETUC Confederal Secretary at the Paris Congress in 2015. She has extensive trade union and legal experience at an Irish, European and International level and has played a key role in developing trade union strategies in Ireland and internationally.

Her trade union experience began when she was elected as a shop steward in the1980s. Before coming to the ETUC, she was the Legislation and Social Affairs Officer with the Irish Congress of Trade Unions (ICTU). Within the ETUC, Esther has a wide-ranging portfolio with responsibility for collective bargaining and wage policy, public procurement, fundamental and trade union rights, labour law, and health and safety. She leads ETUC interventions on the European Pillar of Social Rights, the European Commission's Undeclared Work Platform and the ILO Future of Work Initiative. She manages the work of three ETUC Committees along with the Legal Strategy Group, NETLEX the ETUC Labour Law Expert Group.

She is currently spearheading a major campaign for a pay rise in Europe. She oversees the political work of the ETUI in respect of Health and Safety and she has led a successful campaign on workplace cancers that led to a Covenant between Business Europe, the Commission and the ETUC.

Emilie Durlach, Ph.D. Legal Department CFDT, Paris

Short Biography

Following a master degree in industrial relations and labour law obtained from Paris university in 2000 (POUND university), I completed my doctorate thesis on "Right to work and labor law" in 2006 (Paris University, POUND).

Meanwhile, I had been working part-time for the national job centre legal department and teaching civil and labour law as assistant professor at Paris university.

Now working in the CFDT national Congress legal department since 2009, I'm assistant chief editor of CFDT law review, I analyse new statutes passed in labour law and I provide legal advises during national collective bargaining.

Abstract

In the last decade, labor law has often been said to be less efficient and more and more irrelevant for it has been undermined by 2 factors: emerging new forms of work on the one hand and new structures of undertakings on the other hand.

- **The recent surge of new forms of work**, such as for example platform workers, led CFDT unions to look for including those workers (and more generally self-employed workers) in their strategies. The decision to tackle this issue was taken during CFDT's last Convention in June 2018. Nevertheless, this is not a simple issue for several reasons.

  First of all regarding the true nature of the contract. The CFDT Congress does not contemplate setting up a new status for this kind of workers in between employees' position and real self-employed workers' situation.

  The CFDT Congress rather considers that those workers who are experiencing in practice a subordinate relationship with their co-contractor should therefore be untitled to benefit full employment status. Otherwise, should a third status be recognized, employers might be tempted to divert this new status in the workers' detriment.

  However, some of those "in between" workers do not wish to see their own relationships with their co-contractors be reclassified as a labor contract, and they should be heard too.

  For these reasons, the CFDT Congress advocates that all workers, regardless their status, should be granted some basic rights, in particular social security benefits, employment insurance…

  Secondly regarding collective rights. The rights to take collective actions and to organize and create union are fundamental rights which should as such be ensured to those so-called self-employed workers.

  Yet, there is, in the CFDT's point of view, a major obstacle to acknowledge self-employed workers' organizations the right of collective bargaining: in France, collective bargaining is only granted to 'representative' organizations. More specifically, conditions to be recognized "representative" differ from trade Unions to employers' organizations. Since self-employed workers are neither employees nor employers there is no proper set of rules to determine their organization's representativeness. Furthermore, those 'in between' workers' organizations can't join CFDT without undermining its representativeness as a national workers trade union.

- **The rise of new structures of enterprises** and in particular the organization of activities at the international level arise other series of problems, we try to solve.

  In this respect, one of CFDT claim is to recognize a right to representation at the central level for workers in franchise networks where workforce size thresholds are too low to have a staff

representation in each enterprise and where, even though there is not a group of societies, working conditions are in practice similar.

Speech

In the last decade, labour law has often been said to be less efficient and more and more irrelevant for it has been undermined by 2 factors: emerging new forms of work on the one hand and new structures of undertakings on the other hand.

1. The recent surge of new forms of work,

The recent surge of new forms of work, such as for example platform workers, led CFDT unions to look for including those workers, and more generally self-employed workers, in their strategies.

The decision to tackle this issue was taken during CFDT's last Convention in June 2018. Nevertheless, this is not a simple issue for several reasons.

- **First of all regarding the true nature of the contract. The CFDT Congress does not contemplate setting up a new status for this kind of workers,** i.e**.** a status in between employees' position and real self-employed workers' situation.

The CFDT Congress rather considers that those workers who are experiencing in practice a subordinate relationship with their co-contractor should therefore be untitled to benefit full employment status. By the way, on November 28 last year, the French Court of cassation decided for the first time that platform workers are under/in a subordinate relationship with their co-contractor. More specifically, the decision concerned a bike delivery person who was geo-located and could be denied access to shifts as a result for insufficient or bad performance in the past. Regarding French standards of reclassification, the decision is quite classical: it is based on usual criterias to recognize a subordinate relationship: power to give orders, to control on the worker's activity and power to penalize them[8].

Otherwise, should a third "in between" status be recognized, employers might be tempted to divert this new status in the workers' detriment, in other words to bypass labour law.

However, some of those "in between" workers do not wish to see their own relationships with their co-contractors be reclassified as a labour contract, and they should be heard too.

For these reasons, the CFDT Congress advocates that all workers, regardless of their status, should be granted some basic rights, in particular social security benefits, employment and work accidents insurance, professional training…

In this respect, the CFDT Congress took part in discussions over 2016 labour law Act of Parliament ('loi Travail') and urged the government to introduce some new articles in French labour Code, whereby platform workers are entitled to new rights.

According to these articles, when a certain revenue threshold is reached, the platform has to pay a portion of workers' insurance against the risk of work accidents and a portion of workers' professional training[9].

The CFDT Congress considers this a first step towards recognition of basic rights common to all workers.

- **Secondly regarding collective rights.** In the CFDT Congress' point of view, the rights to take collective actions and to organize and create unions are fundamental rights, which should as such be ensured to those so-called self-employed workers.

[8]Cass.soc.28.11.18, n°17-20079.

[9] From a 2014 status onwards, and even more since september 2018 status, all workers, whether subordinate or not, should benefit a personal vocational training account/credit.

In these matters as well, the 2016 act of Parliament enacted some new articles in French labour Code.

According to those articles, self-employed platform workers are granted the right to create and join Trade Unions in order to defend their interests[10].

Moreover, the right to take collective actions is now recognized to platform workers. Therefore, now on, platform workers' contracts must not be terminated anytime they take part in a collective action. Besides, workers shall not be held liable for refusing to work.

Yet, and even if the ESRC decision[11] on self-employed right to bargain is good news, in the CFDT's point of view, there is, more generally speaking, a major obstacle to acknowledge self-employed workers' organizations the right of collective bargaining: in France, collective bargaining is only granted to 'representative' organizations.

More specifically, conditions to be recognized "representative" differ from trade Unions to employers' organizations. Since most of self-employed workers are neither employees nor employers there is no proper set of rules to determine their organization's representativeness. Furthermore, as long as they are not recognized as an employees' organization, those 'in between' workers' organizations can't join the CFDT Congress without undermining its representativeness as a national employees' trade union.

Thus, for the time being, the CFDT Congress is in favor of granting specific rules of representativeness for those workers' associations so that they can take a part in national discussions, or even bargain, particularly on social welfare issues.

Besides, another issue to tackle is to determine the discussion partner for those workers. In this respect, it is quite easy to identify platform workers bargaining partner (the platform can play the part of the employer in collective bargaining) but, on the contrary, it is hardly possible to identify such a partner for self-employed workers more generally speaking.

Above all, if such bargaining takes place, it's outcome can't have an *erga omnes* effect (it cannot be generally enforced) like collective agreements do in France for employees…

In a nutshell, regarding French collective bargaining rules as they are for now, it is quite a complex issue. So, in the CFDT Congress' point of view, if there is to be such collective agreements they should not be on the same pattern as the one we have known up to now in the French labor code.

2. The rise of new structures of enterprises/undertakings.

Today working activities are more and more planned on an international level, which is an issue that the CFDT congress aims to tackle.

Moreover at the national level, new structures such as franchise networks have multiplied, notably in certain sectors such as shops, hotels etc. This tendency has a negative effect on employees' rights, particularly on their right to representation.

Indeed, this type of organization of work tends to divide collective labor in between the different companies in the network representing an obstacle for employees' right to representation. Employees are divided in so little groups that they can't claim their representative bodies to be set up in their place of work.

- **In this respect, the CFDT Congress' claims to recognize/acknowledge a right for all employees' representation at the central level in franchise networks.**

[10] That is to say platform workers who have been reclassified as employee are not concerned by these articles: they benefit whole employee status.
[11] Irish Congress of Trade unions / Ireland.

As a matter of facts, workforce size thresholds are often too low to have a staff representation body in each company and, even though there is not a group of companies, working conditions are in practice similar.

In 2016, while the Act of Parliament was under discussions, the CFDT Congress' proposal eventually passed an article dealing with workers' representation in franchise networks. Thereby, all employers in a franchise network of more than 300 employees have to undertake a collective bargaining to set up a representative body anytime a Trade Union asks for it.

Unfortunately, in 2018, last Act of Parliament repealed this article… Therefore, CFDT Trade Unions try to settle some kind of representation bodies in networks through bargaining at the undertaking level. Up to now/so far, we have signed only one collective agreement in this respect.

- **Regarding multinational companies.**

In that respect, the CFDT Congress has supported the 2017 duty of vigilance act of Parliament.

Following the Rana Plaza disaster, the CFDT Congress has been working with many NGOs for a piece of legislation to be enacted in order to tackle and prevent such calamity. Eventually in march 2017, an act of Parliament was passed.

In the CFDT Congress's point view, this piece of legislation is very interesting because it relies on the prevention of risks and enshrines legal duties all over the subcontracting chain, and even over part of the supply chain.

Ewa Podgórska-Rakiel, PhD, Legal Department NSZZ "Solidarnosc", Gdansk

Short biography

PhD in Legal Studies at the University of Gdańsk on “Protection of trade union leaders performing work under civil law contracts” (2014). BA Studies at the Institute of English and American Studies, Faculty of Languages, University of Gdansk. Lawyer in the Expert Department at the National Commission of the Independent Self-Governing Trade Union “Solidarność”. Member of the International Committee of the Social Dialogue Council in Poland. Member of the ETUC Taskforce on Posting and member of a European Commission subgroup on the transposition of Directive 2018/957/EU. Substitute member in the ETUC Fundamental Rights and Litigation Advisory Group. Member of the delegation to the International Labour Organisation Geneva session. Lecturer at the postgraduate Program in Labour Law and Social Security at Lazarski University in Warsaw. The business owner – Rakiel Labour and Employment Law (www.rakiel.com.pl).

