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2019/4

Revue de Droit Comparé du Travail et de la Sécurité Sociale

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N. Mzid Social Dialogue and Democracy in Tunisia

S. Burri Protection and Rights Related to Pregnancy and Maternity in EU Law

G. Mendizábal Bermúdez The Challenges of Mexican Social Security in the Face of Socio-Natural Disasters

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INTERNATIONAL LABOUR CASE LAW

COMMENTARY

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COMMENTARY

Commentary on Court of Justice of the European Union judgments C-434/15 of 20 December 2017 (Asociacion Profesional Elite Taxi v Uber Systems Spain SL) and C-320/16 of 10 April 2018 (Uber France SAS)

RÉSUMÉ

Dans ses deux arrêts sur l'activité de l'entreprise Uber en Espagne et en France, la CJUE a qualifié l'activité de l'entreprise de service de transport, soumis au régime général de la Directive relative aux services dans le marché intérieur et faisant l'objet d'une compétence partagée entre les Etats membres et l'Union. Les Etats membres sont donc autorisés à réglementer cette activité en la soumettant à autorisation, voire en l'interdisant. L'analyse fonctionnelle de l'activité d'Uber effectuée par la CJUE devrait à notre avis nourrir le raisonnement des tribunaux nationaux qui seront appelés à se pencher sur la question, cruciale en droit social, de la nature des rapports juridiques entre Uber et ses chauffeurs (contrat de travail ou partenariat avec des indépendants).

Mots-clés : Digitalisation, Travail de plateforme,Qualification des services dans l'économie collaborative, Concurrence, Fonction d'employeur.

ABSTRACT

In its two decisions on the activity of the company Uber in Spain and France, the CJEU described the company's activity as a transport service, subject to the general regime of the Directive on services in the internal market and subject to shared competence between the Member States and the Union. Member States are therefore authorised to regulate this activity by making it subject to authorisation or even by prohibiting it. In our opinion, the functional analysis of Uber's activity carried out by the CJEU should inspire the reasoning of the national courts, which will be called upon to examine the crucial question in labour law of the nature of the legal relations between Uber and his drivers (employees or independent contractors).

Keywords: Digitalisation, Platform work, Qualification of services in the collaborative economy, Competition, Employer's function.

Technical developments are constantly offering new possibilities to companies which, at the same time, are adapting their business models as they integrate and use all these different technologies (internet of things, crowdworking, big data, blockchain, artificial intelligence applied to automation and robotisation, etc.). From the employment law perspective, one in particular of the new forms adopted by companies raises concerns: the sharing economy platforms, the best known of which are the American sites *Airbnb* (holiday lets in private homes) and *Uber* (a ride-hailing service putting «private» drivers in touch with people looking for a ride)[1]. Each of these «platforms» has its own business model designed to generate turnover and even a profit. The most common way of doing so is to take a commission on each transaction that takes place via the platform. In addition, advertising revenue plays a non-negligible role in this business model.

The business models of certain platforms can present some challenges with regard to employment law, in the cases where they use workers (or service providers). This is not the case of all platforms since for some, the service rendered by the platform is not the centre of the service to the customer (this is the case with Airbnb, where the central service is the provision of accommodation). That being the case, the main challenge posed by the development of the platform economy, when it uses people's labour, is that of how to classify the services provided from a legal point of view[2]. Are the service providers agents or employees? Should they be considered as self-employed or dependent workers? Do they fall within the scope of employment law or not? Do collective labour agreements apply or not[3]? What about social insurance and the risk of «moonlighting»? And what about competition[4]?

From the point of view of European law, the classification question also arises, but with regard more precisely to the type of service the company in question provides, which is what determines which regime applies to it. This is the question that was put to the

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1 Many other platforms are appearing on the market, in various different sectors of the economy: these include not only many competitors of Uber (Via, Lyft, etc.) or Airbnb (Homeaway, for example), but also platforms like Taskrabbit or Handy, which link up people who are willing to do all kinds of odd jobs (gardening, household maintenance, plumbing, etc.) with people that need these services. This list is not exhaustive, and is being added to daily.