Author of NSZZ “Solidarność” complaints to the international institutions: complaint to the ILO (Freedom of Association Committee) on limitations of the freedom of association of Polish workers under civil law contracts (Case No. 2888); complaint to the ILO (Case No. 3111) on the narrow definition of parties to a collective dispute, in particular the right to strike and excessive exclusion from this right of some civil service employees; complaint to the European Commission on the problem of fixed-term contracts (Case No. CHAP(2012)02800). All these complaints were accepted as valid, recommendations were issued and relevant legal amendments are pending.

Author of numerous books, scientific papers in the area of labour law. The scope of publications and presentations cover: labour law in Poland, freedom of association, the right to strike, social dialogue, protection of personal data in labour law, posted workers in general and in the context of international transport.

Abstract

The main points of presentation:

- Collective rights for all workers not only for the employees
- Employee status cannot decide about collective negotiation

It is worth to emphasized that new forms of employment should guarantee trade union protection for all persons engaged in paid work. We must promote collective bargaining for them in particularly for the self-employed.

In 2011 trade union NSZZ “"Solidarność”, filed a complaint to the Committee on Freedom of Association because in Poland the self-employed and other persons performing work on the basis of civil-law contracts could not join trade union. After 7 years, in 2019, following the recommendation of the Committee to amend the provisions accordingly becomes a fact. All persons engaged in gainful employment, regardless of whether they are covered by the definition of an employee included in the Labor Code or not have right to associate in trade union. The Act now applies to “all persons engaged in paid work” defined as “employees or persons performing work on basis other than employment relationship, regardless of employment status, who work on an own-account basis and who have rights and interests related to performing work that can be represented and defended by a trade union” (Article 11.1 of the Act on Trade Unions). On the one hand worker has right to associate in trade union

but on the other hand the Act provides that worker should have interests related to performing work that can be represented and defended by a trade union to be a member of trade union. Moreover employer cannot without the consent of the trade union organization, dismiss or terminate the contract with the worker who is a board member of the organization. All trade unions without distinction whatsoever have right to collective bargaining. It seems that new principles of protection of self-employed and other persons performing work on the basis of civil-law contracts are guarantee and that this protection is effective in Poland - as required by the conventions 87, 98 and 135 of the ILO.

The future of work with new forms of employment are coming and currently, the new discussion is held that the self-employed should have right to organise in trade unions but without right to negotiation of collective bargaining. The major recommendation for working people is to ensure a level playing field between employees and the self-employed particularly with regard to social protection, to tackle bogus self-employment and to promote collective bargaining for the self-employed. This is the key role of the trade unions.

Speech

Ewa Podgórska-Rakiel, PhD

Legal Department, National Commission of NSZZ "Solidarność"
Poland

European Labour Law Conference – New forms of labour and new structures of enterprises – challenges for labour law (panel discussion).

I. General notes

The basic aim of the present elaboration in the context of new forms of labour is to introduce the new principles of the Act on Trade Unions in Poland. It should be noted that no provision of the Polish Act on Trade Unions before 2019 implied the right to organize for people working on the basis of civil law contracts and for the self-employed. The provisions were incompatible with the Constitution of the Republic of Poland and with the Convention No. 87 of the International Labour Organization.

II. Complaint to the Committee on Freedom of Association

In 2011 trade union NSZZ "Solidarność" filed a complaint to the Committee on Freedom of Association because in Poland the self-employed and other persons performing work on the basis of civil-law contracts could not join trade union. As the author of the NSZZ "Solidarność" complainant I indicated that the Polish version of Convention No. 87 uses the term "employees" (pracownicy) as a translation of the English term "workers" or the French term "travailleurs" used in the text of the Convention. Extremely important was the fact that the Polish term "employee" in the legal language has a narrower meaning referring only to workers as defined by the Labour Code. The Labour Code defines the term "employee" as a person employed on the basis of a contract of employment, appointment, election, nomination or a cooperative contract of employment. Polish legislation, in defining the scope of the right to organize as set forth in the Act on Trade Unions of 1991 grants the right to establish and join trade unions exclusively to "workers" as defined by the Labour Code, members of agricultural cooperatives, persons performing work on the basis of agency contracts, home-based workers, pensioners, unemployed, functionaries and those engaged in the non-combatant military service. Therefore the complainant is of the opinion that by using a narrow definition of the term "employee" inspired by the Labour Code, the legislator denied freedom of association rights to persons employed

on the basis of civil law contracts (contract for service), self-employed and other persons performing work who are not employers. According to the data from statistics in Poland work on this basis approximately 2.5 million people.

III. The ILO recommendation and judgment of the Constitutional Tribunal of Poland

In its recommendation from 2012 the Committee of Freedom of Association of the International Labour Organisation requested the Polish Government to take the necessary measures in order to ensure that all workers, without distinction whatsoever, including self-employed workers and those employed under civil law contracts, enjoy the right to establish and join organizations of their own choosing within the meaning of ILO Convention No. 87. Moreover, recalling that ILO Convention No. 98 protects all workers and their representatives against acts of anti-union discrimination and that the only possible exceptions from its scope of application are the police, armed forces and public servants engaged in the administration of the State, the Committee requests the Government to ensure that all workers and their representatives enjoy adequate protection against acts of anti-union discrimination regardless of whether they fall under the definition of employee under the Labour Code or not (see Case No. 2888, GB.313/INS/9, Geneva 15-30 March 2012).

It should be mentioned that Polish definition of an "employee" covers both blue collar and white collar workers. On the other hand, in the current legislation, there is no statutory definition of self-employment. The doctrine generally accepts that self-employment should be understood as performance of work or services by one-man undertakings. Besides common forms of non-employee employment are civil law employment. The most common is performance of work under such civil law contracts as a contract for provision of services to which provisions on the contract of mandate apply respectively, a contract of mandate and a contract for specific work.

After 7 years from the ILO recommendation (case 2888), with the beginning of the year 2019 for the first time in Poland, both self-employed and civil law contract workers have the right of association in trade unions. The ILO recommendations issued on the basis of the complaint obliged Poland to amend regulations by extending the right of association to individuals working under civil law contracts and self-employed individuals, which was confirmed by the Constitutional Tribunal of Poland in a 2015 judgment (case K 1/13). The amended Act on Trade Unions entered into force on 1 January 2019. Since then, all workers, including people performing work on the basis of civil law contracts and the self-employed, have the right to organize into trade unions and to engage in collective bargaining and collective disputes, and to join strikes in particular.

IV. Collective rights

In addition, since the beginning of the year 2019, both self-employed and civil law contract workers are granted all collective rights including the right to collective bargaining and collective disputes. Thus finally collective rights not only employees but all workers are guaranteed. In this context, I must mention that in my opinion employee status cannot decide about collective rights. New forms of employment (e.g. platform work, digital economy) are generally based on civil law agreements in Poland. All persons engaged in paid work and not only those with employee status should be guaranteed trade union protection. We must promote collective bargaining particularly for the self-employed. It could be describes as a wide "protection umbrella", and if we say that all workers should have the right to organize in trade unions, then the next step is to give them all collective rights.

V. The 2019 report of the ILO Committee of Experts and Recommendations

On the other hand, in the 2019 Report of the ILO Committee of Experts and Recommendations (see pages 135-136; ILC.108/III(A)) in case of Poland notes with satisfaction that the personal scope of application of the anti-union discrimination provisions covers new categories of workers and is therefore no longer restricted to employees. The Committee notes that the draft Act on Trade Unions was signed on 25 July 2018. It was noticed that the right to establish and join trade unions will be extended to "persons working for money", which includes not only employees but also any person providing work for remuneration irrespective of the legal basis of contractual relationship. Furthermore, the Government indicates that the new definition of "a person working for money" means that membership in trade unions is open to persons hired under a mandate, contract for provision of service, contract to perform specific tasks, as well as self-employed (i.e. sole traders and persons running a one-person business, other than in agriculture). Volunteers, interns and other persons who work without receiving remuneration will also be granted the right to join trade unions on the terms and conditions specified in the trade unions' by-laws.

"The Committee also notes the observations from the National Commission of the Independent and Self-Governing Trade Union (NSZZ) "Solidarność" and the All-Poland Alliance of Trade Unions (OPZZ), received respectively on 9 and 27 August 2018 and the related comments from the Government. The Committee recalls that the Committee on Freedom of Association (CFA) (Case No. 2888) had requested the Government to ensure that all workers and their representatives enjoy adequate protection against acts of anti-union discrimination, regardless of whether they are or not considered an employee under the Labour Code or not. The CFA had referred the legislative aspects of this case to the Committee. In this regard, the Committee notes that the Act on Trade Unions was amended on 25 July 2018, and the amendments entering into force on 1 January 2019. "Persons who work for money" as long as they do not employ any other person to perform this type of work and irrespective of the legal characterization of their employment; paragraphs 5–7 also extend the right to establish and join trade unions to pensioners, persons on disability pension, unemployed persons, volunteers, interns, and other persons who work in person without being paid as well as to persons delegated to employers in order to complete substitute service, officers of the police, border guards, custom-fiscal service employees, prison service employees, firefighters and employees of the Supreme Audit Office; new articles 3 to 5 of the Act on Trade Unions extend the prohibition of unequal treatment based on trade union membership and trade union activities to the above-mentioned categories of workers. New article 32(1) of the Act on Trade Unions extends the special protection against termination and unilateral modification of remuneration or employment conditions to "persons working for money" who are trade union representatives; and article 26(2) of the amended Act on Trade Unions establishes that trade union organizations shall have the right to take a position in matters related to the collective interests and rights of persons who work for money. The Committee notes with satisfaction that the personal scope of application of the Act on Trade Unions anti-union discrimination provisions covers new categories of workers and therefore is no longer restricted to employees."[12]

[12] Application of International Labour Standards 2019, Report of the Committee of Experts on the Application of Conventions and Recommendations, REPORT III (Part A) International Labour Conference, 108th Session, 2019, pp. 135-136; ILC.108/III(A).

VI. Workplace-based trade union model

Finally, I would like point out that Poland adopted a workplace-based trade union model. This means that the membership in a trade union is possible through membership in the "enterprise" or "inter-enterprise" trade union organization. The legislature granted trade union rights only to enterprise and inter-enterprise trade union structures (not to sectoral or national structures). Undoubtedly, such a legal construction will not encourage persons working on the basis of civil law contracts and the self-employed to join or establish trade unions. It could be a problem to associate in trade unions for workers in new forms of employment, in particular temporary workers who cannot be directly linked to one workplace. They have the right to associate only in the agency who is the real employer but their interests with the user-employer.