2 See in particular L. Grozdanovski, «L'opportunité d'un régime spécifique en droit de l'Union européenne relatif à l'économie collaborative», *Actes de la Journée internationale de jeunes chercheurs, Ubérisation et économie collaborative: Evolutions récentes dans l'Union européenne et ses Etats membres*, 17 January 2018, Panthéon-Assas (Paris 2) University, to be published (ed. Panthéon-Assas University).

3 3 See in particular K. Pärli, A. Meier and Z. Seiler, «Le futur du dialogue social et du tripartisme dans le contexte de la digitalisation de l'économie», Study commissioned by the National Tripartite Committee for ILO Affairs, 2018: https://www.seco.admin.ch/seco/fr/home/Arbeit/Internationale_Arbeitsfragen/IAO.html

4 On this question, see in particular A. Barinova, «L'applicabilité du droit européen de la concurrence à l'économie collaborative», 31 December 2018, *blog* of the Research Observatory on Sharing Economy, Law and Society (ROSELS): http://www.rosels.eu/lapplicabilite-du-droit-europeen-de-la-concurrence-a-leconomie-collaborative/

Court of Justice of the European Union (CJEU) concerning Uber (judgment C-434/15 of 20 December 2017 - *Asociacion Profesional Elite Taxi v Uber Systems Spain SL*) or case C-320/16 (10 April 2018) involving Uber France SAS. The consequences of this classification are important: if these are information society services[5], as Uber claimed, the platform's activity would have been exempt from the general framework of Directive 2006/123/EC[6], as well as from the frameworks governing services that fall within the scope of other treaty provisions, such as the provisions on transport[7]. If, on the other hand, these are transport services, then they fall within the shared competence of the Union and its Member States[8], which authorises the Member States to set up an authorisaton system.

The two judgments mentioned above concern only the UberPop service, namely the transporting of persons by non-professional drivers. In the Spanish case, the legal proceedings were brought by a professional organisation of taxis drivers in Barcelona; it considered that Uber's activities infringed the legislation in force and amounted to misleading commercial practices and acts of unfair competition[9]. As for the French judgment, it concerned criminal proceedings brought against Uber France for illegal organisation of a system for putting non-professional drivers using their own vehicle in contact with persons who wish to make urban journeys.

In the Spanish judgment (to which the French judgment refers in its entirety)[10], the CJEU held that «the intermediation service provided by Uber is based on the selection of non-professional drivers using their own vehicle, to whom the company provides an application without which (i) those drivers would not be led to provide transport services and (ii) persons who wish to make an urban journey would not use the services provided by those drivers. In addition, Uber exercises decisive influence over the conditions under which that service is provided by those drivers. On the latter point, it appears, inter alia, that Uber determines at least the maximum fare by means of the eponymous application, that the company receives that amount from the client before paying part of it to the non-professional driver of the vehicle, and that it exercises a certain control over the quality of the vehicles, the drivers and their conduct, which can, in some circumstances, result in their exclusion»[11].

Thus, according to the CJEU, «That intermediation service must thus be regarded as forming an integral part of an overall service whose main component is a transport service and, accordingly, must be classified not as "an information society service" […], but as "a service in the field of transport"»[12]. It should be noted that the German Bundesgerichtshof (Federal Court of Justice) also submitted a similar question to the CJEU, but which

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5 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ no. L 178, 17.7.2000.

6 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, JO no. L 376, 27.12.2006, p. 36.

7 L. Grozdanowski, *op. cit.,* para. 18.

8 Art. 4, para. 2,g), TFEU.

9 Opinion of the Advocate General M. Szpunar, presented on 11 May 2017, para. 16.

10 Judgment C-320/16 of 10 April 2018, *Uber France SAS,* para. 18.

11 Judgement C-434/15, *Asociacion Profesional Elite Taxi contre Uber Systems Spain SL,* 20 December 2017, para. 39.

12 Aforementioned judgment, para. 40.

concerned the UberBlack service and not UberPop. UberBlack is a limousine service whose drivers are professionals. The German referral was withdrawn after the judgment was given in the Uber Spain case, because the question of whether Uber was a service company in the transport field had then been answered; the referral was therefore devoid of purpose[13].

In a way, in these two judgments, the CJEU is pointing out that the service rendered by Uber has already existed on the market for a long time, since it is a question of transporting persons. Uber therefore illustrates a case where technology allows a service to be provided in a new way (in the case in point, by putting the provider of a service in direct contact with the customer by means of an application), without its legal nature being altered. This was furthermore what the Advocate General had already emphasised in his opinion: «Uber is therefore not a mere intermediary between drivers willing to offer transport services occasionally and passengers in search of such services. On the contrary, Uber is a genuine organiser and operator of urban transport services in the cities where it has a presence. While it is true, as Uber states in its observations in the case, that its concept is innovative, that innovation nonetheless pertains to the field of urban transport»[14].

The CJEU does not adopt a position on the question that is central in employment law, that of the nature of the legal relationship between Uber and its drivers. This question is not within its jurisdiction and must therefore be examined by each Member State, in application of its internal legislation. However, the Advocate General did, with just cause, offer some reflections on the function of Uber in its business model, by analysing its role towards its customers and its drivers. In our opinion, this functional analysis of Uber highlights how it actually exercises the functions of an employer: «In its written observations, Uber claims that it simply matches supply (the supply of urban transport) to demand. I think, however, that this is an unduly narrow view of its role. Uber actually does much more than match supply to demand: it created the supply itself. It also lays down rules concerning the essential characteristics of the supply and organises how it works»[15].

In particular, the Advocate General emphasises the importance of the control exercised by Uber over the work of its drivers: «Uber makes it possible for persons wishing to pursue the activity of urban passenger transport to connect to its application and carry out that activity subject to the terms and conditions imposed by Uber, which are binding on drivers by means of the contract for use of the application. There are numerous terms and conditions […][16]. Thus, without exerting any formal constraints over drivers, Uber is able to tailor its supply to fluctuations in demand […][17]. Uber therefore exerts control, albeit indirect, over the quality of the services provided by drivers […][18]. Lastly, it is Uber that sets the price of the service provided […][19]. Thus, Uber exerts control over all the relevant aspects of an urban transport service: over the price, obviously, but also over the minimum safety conditions by means of prior requirements concerning drivers and vehicles, over the accessibility of the transport supply by encouraging drivers to work when and where

13 https://www.zeit.de/arbeit/2018-12/uber-black-ist-in-deutschland-unzulaessig

14 Opinion of the Advocate General, para. 61.

15 Opinion of the Advocate General, para. 43.

16 Opinion of the Advocate General, para. 44.

17 Opinion of the Advocate General, para. 47 *in fine*.

18 Opinion of the Advocate General, para. 48 (control exerted by the driver rating function and the consequences of poor scores).

19 Opinion of the Advocate General, para. 49.

demand is high, over the conduct of drivers by means of the ratings system and, lastly, over possible exclusion from the platform […]. Uber therefore controls the economically significant aspects of the transport service offered through its platform[20]. While this control is not exercised in the context of a traditional employer-employee relationship, one should not be fooled by appearances. Indirect control such as that exercised by Uber, based on financial incentives and decentralised passenger-led ratings, with a scale effect, makes it possible to manage in a way that is just as - if not more - effective than management based on formal orders given by an employer to his employees and direct control over the carrying out of such orders[21]. The foregoing leads me to conclude that Uber's activity comprises a single supply of transport in a vehicle located and booked by means of the smartphone application and that this service is provided, from an economic standpoint, by Uber or on its behalf»[22].

Nevertheless, the Advocate General did not go, any more than the Court would, as far as to give an opinion on the nature of the contractual relations that bind Uber to its drivers: «The above finding does not, however, mean that Uber's drivers must necessarily be regarded as its employees. The company may very well provide its services through independent traders who act on its behalf as subcontractors. The controversy surrounding the status of drivers with respect to Uber, which has already resulted in court judgments in some Member States, is wholly unrelated to the legal questions before the Court in this case […][23]. I must also point out that classifying Uber as a platform which groups together independent service providers may raise questions from the standpoint of competition law»[24].