VII. Conclusion

The main conclusion to be drawn is that in Poland the Act on Trade Unions applies to "all persons engaged in paid work" defined as "employees or persons performing work on the basis other than employment relationship, who work on an own-account basis and who have rights and interests related to performing work that can be represented and defended by a trade union". A worker has the right to be a trade union member but the Act requires that worker to have interests related to performing work that can be represented and defended by a trade union. In addition, an employer cannot dismiss or terminate the contract with the worker who is a board member of the organization without the consent of the trade union organization. All trade unions with new category of workers have right to collective rights. In my opinion new principles for the self-employed and other persons performing work on the basis of civil law contracts now guarantee as required by the ILO Conventions 87, 98 and 135. Collective rights are granted to all workers, not only employees. Also, employee status is not prerequisite to collective bargaining.

Dr. Antonio Garcia-Muñoz, Goethe Universität Frankfurt/M., for CCOO

Short biography

Ph.D. in law

Research Fellow, Goethe University, European Centre of Expertise

Garcia.MunozAlhambra@jur.uni-frankfurt.de

Publications

Books (selection):

La negociación colectiva europea de sector. Ed: Bomarzo, Albacete, 2017

Chapters in edited books:

"European Sectoral Social Dialogue" in Kun, A and Ter Haar, B EU Collective Labour Law, Ed: Edward Elgar. Forthcoming 2018

"Reconocimiento mutuo, competencia entre regulaciones y dumping social en la Unión Europea" in Arroyo Jiménez, L and Nieto Martín, A, El reconocimiento mutuo en el derecho español y europeo. Ed: Marcial Pons, 2018

"Diálogo Social Europeo y negociación colectiva" in Casas Baamonde, M.E and Gil Alburquerque, R (Dir.) Derecho Social de la Unión Europea. Aplicación por el Tribunal de Justicia. Ed: Francis Lefebvre, Madrid, April 2018

"Dismissal regulation in Spain after the crisis' reform" in Carinci, M.T (ed.), The evolution of dismissal regulation. A comparison between Japan and Europe, Ed: Giuffré, Milano, 2017

"Multilateral Framework Agreements: A milestone in Transnational Labour Law Tools?" in Perulli, A (ed.), L'Idea di diritto del lavoro.Oggi, Ed: CEDAM, Padova, 2016

Articles in referred Journals (selection):

Co-authored with Pavlou, V "La Directiva 1999/70/CE sobre el trabajo de duración determinada y la contratación temporal en España. Un comentario a las sentencias del TJUE del 14 de septiembre de 2016" Revista de Derecho Social, nº 75, July-September 2016

Abstract

My intervention will consist on a short input on the strategies the main trade unions in Spain (CCOO and UGT) have designed in order to face the challenges of digitalisation and platform economy. The focus will be on the trade union's action and strategies, as they have been elaborated and explained in the most recent documents on this topic by CCOO and UGT.

The relevance of the topic for Spanish trade unionism is of the utmost importance: Spain is, with more than 2.000.000 workers that obtain a relevant part of their incomes (+25%) from platform economy and with over 700.000 workers that work in platforms as main activity, the second EU' State in number of platform workers.

It has been demonstrated that these workers face worse working conditions than regular workers and that there is a notable asymmetry of power between workers and platforms (higher control, low

salaries, individualized conditions, possibility to 'disconnect' workers…). This situation demands an answer in the form of better (and maybe specific) rights and effective trade union action to organise, represent and protect these workers.

For CCOO, the starting point is that digitalisation of the economy can and must be governed, with the participation of trade unions. The main axes of the trade union involvement in this field are:

- Reinforcement of the role of collective bargaining in digitalisation related issues and platform economy
- To adapt the trade union's intervention and strategies to the new environment
- Engagement in tripartite social dialogue to foster adequate regulatory frameworks for digitalisation and platform economy.

The strategy of CCOO builds around the recognition and legal control of the worker statute of those persons engaging in platform economy; the removal of the many obstacles for the development of Industrial relations in the platform economy; the reinforcement of the control by the workers' representatives at company level of practices of subcontracting and externalizing to platforms that do not respect the minimum working conditions applicable in the applicable collective agreement in the company; to organise workers in platform economy (through a variety of strategies that I will mention in my intervention); to organise and or support emerging collective conflicts in platform economy.

UGT has developed a strategy among the same lines, including the idea of litigation for the recognition of the debt the platforms may have with the Social Security.

Some examples of the specific impact of these strategies can be mentioned in my intervention if there is time, as well as the strategies of platforms to counteract the efforts by Trade Unions to organise the workers.

Declan Owens, solicitor, London

Short biography

Declan Owens is an Irish lawyer practising in England and Wales, working for the Trade Union Law Group of Thompsons Solicitors from its London office and specialising in complex and strategic litigation for trade unions. Declan has studied law in Ireland, England and the Netherlands. He has previously worked for the Amsterdam Institute for Advanced Labour Studies, the International Trade Union Confederation and the International Labour Organisation. He has contributed to the Trade Unions of the World 2016 publication for the International Centre for Trade Union Rights. Declan has been a member of the Haldane Society of Socialist Lawyers Executive Committee for 15 years, attending conferences on its behalf organised by the European Lawyers for Workers Network and the International Association of Democratic Lawyers.

Abstract

Status anxiety: one step forward and one step back, a mixed picture for precarious platform workers under English law.

The recent Uber decision at the English Court of Appeal in December 2018 offers some hope for precarious platform workers in securing enhanced employment rights. A majority of judges dismissed Uber's appeal against a landmark employment tribunal ruling that its drivers should be classed as workers with access to the minimum wage and paid holidays. The judges found there was a "high degree of fiction" in the wording of the standard agreement between Uber and its drivers, which it argues are self-employed independent contractors with few employment rights.

However, a less well-publicised High Court judgment in December 2018 found in favour of another platform provider, Deliveroo, in a judicial review of the Central Arbitration Committee's decision not to recognise the Independent Workers of Great Britain as the trade union for collective bargaining purposes regarding Deliveroo food delivery 'Riders' in a central London zone. The reason was that these Riders were not actually classified as workers for the purposes of recognition under section 296(1) and Schedule A1 of the Trade Union and Labour Relations (Consolidation) Act 1992 but rather as self-employed independent contractors.

How can these seemingly contradictory decisions be reconciled? Unfortunately, the separate legislation in issue in relation to the employment status of workers in these cases still relies on archaic 'employment status' tests derived from case law precedents of common law judges who placed an undue legal (and ideological) reliance on the commercial terms of contracts rather than the rights of workers. Both judgments are under appeal and a consistent legal strategy and rationale is needed to protect the employment status of workers at an individual and collective level.

The legal strategy that needs to be adopted under English law is to maintain the argument for the right to collective bargaining to be judicially accepted as one of the essential elements of the "right to form and to join trade unions for the protection of [one's] interests" set forth in Article 11 of the European Convention of Human Rights as held by the ECtHR in Demir and Baykara v Turkey [2009] 48 EHRR 54. The opening words of Article 11(1) explicitly state that the rights contained therein apply to "everyone". The only exceptions are the categories of work specified in the last sentence of Article 11(2) which refer to "members of the armed forces, police and the administration of the State".

Therefore, a restriction on the right to achieve statutory recognition under Schedule A1 to the 1992 Act in the Deliveroo judgment is a restriction on the right to collective bargaining under Article 11, which cannot be justified.

In this sense, the optimal legal and trade union strategies converge. Precarious platform workers need the collective strength that trade union recognition brings to negotiations with employers so that they can be in a better position to secure and enforce their rights collectively rather than individually. Whilst the Uber judgment emphasises individual employment rights, this is based on uncertain worker status tests and there is still the opportunity for the employer to contract out with individual workers. Therefore, the rights of workers are still highly contingent and, it is contended, a judicial reversal of the Deliveroo judgment using the Demir rationale is necessary and would have more substantial, longer-lasting effects in securing a greater degree of equality of bargaining power under English law. The UK Supreme Court should also take the opportunity to strengthen the reasoning of the Uber judgment on this human rights-based rationale.

Presentation

DECEMBER 2018 GOVERNMENT REVIEW

- Taylor Review of Modern Working Practices 2017 / Good Work Plan 2018: fundamental point is that the "British Way" of structuring the labour market works [!]
- Conclusion: the balance between flexibility and rights is broadly correct [!] but there is some work to be done on improving the quality of work.
- Suggests codification of the test for employment status.
- A worker is to be called a "dependent contractor".
- Reversal of the burden of proof: a presumption that someone is an employee or dependent contractor (depending on the right asserted) unless the employer proves otherwise.
- A lot of academic and political criticism – employment status not addressed in GWP 2018.

ONE STEP FORWARD: UBER JUDGMENT, DECEMBER 2018 (I)

- CA, by a majority, upheld an ET's decision that Uber drivers are 'workers' within the meaning of S.230(3)(b) of the Employment Rights Act 1996 and the equivalent definitions in the National Minimum Wage Act 1998 and the Working Time Regulations 1998 SI 1998/1833.
- A "high degree of fiction" in the wording of the standard agreement between Uber and its drivers.
- Automatic generation of an invoice from the driver to the passenger after each ride was also a 'fiction'.
- Not helpful to compare Uber's operation with minicabs in general, or black cabs.

ONE STEP FORWARD: UBER JUDGMENT, DECEMBER 2018 (II)

- ET entitled to disregard terms of the contractual documents portraying the drivers as self-employed service-providers who contracted directly with passengers, with Uber acting as intermediary, on the basis that they did not reflect the reality of the working arrangements.
- Drivers are working for the purposes of the 1998 Act and the Regulations at any time when they are logged into the Uber app, within the territory in which they are authorised to work, and ready and willing to accept assignments.
- Strong dissent – permission to appeal to Supreme Court

ONE STEP BACK: DELIVEROO JUDGMENT, DECEMBER 2018

- The High Court rejected a judicial review challenge brought by the IWGB trade union against the Central Arbitration Committee's decision that food delivery riders are not 'workers' and so cannot rely on Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992 to establish the right to collective bargaining arrangements.
- The dispute before the CAC focused on whether the riders' contracts contained an obligation of personal service, which is a crucial element of 'worker' status.
- The Court dismissed IWGB's argument that the restriction of statutory recognition to conduct collective bargaining to 'workers' breached Article 11 of the European Convention of Human Rights, (i.e. the requirement of 'personal service' should be interpreted not to exclude these riders), holding that Article 11 was not engaged.

LEGAL STRATEGY: BREXIT PROOFED!

- Right to collective bargaining - one of the essential elements of the "right to form and to join trade unions for the protection of [one's] interests" set forth in Article 11 ECHR as held by the ECtHR in *Demir and Baykara v Turkey [2009] 48 EHRR 54*.
- The opening words of Article 11(1) explicitly state that the rights contained therein apply to "everyone".
- The only exceptions are the categories of work specified in the last sentence of Article 11(2) which refer to "members of the armed forces, police and the administration of the State".
- Yet these categories the ECtHR has held, in *Demir*, are to be construed strictly and should be confined to the 'exercise' of the rights in question and must not impair the very essence of the right to organise.

PARA 154 IN *DEMIR* AND COLLECTIVE BARGAINING IN INTERNATIONAL LAW INSTRUMENTS

- Article 23(4) of the United Nations Declaration of Human Rights 1948
- Article 2 of ILO Convention No.87 on Freedom of Association and Protection of the Right to Organise (ratified by the UK in 1949): " … workers … without distinction whatsoever …"
- Article 4 of ILO Convention 98 on the Right to Organise and Collective Bargaining (ratified by the UK in 1949)
- Article 8(2) of the International Covenant on Economic, Social and Cultural Rights 1966
- Article 22(1) of the International Covenant on Civil and Political Rights 1966
- ILO Recommendation No 198 of 2006 concerning the employment relationship.
- CEACR in its *General Survey on the Fundamental Conventions concerning Rights at Work in the light of the ILO Declaration on Social Justice for a Fair Globalisation*, 2008, ILO, 2012 at para 209 refers to **the right to collective bargaining covering organisations representing, *inter alia*, the self-employed.**

TWO STEPS FORWARD: RESOLVING THE DILEMMA? THE VALUE OF COLLECTIVE BARGAINING

- 4 February 2019: courier company, Hermes, agreed to settle litigation and offer drivers guaranteed minimum wages and holiday pay in the first UK deal to provide trade union recognition for gig economy workers.
- Under the agreement with the GMB union, Hermes' 15,000 drivers will continue to be self-employed but can opt into contracts with better rights ('self-employed plus'!).
- The deal comes after almost 200 Hermes couriers won the right to be recognised as "workers" at an employment tribunal in June 2018 in a case backed by the GMB.

ALIGNED POLITICAL STRATEGY: A MANIFESTO FOR LABOUR LAW

- The 25 principal recommendations are based on the need to ensure that workers' voice is heard and respected through a Ministry of Labour, a National Economic Forum and Sectoral Employment Commissions.
- These recommendations are supported by the 'four pillars of collective bargaining' with transformative implications across four spheres of social life: (i) workplace democracy; (ii) social justice; (iii) economic policy; and (iv) the rule of law (requiring the UK to comply with international labour standards).

CONCLUSION

- Brexit and the UK Government's 'Good Work Plan' – unclear future
- Uber and Deliveroo judgments – legal strategy for incorporation of international labour law norms regarding employment status into UK case law – broadens scope to self-employed
- Legal strategy is necessary but not sufficient as it is limited in its ability to protect workers without an institutional political strategy to underpin it - Manifesto for Labour Law.

Speech

Employment status anxiety: one step forward and one step back, a mixed picture for precarious platform workers under English law.

Declan Owens, Thompsons Solicitors

Introduction

The recent Uber decision at the English Court of Appeal in December 2018 offers some hope for precarious platform workers in securing enhanced employment rights.[13] A majority of judges dismissed Uber's appeal against a landmark employment tribunal ruling that its drivers should be classed as workers with access to the minimum wage and paid holidays. The judges found there was a "high degree of fiction" in the wording of the standard agreement between Uber and its drivers, which it argues are self-employed independent contractors with few employment rights.

However, a less well-publicised High Court judgment in December 2018 found in favour of another platform provider, Deliveroo, in a judicial review of the Central Arbitration Committee's decision not to recognise the Independent Workers of Great Britain ('IWGB') as the trade union for collective bargaining purposes regarding Deliveroo food delivery 'Riders' in a central London zone.[14] The reason was that these Riders were not actually classified as workers for the purposes of recognition under section 296(1) and Schedule A1 of the Trade Union and Labour Relations (Consolidation) Act 1992 but rather as self-employed independent contractors.[15]

How can these seemingly contradictory decisions on employment status be reconciled? Unfortunately, the separate legislation in issue in relation to the employment status of workers in these cases (itself the outcome of normative political judgements on the appropriate boundary of the balance between autonomy and social protection) still relies for its interpretation on archaic employment status tests derived from case law precedents of common law judges who also placed an undue (ideological and legal) reliance on the commercial terms of contracts (originating from a master/servant premise regarding the employment relationship) rather than on the rights of workers.[16] Both judgments are under appeal and a consistent legal strategy and rationale is needed to protect the employment status of workers at an individual and collective level.

Accordingly, this paper will firstly outline current policy developments in the UK relating to the uncertain future of labour law in respect of the UK Government's recent proposals to deal with

---

[13] Uber B.V., Uber London Limited, Uber Britannia Limited v Yaseen Aslam, James Farrar, Robert Dawson & Others [2018] EWCA Civ 2748.

[14] The Queen on the Application of The Independent Workers Union of Great Britain v. Central Arbitration Committee And Roofoods Limited T/A Deliveroo [2018] EWHC 3342 (Admin)

[15] The definition of the 'worker' in section 296 of the Trade Union and Labour Relations (Consolidation) Act ('TULRCA') is as follows:

(1) In this Act worker means an individual who works, or normally works or seeks to work--
  (a) under a contract of employment, or
  (b) under any other contract whereby he undertakes to do or perform personally any work or services for another party to the contract who is not a professional client of his, or
  (c) in employment under or for the purposes of a government department [...]

[16] Typically, the 'ownership of the assets' is a key factor that will frustrate the successful deployment of a number of key employment status tests and indicators, for instance the 'business integration' test often in conjunction with the 'economic reality' test, creating or encouraging an assumption that e.g. an Uber driver-owner is subject to little or no control on the part of the putative employer. Other employment status tests include 'control', 'mutuality of obligation' and 'personal service'.

problematic modern working practices. Secondly, it will consider the implications of the Uber judgment, which focuses on the employment status of workers within the sphere of individual employment law. Thirdly, it will consider the implications of the Deliveroo judgment, which focuses on the employment status of workers for collective bargaining purposes. Finally, it will outline a legal strategy based on the proper incorporation of international labour law standards into UK law to address the problems that arise from the employment status tests in the Uber and Deliveroo judgments and consider how this legal strategy interacts with an alternative political strategy proposed by the UK's Labour Party based on the academic input of labour lawyers.

The uncertain future of UK labour law

In December 2018, the UK Government published the 'Good Work Plan',[17] setting out details of its proposals for implementing various recommendations made by the Taylor Review of Modern Working Practices.[18] It was promoted by the Government as the biggest package of workplace reforms for over 20 years and sets out a strategy with three broad aims:

1. ensuring that workers can access fair and decent work;
2. that both employers and workers have the clarity they need to understand their employment relationships; and
3. that the enforcement system is fairer.

The main commitments include:

- making it easier for casual staff to establish continuity of employment;
- improved written statement of terms for all workers, from day one;
- abolition of the Swedish Derogation in the Agency Workers Regulations 2010 SI 2010/93, which excludes agency workers from the right to the same pay as directly recruited workers if they have a contract of employment with the agency;[19]
- a ban on deductions from staff tips;
- lower thresholds for requesting information and consultation arrangements; and
- increased penalties for breaches of employment law.

The Government has not committed to a timetable for most of these reforms, but it is expected to introduce some legislation in 2019, though the Brexit negotiations are likely to have an influence.[20]

The Taylor Review was commissioned because of a concern that the balance of power in many working arrangements had tipped too far in favour of business: the growing use of zero-hours contracts, increasing numbers of people becoming self-employed, and workplace practices, such as employers keeping back tips from staff, have, over the years, contributed to a general perception that swathes of

[17] *Good Work Plan*, UK Government Department for Business, Energy & Industrial Strategy, 17 December 2018. Available at https://www.gov.uk/government/publications/good-work-plan/good-work-plan.

[18] *Matthew Taylor, 'Good Work; The Taylor Review of Modern Working Practices' (Gov.uk, 2017). Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/627671/good-work-taylor-review-modern-working-practices-rg.pdf (The Taylor Review).*

[19] In 2013, the Trades Union Congress lodged a formal complaint with the European Commission, claiming that that the Government had failed properly to implement its obligations under the EU Temporary Agency Work Directive (No.2008/104).

[20] The complexities of how workers' rights will be affected by Brexit are very much outside the scope of this paper and were outside the scope of the Taylor Review despite the impending or potential loss of EU social rights.

people are being exploited and with practices such as the creeping influence of zero-hours contracts becoming common.

The Prime Minister has stated that better workplace rights are necessary for "a stronger, fairer Britain" and that the standards of the best employers should become the benchmark. It is not yet possible to assess whether the Good Work Plan measures up against this purported ambition because only a few of the commitments have made it to draft legislation and the detail of others has not been published. However, the Good Work Plan has received a lukewarm response from trade unions and plenty of academic criticism.[21]

Indeed, the crucial issue of how to define employment status has yet to be decided as part of the Good Work Plan, although the Government has indicated support for Taylor's recommendation to align the employment status frameworks for the purposes of employment rights and tax to ensure that the differences between the two systems are reduced to an absolute minimum. The Government also says it will "legislate to improve the clarity of the employment status tests, reflecting the reality of modern working relationships", but has not provided any detail as to how this will be achieved. This leaves UK workers reliant on judicial determination of employment status (and the consequent differing rights available to employees, workers and independent contractors / the genuinely self-employed), with the two recent judgments in December 2018 being the current state of the law and best indicators of future developments.

The Uber judgment

The Court of Appeal, by a majority, upheld an employment tribunal's decision that Uber drivers are 'workers' within the meaning of S.230(3)(b) of the Employment Rights Act 1996[22] and the equivalent definitions in the National Minimum Wage Act 1998 and the Working Time Regulations 1998 SI 1998/1833. The 'worker' test focuses on what has been contractually agreed between the parties. Many similar recent employment status cases have involved individuals working in the gig economy, in which the individuals are described in the contractual documents as self-employed, independent contractors rather than workers, and the question arises whether the tribunal is bound to respect that characterisation.

---

[21] An astute and devastating critique of the Taylor Review, especially of so-called 'British Way' of regulating the labour market and the focus on individual employment law at the expense of collective labour law, is provided in K Beales, A Bogg & T Novitz, 'Voice' and 'Choice' in Modern Working Practices: Problems With the Taylor Review - Ind Law J (2018) 47 (1): 46

[22] Section 230 of the ERA 1996 provides:-

"Employees, workers etc.

(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker's contract shall be construed accordingly.

(4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

The Court of Appeal held that the tribunal was entitled to disregard terms of the contractual documents portraying the drivers as self-employed service-providers who contracted directly with passengers, with Uber acting as intermediary, on the basis that they did not reflect the reality of the working arrangements. The majority also upheld the tribunal's decision that the drivers are working for the purposes of the 1998 Act and the Regulations at any time when they are logged into the Uber app, within the territory in which they are authorised to work, and ready and willing to accept assignments.

In this case, the written documentation indicated that Uber acted only as an intermediary, providing booking and payment services, and the drivers drove the passengers as independent contractors. The majority agreed with the tribunal that it was not realistic to regard Uber as working 'for' the drivers. The reality was the other way around, namely that Uber runs a transportation business and the drivers provide the skilled labour through which that business delivers its services and earns its profits.