This being the case, one can question the influence of the two judgments analysed here and the way the Member States classify, according to their respective national laws, the contractual relations between Uber and its drivers. In our opinion, the functional analysis of Uber's activity proposed by the Advocate General and confirmed by the CJEU, is particularly important to the analysis of the nature of contractual relations in domestic law. Indeed, an analysis of Uber's concrete role in the triangle formed by the application (the platform per se), the drivers and the customers, clearly reveals that Uber does not content itself with a purely passive role, as the company claims. Far from limiting itself to matching customer demand with the supply of services offered by the drivers signed up to the application, Uber determines the price of the service, collects the payment, unilaterally decides the amount of commission it takes, chooses and controls the type of car each driver is allowed to use. Finally, Uber exercises concrete and virtually real-time control over the tasks performed by each driver, reserving the right to exclude drivers it deems unsatisfactory.

Uber therefore demonstrates that the function of employer can be exercised in a completely new way (surveillance of the employee, not by a foreman as in the past, but *via*

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20 Opinion of the Advocate General, para. 51.

21 Opinion of the Advocate General, para. 52.

22 Opinion of the Advocate General, para. 53.

23 Opinion of the Advocate General, para. 54.

24 Opinion of the Advocate General, para. 62. On the close link with competition law, see in particular CJEU Judgment C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden of 4 December 2014*. A. Meier, «Droit collectif du travail et droit de la concurrence», *Semaine judiciaire*, 2017, II, 93, p. 109; K. Pärli, «Die sozialversicherungsrechtliche Qualifikation des Einkommens von Uber-Fahrern/innen», *Jusletter*, 12.06.2017, no. 35.

a smartphone and consumers who rate the quality of the service) without the nature of the service accomplished or the architecture of the legal relationships being modified in any way. When the CJEU asserts that Uber is a transport company, it is determining not only the framework applicable to it in European law - with regard in particular to the Services Directive - but also, indirectly, the rules on the protection of the driver's health, road safety, passenger safety and any collective labour agreements that may apply to this branch of the economy. Without pre-judging the status of the drivers in domestic law (workers or self-employed), the CJEU judgments therefore have a non-negligible impact on the standards that apply to them through the company that manages their activity. All these rules have an intrinsic coherence within the overall legal system that governs free and healthy competition on the market: any service provider must be subject to the same rules as his/her competitors.

In our opinion, the courts of the Member States can therefore rely on the reasoning of the CJEU to determine Uber's status with respect to their national regulations - in particular concerning the status of the drivers as employees - under employment law and with regard to social insurance. A brief comparative overview (which is not intended to be exhaustive) shows that as yet there is no consensus within Europe. Although it is now clear that the Member States are free to regulate the activity of UberPop and UberBlack[25], the issue of the classification of the contractual relationship has not yet been settled once and for all in most of the Member States or the European Union, even if a clear trend is beginning to appear in favour of the existence of an employment relationship.

In the United Kingdom, the *Court of Appeal* held in December 2018 that Uber drivers were to be considered as workers[26] and were therefore entitled in particular to the minimum wage and holiday pay[27]. Uber has already announced that it will appeal to the *Supreme Court*. In France, the Court of Appeal of Paris ruled on 10 January 2019[28], that Uber drivers who are «*auto-entrepreneurs*» (a simplified form of self-employment) are not self-employed workers insofar as they cannot freely build their own customer base, they do not control the price of their service and they do not freely decide the conditions of their provision of their transport service. On the contrary, Uber exerts control over its driver's' activity, issues instructions and can impose penalties[29]. In Switzerland, the National Accident Insurance Fund (SUVA) decided in 2017 that Uber was obliged to insure its drivers against accidents, an obligation imposed on all employers in Switzerland. Uber having challenged this decision, the Social Insurance Court of the Canton of Zurich issued a judgment in which it did not adopt a position on the merits of the dispute and contented itself with referring the case back to the insurance fund on the grounds of a lack of clarity as to the identity of the employer: the cause of this being the complex legal structures that Uber constructs in Europe. Indeed, Uber does not have a branch in Switzerland (*Uber Switzerland*). Even when it did, the contracts between the drivers and the company (concluded by accepting

25 Germany has recently banned UberBlack in the country, in the «*UberBlack II» judgment of the Bundesgerichtshof* (13 December 2018): http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2018&Sort=3&nr=90389&pos=1&anz=185