It is likely that this case will ultimately be decided by the Supreme Court because the Court of Appeal has given Uber permission to appeal and it will have extensive consequences for the gig economy in general. Underhill LJ's dissenting opinion goes against the trend of recent employment status cases, especially those involving couriers and drivers, who were found to be workers in the cases involving Addison Lee (concerning both cycle couriers and minicab drivers), CitySprint and Excel. The only notable exception to this trend was in *R (on the application of the Independent Workers' Union of Great Britain) v Central Arbitration Committee and anor*, where the High Court held that Deliveroo riders are not 'workers' for the purpose of the collective bargaining provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (which relies on a substantially identical definition of 'worker' as that found in S.230(3)(b) ERA). However, in that case, which is discussed further below, it was decided that the riders were not contractually obliged to perform services personally because they could, if they wished, send a substitute, whereas in the Uber case there was an obligation of personal service.[23]

The difference between the majority's approach and that of Underhill LJ in the Uber judgment can be characterised as a difference between an expansive and a strict application of the principle set down by the Supreme Court in *Autoclenz*.[24] The Supreme Court there was faced with the situation where, on the tribunal's findings, both the putative employer and the putative employees objectively intended the working relationship to have all the facets of an employer/employee relationship but the employer had concealed the true nature of that relationship in the contractual documents. The tribunal had found that, in practice, the car valets were required to provide personal service and were under an obligation to do some work. Accordingly, there was an inconsistency between the contractual paperwork and the parties' mutual understanding as to how the relationship worked in practice. It was therefore false for the contractual documents to state that no such requirements or obligations existed and, given the unequal bargaining power between the parties, it was permissible to disregard those terms in answering the question of employment status.

[23] The Taylor Review's proposal to remove the requirement of personal service from the worker status test and replace the category of 'worker' with that of 'dependent contractor' places a greater emphasis on control and therefore would raise other problems. See note 9 above.

[24] Autoclenz Ltd v Belcher and ors. Supreme Court, 2011 ICR 1157. The Supreme Court held that in litigation about an individual's employment status, a tribunal will look at the reality of the working relationship and it is open to the tribunal to disregard the label that the parties have adopted in contractual documentation between them. Furthermore, it held that the contracts signed by car valets stating that they were 'sub-contractors' did not reflect the true agreement between the parties and could be disregarded.

The majority in the Uber case took a slightly different approach. Relying on what it considered to be the extended meaning of 'sham' endorsed in *Autoclenz*, the majority effectively put the written agreement to one side, considered the 'reality' of the working relationship as it was operated in practice, and decided that that 'reality' corresponded to 'worker' status. However, as Underhill LJ points out, *Autoclenz* can be interpreted as not authorising a tribunal to rewrite the contractual terms simply because one party's superior bargaining power has resulted in disadvantageous terms for the other. In that case, it was held that the documents can only be ignored if they present a false characterisation and that was arguably not the case here. The legal relationship that the documents purported to create was, according to Underhill LJ, unexceptional, being the kind of agency relationship commonly adopted by taxi and private hire firms, and the control that Uber exerted over the drivers was not inconsistent with that.

Underhill LJ's dissent could be persuasive in its interpretation of existing employment status tests. As he points out, the problem in the Uber case may be interpreted as not being that the written terms mischaracterised the true relationship but that the relationship they created was one unprotected by the law. The majority sought to extend the common law to fill that gap but Underhill LJ considered that it was inappropriate to do so, stating that "protecting against abuses of inequality of bargaining power is the role of legislation". He derived support for his view from a legal journal article by Sir Patrick Elias, former President of the Employment Appeal Tribunal ('EAT') and Lord Justice of Appeal, who gave judgment in a number of leading employment status cases.[25] The fact that two former Presidents of the EAT are in agreement on this topic suggests that Uber's prospects of success on appeal to the Supreme Court have some authoritative judicial support. On the other hand, the Supreme Court may well decide that, even if the Court of Appeal majority did extend the reasoning of *Autoclenz*, it was desirable and proper to do so, despite Underhill's LJ caution about the courts stepping on Parliament's toes.

The Deliveroo judgment

The High Court rejected a judicial review challenge brought by the IWGB trade union against the Central Arbitration Committee's ('CAC') decision that food delivery riders are not 'workers' and so cannot rely on Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992 to establish the right to collective bargaining arrangements. The dispute before the CAC focused on whether the riders' contracts contained an obligation of personal service, which is a crucial element of 'worker' status.

In this respect, Delivery riders for Deliveroo, an app-based food delivery service, work under non-negotiable 'supplier agreements' which describe them as suppliers in business on their own account who wish to provide delivery services to Deliveroo. The agreements state that there is no obligation on Deliveroo to provide work and no obligation on the rider to be available at any time or to accept work – riders can reject jobs without penalty and it is entirely up to them when and where they decide to work (within the company's areas and opening times). Riders can work for other organisations, including competitors. The Court dismissed IWGB's argument that the restriction of statutory

[25] P Elias, *Changes and Challenges to the Contract of Employment,* Oxford Journal of Legal Studies, Volume 38, Issue 3, 1 September 2018, 411–429.

recognition to conduct collective bargaining to 'workers' breached Article 11 of the European Convention on Human Rights, holding that Article 11 was not engaged.[26]

Over the last couple of years, several gig economy workers have successfully established that they fall within the definition of 'worker' and so benefit from various employment rights and protections. This case goes against the trend, confirming that Deliveroo riders who were said to be genuinely contractually entitled to provide a substitute – and so were not required to provide personal service – were not 'workers' for the purposes of collective bargaining, even in the light of the Article 11 right to freedom of association.[27] IWGB has stated that it intends to appeal.

The High Court's reasoning was unclear, which might help IWGB in its intended appeal. However, even if IWGB had succeeded in establishing that the riders' Article 11 rights were engaged, the Court's conclusion that the exclusion of non-workers from the right to trigger the statutory recognition procedure would have been justified under Article 11(2) could be accepted by Court of Appeal and, ultimately, Supreme Court, judges, given that the restriction to workers who provide personal service meets the test that it was "rationally connected" to the objective of preserving freedom of business and contract by limiting the cases in which collective bargaining should apply.[28]

A legal strategy to protect [precarious platform] workers

The legal strategy that needs to be adopted under English law in light of the challenges outlined above in the Deliveroo case is to maintain the argument for the right to collective bargaining to be judicially accepted to apply to Deliveroo riders as one of the essential elements of the "right to form and to join

[26] It was common ground before the CAC that the riders did not fall within S.296(1)(a), and the CAC had decided that they did not fall within limb (b) either. IWGB was permitted to argue before the High Court that the requirement of 'personal service' in S.296(1) should be interpreted in a way that does not exclude these workers from exercising their Article 11 right to bargain collectively. It argued that the concept of workers' status, as defined within S.296(1), is an entirely domestic concept, whereas, in EU law, the term 'worker' simply refers to a relationship whereby someone 'performs services for and under the direction of another person, in return for which he receives remuneration' – Betriebsrat der Ruhrlandklinik gGmbH v Ruhrlandklinik gGmbH. It also argued that nothing in the jurisprudence of the European Court of Human Rights suggests that the right to collective bargaining is dependent on workers' status, other than the last sentence of Article 11(2).

[27] Clause 8 of the supplier agreement allows riders to provide a substitute, who may be employed or engaged directly by the rider, to perform the delivery. There is no need for the rider to obtain Deliveroo's approval or even inform it of the substitution, unless the substitute is using a different vehicle type. The substitute may be anyone except former Deliveroo riders who have had their contract terminated for material breach, or anyone else who has engaged in conduct which would have resulted in termination if he or she had been a Deliveroo rider. It is the rider's responsibility to ensure that the substitute has the necessary skills and training. The rider remains responsible for performance and for ensuring that substitutes give the same warranties as are applicable to riders. The rider is paid for the work and any arrangements for paying the substitute are left to the rider and the substitute. There was evidence that a few riders used the right of substitution – one frequently – though most did not. The CAC concluded that the 'almost unfettered' substitution provisions were genuine, and that this was fatal to the argument that the contract was one of personal service.

[28] Applying Lord Sumption's criterion in *Bank Mellat (No.2) v HM Treasury* [2013] UKSC 39 at para 20. The Court agreed with the CAC's submission that the 'rights and freedoms of others' included freedom of business and freedom to contract on terms the business chooses to offer, including freedom from the imposition of bargaining arrangements, and that the restriction in S.296(1) was 'rationally connected' to the objective of preserving this freedom by limiting the cases in which the "burden" of collective bargaining should apply. Further, the interference was proportionate and struck a fair balance between competing interests in that it was limited to preventing those who did not have to do work or perform work personally from invoking compulsory recognition procedures. It did not affect anyone who was contractually obliged personally to work. Nor did it prevent riders from belonging to a union if they choose to do so, or making voluntary arrangements. All it precluded was the compulsory mechanism provided by Schedule A1 to the TULR(C)A.

trade unions for the protection of [one's] interests" set forth in Article 11 of the European Convention of Human Rights as held by the ECtHR in *Demir and Baykara v Turkey [2009] 48 EHRR 54*.[29] The opening words of Article 11(1) explicitly state that the rights contained therein apply to "everyone". The only exceptions are the categories of work specified in the last sentence of Article 11(2) which refer to "members of the armed forces, police and the administration of the State". Yet even in relation to these categories the ECtHR has held, in *Demir*, that the restrictions imposed on the three groups mentioned in Article 11(2) are to be construed strictly and should be confined to the 'exercise' of the rights in question and must not impair the very essence of the right to organise.

Schedule A1 is a mechanism which allows for the enjoyment of the right to collective bargaining in the UK. A statutory barrier within the 1992 Act to recognition under this scheme necessarily engages Article 11. Therefore, a restriction on the right to achieve statutory recognition under Schedule A1 to the 1992 Act in the Deliveroo judgment is a restriction on the right to collective bargaining under Article 11, which cannot be justified.

Several other international instruments equally guarantee the right to collective bargaining. Article 23(4) of the United Nations Declaration of Human Rights 1948 is in identical terms: "*Everyone has the right to form and join trade unions for the protection of his interests*". Article 8(2) of the International Covenant on Economic, Social and Cultural Rights 1966 and Article 22(1) of the International Covenant on Civil and Political Rights 1966 are similarly worded, both of which were cited in *Demir* at paragraphs 40-41. Article 4 of ILO Convention 98 on the Right to Organise and Collective Bargaining and the ILO Committee of Experts on the Application of Conventions and Recommendations in its General Survey on the Fundamental Conventions concerning Rights at Work in the light of the ILO Declaration on Social Justice for a Fair Globalisation, 2008, ILO, 2012 at para 209 which refers to the right to collective bargaining covering organisations representing, inter alia, the self-employed. Article 2 of ILO Convention No.87 on Freedom of Association and Protection of the Right to Organise (ratified by the UK in 1949) provides that:

> "*Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation*."

Furthermore, regarding collective labour law in the UK, the 'worker' definition contained in TULRCA section 296 sustains quite an inclusive concept of the worker which embraces a broad range of individuals, including self-employed workers, who contract to provide personal services, excepting only those who do so as a professional to a client. Unlike the 'worker' definition in the individual rights context of the National Minimum Wage Act 1998, it does not go on to exclude those who provide their services as a business to a customer. This slightly broader scope is sustained by a careful reading of the aforementioned international instruments. In particular, the ILO supervisory bodies seem to suggest that self-employed workers ought to be entitled to collective bargaining rights, without regard to whether they are acting as professionals to clients or businesses to customers. As Freedland and Kountouris argue, this more expansive approach accords better with an inclusive normative framework but is clearly hard to reconcile with the more restrictive approaches in various areas of UK domestic

[29] See K. D. Ewing and J. Hendy, 'The Dramatic Implications of *Demir and Baykara*' (2010) 39 ILJ 2-51.

law.[30] They suggest that the basis for such an argument is to be found in ILO Recommendation No 198 of 2006 concerning the employment relationship.

Accordingly, the optimal legal and trade union strategies converge in the UK in pushing for greater legal protection for the recognition of collective bargaining rights via international labour law instruments.[31] Precarious platform workers need the collective strength that trade union recognition brings to negotiations with employers so that they can be in a better position to negotiate to secure and enforce their rights collectively rather than individually. Whilst the Uber judgment emphasises individual employment rights, this is based on uncertain employment status tests and there is still the opportunity for the employer to contract out with individual workers or rely on the 'reality' of standard contracts incapable of individual negotiation. Therefore, the rights of workers are still highly contingent and, it is contended, a judicial reversal of the Deliveroo judgment using the *Demir* rationale is necessary and would have more substantial, longer-lasting effects in securing a greater degree of equality of bargaining power under English law. The UK Supreme Court should also take the opportunity to strengthen the reasoning of the Uber judgment on this human rights-based rationale and adopt wider international labour law norms in assessing the proper interpretation of the employment status tests.[32]

An aligned political strategy

The Institute of Employment Rights in 2016 produced a 'Manifesto for Labour Law' which would provide the transformative changes necessary to UK labour law that would respect international labour law standards.[33] This Manifesto was drafted by a dream team of 15 labour academic lawyers and labour specialists and was in part adopted by the UK Labour Party in its 2017 General Election manifesto. The 25 principal recommendations are based on the need to ensure that workers' voice is heard and respected through a Ministry of Labour, a National Economic Forum and Sectoral Employment Commissions. These recommendations are supported by the 'four pillars of collective bargaining' with transformative implications across four spheres of social life: (i) workplace democracy; (ii) social justice; (iii) economic policy; and (iv) the rule of law (requiring the UK to comply with international labour standards). The dejuridification of the employment relationship achieved through the shift from legislation to collective bargaining as a regulatory mechanism should reduce expensive and lengthy litigation for workers.[34]

The proposals also include the need to ensure universal rights at work for all workers (not just employees), freedom of association, and the right to strike (without which collective bargaining 'is little

[30] Freedland, M and Kountouris N, Some Reflections on the 'Personal Scope' of Collective Labour Law - Ind Law J (2017) 46 (1): 52

[31] K D Ewing and J Hendy, 'New Perspectives on Collective Labour Law: Trade Union Recognition and Collective Bargaining' (2017) 46 *ILJ* 23. Union recognition operates as an inducement to union recruitment but depends on a supportive legal and public policy environment.

[32] Kountouris N, The Concept of 'Worker' in European Labour Law: Fragmentation, Autonomy and Scope - Ind Law J (2018) 47 (2): 192. See http://www.ilo.org/global/topics/future-of-work/lang--en/index.htm. See also Valerio De Stefano, *The Rise of the 'Just-in-Time Workforce': On-demand work, crowd work and labour protection in the 'Gig-Economy'* ILO Working Paper http://www.ilo.org/travail/whatwedo/publications/WCMS_443267/lang--en/index.htm

[33] KD Ewing, J Hendy and C Jones (eds), *A Manifesto for Labour Law: Towards a Comprehensive Revision of Workers' Rights* (Liverpool: IER, 2016)

[34] Some of the costs have since been reduced following the Supreme Court's decision to declare employment tribunal fees unlawful in *R (UNISON) v Lord Chancellor* [2017] UKSC 51, Supreme Court (SC).

more than collective begging'), supported by a call to repeal the Trade Union Act 2016. In an era of blacklisting of trade unionists in the construction sector; zero hours and exploitative temporary agency work contracts across the sectors in firms such as Sports Direct, Deliveroo and Uber Eats; exploitation and betrayal of migrant labour by firms such as Byron; and sharp practice by employers such as BHS in business restructuring, the Manifesto is a comprehensive legal and industrial strategy to address injustice in the modern workplace. The recommendation for the creation of a specialist Labour Court and an effectively resourced Labour Inspectorate would help to further protect workers with proper enforcement.

Conclusion

Although it remains to be seen what Brexit and the UK Government's 'Good Work Plan' may bring in relation to addressing the challenges for labour law regarding modern working practices, it is clear from the Uber and Deliveroo judgments that there is still considerable legislative change needed to protect workers. Accordingly, a legal strategy that is overly reliant on placing its hopes in a favourable interpretation of European and international labour law at the UK Supreme Court is limited in its ability to protect workers without an institutional political strategy to underpin it. Whilst this is certainly a necessary legal strategy in current circumstances, it is not sufficient to achieve the required protections for workers without the sort of legislative changes envisaged in the Manifesto for Labour Law.

Bas van Dis, lawyer, Amsterdam

Short biography

Bas van Dis, 44 years old and living in De Bilt (Utrecht), The Netherlands.

Working experience

2000 - 2006: Allen & Overy LLP, Amsterdam

2006 - 2014: Van Dis Attorneys, Utrecht

2014 - 2018: KBS Attorneys, Utrecht

2018 - onwards: Van Dis: Employment Law, De Bilt

Associations

Member of VAAN (Dutch Union of Employment Law Attorneys)

Member of VAAA (Union of Employment Law Attorneys Amsterdam)

Bas was the attorney of Sytze Ferwerda, the 19 year old student who delivered meals on his bicycle in Amsterdam for Deliveroo and who sued Deliveroo for employment. The case drew national and international media attention as Deliveroo's strategy to work with 'independent contractors' directly undermined workers legal position under Dutch employment law.

Abstract

Legal Strategies: The Dutch Deliveroo cases

In the Netherlands, Deliveroo tried to change all of the contracts of its meal couriers from employment agreement to agreements for services. Former employees had to become independent contractors.

The reason for this is because it is much cheaper to hire independent contractors. No pension contributions are due, no social securities contributions and there are tax benefits independent contractors can benefit from, which would make it cheaper to get the same amount of money to the meal couriers as before.

Side effect of this strategy is that the entire system of employment law would seize to apply. No paid sick leave, no vacation allowance, no vacation time, no protection form unreasonable dismissal. Deliveroo was one of the first so called 'platform' of 'newconomy' enterprises that undertook this strategy.

I had the honour of representing one of the meal couriers, Mr. Sytze Ferwerda. He sued Deliveroo for employment and the case drew massive media attention. It was in fact, this type of media attention that proved to be extremely valuable to the discussion of service contracts versus employment contracts.

Because: if Deliveroo could do this, than what was to stop any other company that does not have to micromanage its employees on a daily basis from doing the exact same thing?

The court ruled in favour of Deliveroo, but it was a short-lived victory: the largest Dutch trade union also sued Deliveroo and won. The case is now subject to appeal. More importantly, these type of cases demonstrate that courtrooms can be an excellent way of activism. Not only because of the media attention, but also because of the impact of the court decisions for business strategies and business cases.

Speech

Legal Strategies: The Dutch Deliveroo cases

Legal definitions

In the Netherlands, the legal definitions of both an employment contract and an agreement for services are very similar. Both have:

- an obligation to work for the worker;
- an obligation to pay for the person hiring the worker; and
- the right to give instructions to the worker.

De difference is in the little things. If you tell the worker to paint your house red, it's an agreement for services. If you tell him to be there at eight in the morning, dressed in your companies' white uniform, using a two inch brush and start at the windows on the east-side, it's probably an employment agreement. But not necessarily so.

Legal consequences

De differences in the legal definitions may be small, the differences in legal consequences could not be any greater. In the case of an employment agreement:

- the employer has to pay social securities' benefits;
- the employer is likely to be subject to a mandatory pension scheme;
- the employee is entitled to vacation allowance, paid vacation time, paid sick leave; and
- the employee is protected against unfair dismissal.

In the case of an agreement for services none of the above apply. The worker does enjoy certain tax benefits for a limited amount of time. So that makes it extremely cheaper and more flexible to hire workers on the basis of a services agreement compared to an employment agreement. That is why it is seen as an attractive business model.

Supreme Court

In qualifying agreements, the Dutch Supreme Court has developed the holistic approach. It means that all circumstances must be taken into account. Courts will have to look at what it was that parties wanted to agree to, also taken into account how parties have executed the agreement as well as the type of relation between the parties. These factors will all have to be taken into consideration and this must lead to an outcome: employment agreement or agreement for services.

Tax authority

Mind you: this type of qualifying difficulties have existed for decades. What changed, is that workers in the Netherlands used to be able to get a statement from the tax authority, saying that they would not be treated as employees, but as independent contractors. This was called the VAR. The VAR was abolished in 2016. Since then the government said that companies should have some time to look at their own workforce with a critical eye, and then determine whether it should use employment or service agreements. The tax authority would not uphold the law, and not impose penalties under tax law, except for cases of gross misconduct or abuse of the law. I heard that happened about five times. So with the legislator leaving room for interpretation, the Supreme Court caught in its own holistic approach and the tax authority bound and gagged in a corner, it clearly was a matter of time before that void would be exploited to the max.

Deliveroo

This is what someone at Deliveroo must have thought. Deliveroo terminated all of its employed agreements and re-hired the very same meal couriers as independent contractors. Nothing else really changed, except that the couriers were now paid per delivery, as opposed to an hourly wage. Obviously that is rally a big change: you could end up sitting in the town square waiting for a delivery and not getting paid at all. No job security, no vacation allowance, no vacation time, and also none of the other rights that flexible workers usually have.

Legal strategy: sue 'm

There was one of the Deliveroo riders who not only thought this was not right, but who was alo willing to do something about it. His name is Sytze Ferwerda, he was at the time a 19 year old, second year political sciences student at the University of Amsterdam and also a part time meal courier for Deliveroo. We came into contact and we discussed the possibilities for suing Deliveroo for employment. We came to the conclusion that from a legal point of view, the working relation between hem and Deliveroo should be qualified as an employment agreement. We came to this conclusion on the basis of a number of reasons:

- nothing really changed since Sytze started working under his so called services agreement;
- Deliveroo was in fact giving directions as to how the work should be done. From our point of view, it did not matter that these directions were give through an app on Sytze's phone. Directions are directions, also when they come from an algorithm
- Sytze signed a contract for services, but this contract was purely windowdressing. In fact he had to do the work himself and he was integrated into the company through the app and the other materials and support offered by Deliveroo.

Win win

But you wanted to talk strategy. Suing Deliveroo was only part of the strategy. Because everyone who has ever been into court knows, or should know, that there is no such thing as a sure thing. Sytze could either win this case or lose it. The strategy therefore involved a second pillar, which entailed the political motive to raise attention to this type of employers' or employment strategies, being implemented into our society. This worked particularly well, since in the Netherlands it was the first case of an employee suing a so called 'platform' or 'newconomy' company and publicly opening their employment strategy for debate. Sytze of course had and had a very clear idea about this, and it appeared that he had a lot of support for his point of view: not only from the left wing but also from the right wing and the media. The objective was to create a win-win situation: if we win the case, Deliveroo did something bad and nobody should do what they did, but if we lose the case, then the system is bad and needs to be changed.

Succes

It became the latter. The case drew an unprecedented amount of media attention. Questions were asked about this case in Dutch parliament, on various occasions. It was a case before the cantonal court, which is the lowest judge in the hierarchy of the Dutch judicial system. I think as we speak, literally hundreds of cantonal judges throughout the Netherlands are dealing with traffic fines, rent disputes and small claims. But came Sytze's day in court, he had to make our way through a demonstration which was in front of the Amsterdam court house, the case had to be moved to the large court hall which is usually only used for ceremonies, there were two camera teams and the front benches were reserved for the writing press of every self-respecting newspaper. This part of the plan had come together. The judge did not rule in favour of Sytze, saying that it should not be up to a court

to decide on these matter, but the legislator should do this. This ruling was criticised by notable Dutch employment law scientists and lawyers. But maybe more importantly: a lot of Dutch lawyers wrote something about this case on their website, or twitter. Deliveroo was all over the place, and so was the debate about employment agreements versus services agreements.

VAAN

I am a member of the Dutch association of employment law attorneys. Coincidently, the day after the court session in the Deliveroo case there was a conference about the platform economy and new types of employment. And the discussion went on about whether this type of development was desirable how we could find a better balance and what legislation should look like to be fairer. I tried to get into it, but I found this discussion to be difficult and tiresome. The reason for this, is because I figured that this was a conference, only for lawyers. Not for legislator or politicians and a good lawyer should be able to stay away from an abstract concept such as what is fair and what not. Fair is in the eye of the beholder. Lawyers sue people. And here I was at this conference of about 800 employment lawyers, but I was the only one who actually sued a platform company.

Why suing

The Deliveroo case has shown that suing companies can be an effective way of activism. The company sued is forced to show up and publicly defend its business decisions, which may be difficult if your business reasons are confined to exploiting already underpaid law wage employees. You may look bad, which is bad for business. Also, by doing this, you can bring a company at great risk. Surely if only Sytze had to be paid his holiday allowance this would nog constitute that big of a problem to a well funded company such as Deliveroo. But all of its workers? Over an undefined period of time, five years in retrospect? With no hiding form the tax authority? The battle is truly brought upon its doorstep. Suing is also better than not suing. Doing nothing has a tendency not to change anything.

FNV

The largest Dutch trade union federacy, the FNV, started litigation against Deliveroo during Sytze's case. FNV argued on behalf of its members that anyone working for Deliveroo should be considered an employee and subject to Dutch employment law. It also sued for application of the collective bargaining agreement for transportation of goods on the road. The case did not draw as much media attention as the first Deliveroo case, but contrary to the first case, the court this time ruled in favour of the employees. Deliveroo said to appeal the decision, which to me demonstrated its own vulnerability: it can do little else than appeal.

Conclusion

The Deliveroo cases have demonstrated that court rooms can be an excellent place for legal activism. It puts the risk of being sued by employees and/or trade unions on the decision making agenda of companies. I think we are thereby helping these companies, setting boundaries not just for them but for their entire industry.

Elena Gramano, PhD, Goethe Universität Frankfurt/M.

Short biography

Dr Elena Gramano is currently a post-doc research Fellow at Goethe University of Frankfurt, Institute for Labour and Civil Law, where inter alia she works as an assistant editor for the scientific project "Restatement of Labour Law in Europe", directed and coordinated by Professor Dr Bernd Waas.

As external docent, she lectured several courses on Employment Law and Industrial Relations at Bocconi University in Milan, also in cooperation with Richmond University (USA), and at Ca' Foscari University in Venice.

At Bocconi University, she obtained a master degree in Law in 2011 (summa cum laude) and later received her doctoral degree in Labour Law (April 2016). For her Doctoral Thesis, she has been awarded the price for "Best PhD thesis – 2017 Edition" entitled to Antonino Pusateri by the National Legal Research Centre "Centro Studi Domenico Napoletano", and the the price for "Best PhD thesis – 2017 Edition" entitled to Massimo D'Antona by the Italian Ministry of Labour and Social Policies and Fondazione Massimo D'Antona.

At Bocconi University, she also served as a postdoctoral researcher with grant between 2016 and 2017.

Selected publications:

1) E. Gramano, Digitalisation and Work: Challenges from the Platform-Economy, Contemporary Social Science Journal, 2019.

2) B. Waas, V. Pavlou & E. Gramano, Introduction to the Special Issue on 'Digitalisation and the Law', Work Organisation, Labour & Globalisation, Winter 2018.

3) E. Gramano, Dalla eterodirezione alla eterorganizzazione e ritorno. Un commento alla sentenza Foodora, Labor, Il lavoro nel diritto, 5, 2018.

4) E. Gramano & H. Stolzenberg, Die Jobs Act-Reform in Italien: "Smarte Regelung" des Weisungsrechts und ein neuer Rechtsrahmen für Selbstständige, Soziales Recht, 5, 2018.

5) M. Del Conte & E. Gramano, Looking to the other side of the bench: The new legal status of independent contractors under the Italian legal system, Comparative Labor Law & Policy Journal, 39/3, 2018.

6) E. Gramano, Riflessioni sulla qualificazione del rapporto di lavoro nella gig-economy, Argomenti di Diritto del Lavoro, 3, 2018.

Abstract

The new ways of organising work and offering services on the market through the so-called digital platforms seem to have put the traditional legal standards for classifying employment relationships into question. The mechanism of functioning of digital platforms, in fact, seems to put together a series of "old" problems in a new combination. On the one hand, platforms present themselves on the market as subjects with an apparently rarefied organizational structure, moving along the threads of algorithms; on the other hand, those who collaborate with them seem to do so in a spontaneous, voluntary, random and flexible way.

It is difficoult to provide for a general and always valid answer to the question whether those who cooperate with a platform shall be classified as employees or not. In fact, the specific features of each relationship between the platform and the workers might largely vary from case to case.

However, some elements that are functional to the solution of the classification issue are still disputable and shall be clarified: (a) in most of the cases, the platform does not act as a mere intermediary between the supply and demand for a certain service; instead, it represents the direct supplier of that service, which is provided through the activities of the workers; therefore, the workers are fully integrated into the platforms' organization; (b) in the light of the rating mechanism and the adoption of certain contractual clauses on withdrawal – that will be described –, often the worker is made illegitimately liable for the unfulfillment of the obligations to the customer; (c) when the conditions a) and b) occur, a substantial overlap between the business carried out by digital platforms and the workers' activities can be detected and this shall be taken into consideration in the investigation on the legal status of the workers, especially in order to prevent any attempt to circumvent the application of the employment law protections.

With particular reference to the Italian system, two legal strategies might be developed:

1) Major role of Article 2, first paragraph, of Decree No. 81 of 2015 that establishes that the full set of employment protections traditionally granted to employees are applicable also to those workers who continuatively collaborate, by providing exclusively personal work, with a principal who organizes the methods of execution of the activity also with reference to the time and place of work.

2) Strengthen the legal relevance of those "incentives" used by platforms to make sure that a high number of workers keep themselves available despite not being formally bound to do so.

Presentation

RESEARCH QUESTION

HOW CAN THE WORKERS WHO PROVIDE FOR THEIR ACTIVITY ON/THROUGHT/IN FAVOUR OF PLATFORMS BE CLASSIFIED?

WORKERS CLASSIFICATION IN THE ITALIAN SYSTEM

The Italian legal system distinguishes between two categories of workers:

Employees	Autonomous workers
• In Italian, "*lavoratore subordinato*"	• = Self-employed workers
• → art. 2094 Civil Code	• In Italian "*lavoratore autonomo*"
	• → art. 2222 Civil Code

3

WHO IS AN EMPLOYEE?

Article 2094 of the Civil Code:

- "a person who agrees to collaborate with an employer in exchange for a remuneration, performing intellectual or manual work **under the direction of the entrepreneur**"

4

WHO IS AN EMPLOYEE?

As building block of the employment relationship, case law adopted one main general concept: the distinctive element of subordination is "**eterodirection**" (*eterodirezione*)

- The employer exercised managerial and disciplinary powers and **determines unilaterally the way according to which the employee is supposed to perform his/her duties**
- Concept of technical subordination

5

WHO IS AN EMPLOYEE?

However, the "eterodirection" parameter is sometime unable to describe comprehensively the complexity of the employees' category

It has been soon realized that "eterodirection" was an incomplete concept

6

WHO IS AN EMPLOYEE?

Therefore, case law developed a wide spectrum of **subsidiary factors** that could indicate the presence of an employment relationship.

These factors include:

- the requirement that the worker follows work rules;
- the length of relationship;
- the respect of set working hours;
- salaried work;
- absence of risk of loss related to the production;
- the use of working tools that belong to the employer;
- the performance of working activity inside the company, etc.

This is a multifactorial test and none of these elements is dispositive

7

WHO IS AN EMPLOYEE?

Therefore, case law developed a wide spectrum of **subsidiary factors** that could indicate the presence of an employment relationship.

These factors include:

- the requirement that the worker follows work rules;
- the length of relationship;
- the respect of set working hours;
- salaried work;
- absence of risk of loss related to the production;
- the use of working tools that belong to the employer;
- the performance of working activity inside the company, etc.

This is a multifactorial test and none of these elements is dispositive

7

WHO IS AN AUTONOMOUS WORKER?

Turning to autonomous workers, surprisingly a definition does not exist under Italian law

Article 2222 of the Civil Code, which governs businesses, defines "*contratto d'opera*" (*locatio operis*) as one carried out by a person

"who performs work or services for remuneration, mainly by means of his/her own labour and ***in the absence of a relationship of subordination*** *vis-a-vis the client."*

→ *a contrario* definition

8

THE JOBS ACT REFORM: MAIN STEPS

Substantial enlargement of the notion of employee

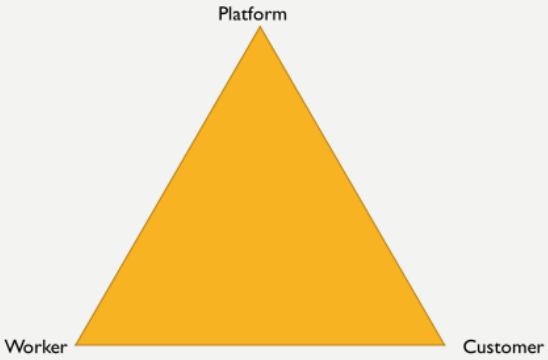
- Definition of employee has not been formally changed
- New notion of "**collaborations organized by the principal**" (*collaborazioni eterorganizzate*)
- When the principal organizes the work also with reference to the **timing** and **place** of the working performance, the worker must be covered by the employment law regulations
- The worker is therefore substantially treated as an EMPLOYEE (open problem on the classification)

Lavoro a progetto has been abrogated

A new law on genuine autonomous workers has been adopted

9

WORK IN FAVOUR OF DIGITAL PLATFORMS: SOME OBSERVATIONS



CASE LAW ON CLASSIFICATION OF WORKERS IN THE GIG-ECONOMY

1986

Tribunal of Milan

CASE LAW ON CLASSIFICATION OF WORKERS IN THE GIG-ECONOMY

2018

Tribunal of Turin

Repealed by Court of Appeal of Turin

CASE LAW ON CLASSIFICATION OF WORKERS IN THE GIG-ECONOMY

2018

Tribunal of Milan

(currently under appeal)

2 MAIN ISSUES

1) Obligation to work → incentives (economic)
2) Exercise of traditional employer's power mediated (hidden?) by the use of technology

Q&A

GRAMANO@JUR.UNI-FRANKFURT.DE

The moderators at the conference

Thomas Schmidt, lawyer, ELDH Secretary General, ELW-Network

Labour Lawyer and trade union lawyer, Düsseldorf. Former secretary in the German trade union ver.di (private and public services) and HBV (commerce, banks, insurances). Specialized in co-determination law, supervisory boards, mergers, restructuring of enterprises. Secretary General of the European Association of Lawyers for Democracy and Human Rights ELDH.

He also studied economics and graduated with a diploma.

Publications on supervisory boards, mergers, division of companies.

Silvia Rainone, Ph.D. Candidate, Tilburg University, ELW-Network

Since November 2015, Silvia is a PhD candidate at Tilburg University, and she is affiliated to the department of Labour Law and Social Policy of the Tilburg Law School. She is working on a research project on EU Labour Law, with a particular focus on the EU approach towards (the clash between) workers' rights and economic freedom.

She teaches in bachelor and master courses on the foundations of labour law and on EU law on business restructurings. Since 2016, she is a member of the coordinating committee of the European Lawyers for Workers Network.

From April till September 2018, she was visiting researcher at the European University Institute (EUI) in Florence, and for March and April 2019 she will be visiting research at the Labour Law Institute of KU Leuven.

Since the starting of her PhD, she has presented in international conferences and has published several contributions on the Court of Justice's interpretation of labour rights and on the evolving rationale of labour law.

Klaus Lörcher, former ETUC legal adviser

Short biography

Trade union lawyer representing members in labour law tribunal and social security tribunal and court of appeal cases, German Confederation of Trade Unions (Deutscher Gewerkschaftsbund);

Legal advisor of the European Trade Union Confederation (ETUC)

Legal Secretary of the Civil Service Tribunal of the European Union

ETUC Human Rights Advisor

Publications

Amongst other publications co-editor of the following books

Filip Dorssemont, Klaus Lörcher, Stefan Clauwaert and Mélanie Schmitt (eds.),

The Charter of Fundamental Rights of the European Union and the Employment relation (Oxford, Hart Publishing), 2019

Niklas Bruun, Klaus Lörcher, Isabelle Schömann and Stefan Clauwaert (eds.),

The European Social Charter and the Employment Relation, (Oxford, Hart Publishing), 2017

Filip Dorssemont, Klaus Lörcher and Isabelle Schömann (eds.),

The European Convention on Human Rights and the Employment relation (Oxford, Hart Publishing), 2013

Dr. Rüdiger Helm, lawyer, Munich and CapeTown, ELW-Network

Short biography

Dr. Rüdiger Helm is a self-employed German lawyer based in South Africa who joins SALDRU as a research affiliate. Helm has a PhD in economics and social sciences from Hamburg University, Germany. The title of his doctoral thesis is, “Health security at the workplace as absolute barrier against limited employment contracts”.

Helm has spent more than two decades working in the legal and research fields and has an accomplished publications record. Amongst his achievements is the fact that he was architect of the “Mangold-Helm Case” to the European Court of Justice, which led to a new interpretation of Age Discrimination laws and other kinds of work discrimination laws in Europe

Publications

Dissertation LL.M Proportionate Income Differentials: A Long Walk to Social Justice A case study on the Entgeltrahmenabkommen (ERA) Baden-Wuerttemberg, a general agreement on pay grades, that seeks to achieve pay equity in this region of the German metal and electrical industry and a critical evaluation of how this model can assist in the implementation of section 27 of the Employment Equity Act (EEA) of South Africa

Dissertation PhD In his Doctorate thesis, he discussed the areas of conflict between the aim of health at the workplace and the freedom of contract.

List of participants

Participants	First name	family name	profession	town	country
1.	Thomas	Backes	Lawyer	Landstuhl	Germany
2.	Ewald	Bartl	Lawyer	Stuttgart	Germany
3.	Marek Beck	Beck	Lawyer	Hamburg	Germany
4.	Till	Bender	Lawyer	Bamberg	Germany
5.	Christiane	Benner	IG Metall Co-President	Frankfurt	Germany
6.	Prof. Bill	Bowring	Barrister	London	UK
7.	Niklas	Bruun	Professor	Stockholm/Helsinki	Sveden/Finland
8.	Jan	Buelens	Lawyer	Antwerp	Belgium
9.	Aude	Cefaliello	Ph.D.Candidate	Frankfurt/M.	Italy/UK
10.	Elisa	Chieregato	Student	Verona	Italy
11.	Stefan	Clauwaert	ETUI Researcher	Brussels	Belgium
12.	Jan	Cremers	Researcher	Tilburg	Netherlands
13.	Simon	Deakin	Professor	Cambridge	UK
14.	Vira	Domchak	Lawyer	Freiburg	Germany
15.	Filip	Dorssemont	Professor	Louvain	Belgium
16.	Emilie	Durchlach	Ph.D. Legal Department CFDT	Paris	France
17.	Martin	Faust	Lawyer	Frankfurt/M.	Germany
18.	Heiner	Fechner	Lawyer	Bremen	Germany
19.	Dr. Sergio F.	Fortunato	Lawyer	Freiburg	Germany
20.	Dr. Patrick	Fütterer	Lawyer	Frankfurt/M.	Germany
21.	Antonio	Garcia-Munoz	Professor	Frankfurt/M.	Spain/Germany
22.	Sabine	Gey-Rommel	Lawyer	Stuttgart	Germany
23.	Elena	Gramano	Ph.D.	Frankfurt/M.	Italy/Germany
24.	Rüdiger	Helm	Lawyer	Munich/Cape Town	Germany/South Africa
25.	Stefan	Hermann	Lawyer	Hamburg	Germany
26.	Jens Peter	Hjort	Lawyer	Hamburg	Germany
27.	Christina	Inversi	lecturer, Manchester University	Manchester	UK
28.	Suzanne	Kali	Lecturer in Labour Law	Leiden	Netherlands
29.	Angelika	Kapeller	Lawyer	Kassel	Germany
30.	Roland	Karpa	Lawyer	Essen	Germany
31.	Boris	Karthaus	Lawyer	Frankfurt	Germany
32.	Csilla	Kollonay-Lehoczky	Professor	Budapest	Hungary
33.	Angela	Kolovos	Lawyer	Frankfurt/M.	Germany
34.	Birgit	Kraemer	Researcher	Düsseldorf	Germany
35.	Barbara	Kresal	Professor	Ljubljana	Slovenia
36.	Klaus	Lörcher	Legal Consultant	Frankfurt	Germany

Participants	First name	family name	profession	town	country
37.	Esther	Lynch	ETUC Conferal Secretary	Brussels	Ireland/Belgium
38.	Tjark	Menssen	Lawyer	Frankfurt	Germany
39.	Federico	Micheli	PhD Student	Brescia	Italy
40.	Detlev	Nitsche	Lawyer	Berlin	Germany
41.	Declan	Owens	Lawyer	London	Ireland/UK
42.	Massimiliano (Max)	Peppoloni	Consultant	Paris	France
43.	Marianne	Pétré	Lawyer	La Louvière	Belgium
44.	Ewa	Podgorska-Rakiel	Legal Department Solidarnosc	Gdansk	Poland
45.	Silvia	Rainone	Ph.D. Student	Amsterdam	Italy/Netherlands
46.	Zana	Rasnaca	ETUI Researcher	Brussels	Belgium
47.	Giuseppe Antonio	Recchia	Researcher	Bari	Italy
48.	Rainer	Rehwald	Lawyer	Hanau	Germany
49.	Karlheinz Schierle	Schierle	Lawyer	Frankfurt/M.	Germany
50.	Kathrin	Schlegel	Lawyer	Frankfurt	Germany
51.	Thomas	Schmidt	Lawyer	Düsseldorf	Germany
52.	Michael	Schubert	Lawyer	Freiburg	Germany
53.	Reinhard	Schütte	Lawyer	Wiesbaden	Germany
54.	Dr. Uwe	Silberberger	Lawyer	Düsseldorf	Germany
55.	Sturla	Spans	Lawyer	Utrecht	Belgium
56.	Francisco	Trillo	Professor	Castilla La Mancha	Spain
57.	Ricarda	Ulbrich-Weber	Lawyer	Freiburg	Germany
58.	Joanna	Unterschütz	Professor	Gdynia	Poland
59.	Piet	Van den Bergh	Lawyer	Brussels	Belgium
60.	Bas	Van Dis	Lawyer	Amsterdam	Netherlands
61.	Bruno	Veneziani	Professor	Bari	Italy
62.	Reinhard	Vorbau	Lawyer	Frankfurt/M.	Germany
63.	Manfred	Weiss	Professor	Frankfurt	Germany
64.	Reingard	Zimmer	Professor	Berlin	Germany

Table of contents