26 *Workers, an intermediate legal status between employees and self-employed.*

27 https://www.theguardian.com/technology/2018/dec/19/uber-loses-appeal-over-driver-employment-rights

28 Judgment 6-2, RG 18/08357.

29 See the analysis and commentary on the judgment: https://www.village-justice.com/articles/les-chauffeurs-uber-auto-entrepreneurs-sont-des-salaries-selon-cour-appel-paris,30456.html

the general terms and conditions when signing up to the application) were contracts with Uber's European head office in the Netherlands (Uber BV)[30]!

«Uber legal precedent» is also already influencing other «platform jobs». This is the case of bike couriers in particular. The French Court of Cassation ruled on the case of a bike courier on 28 November 2018 (no. 17-20079)[31]. In Switzerland, certain bike couriers now benefit, for the first time, from a collective labour agreement, the content of which, however, has not yet been made public[32]. As the collective agreement has no binding force, for the moment it applies only to the companies that sign up to it and not to the entire branch, which is already leading to some competition problems on the market with the arrival of UberEats[33].

Uber has already been active in Europe for about ten years without any clear legal precedent being established. The continuing legal uncertainty works to the advantage of Uber and the other companies that are directly inspired by its business model and which have thrown themselves into the legal vacuum because there is money to be made. The other side of the coin is that this legal vacuum very often leaves drivers, bike couriers, on-demand gardeners and other gig economy «platform workers» with no social protection, even the most basic: no accident insurance, no pension contributions; no limit on working hours; no health cover; no holiday pay; no income if they are sick and unable to work, etc. Important questions are also being raised concerning discrimination and data protection[34].

Such working conditions may mark a real step backwards in terms of social protection[35]. It seems that certain States have already grasped the consequences that this regression could have and have begun to regulate (even ban) certain sectors where platform services are the most common, in some cases without waiting for decisions on principle by the courts, which are slow in coming.

30 K. Pärli, «Uber-Urteile des Sozialversicherungsgerichts Zürich, Die SUVA muss weitere Abklärungen treffen», (UV.2017.00030 und weitere Verfahren), *Jusletter*, 3 September 2018, no. 14.

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IALLJ CALL FOR PAPERS ~ 2020 MARCO BIAGI AWARD

To stimulate scholarly activity and broaden academic interest in comparative labour and employment law, the International Association of Labour Law Journals announces a **Call for Papers** for the 2020 Marco Biagi Award. The award is named in honor of the late Marco Biagi, a distinguished labour lawyer, victim of terrorism because of his commitment to civil rights, and one of the founders of the Association. The Call is addressed to doctoral students, advanced professional students, and academic researchers in the early stage of their careers (that is, with no more than three years of post-doctoral or teaching experience).

1. The Call requests papers concerning comparative and/or international labour or employment law and employment relations, broadly conceived. Research of an empirical nature within the Call's purview is most welcome.

2. Submissions will be evaluated by an academic jury to be appointed by the Association. Submitted papers should include an abstract.

3. The paper chosen as the winner of the award will be assured publication in a member journal, subject to any revisions requested by that journal.

4. Papers may be submitted preferably in English, but papers in French, or Spanish will also be accepted. The maximum length is 12,500 words, including footnotes and appendices. Longer papers will not be considered.

5. The author or authors of the paper chosen as the winner of the award will be invited to present the work at the Association's 2020 meeting which is to be announced soon on the website of the Association. Efforts are being undertaken to provide an honarium and travel expenses for the presentation of the paper. Until that effort bears fruit, however, the Association hopes that home institutional funds would be available to support the researcher's presentation.

6. The deadline for submission is 31 March 2020 (final date of submission). Submissions [and a short bio of the author] should be sent electronically in Microsoft Word both to Lavoro e diritto at lavoroediritto@unife.it and to Frank Hendrickx, the President of the Association, at frank.hendrickx@kuleuven.be and his secretariat: iar@kuleuven.be.

Prior Recipients of the Marco Biagi Award

2019 **Giovanni Gaudio** (Bocconi University, Milan, Italy), «Dapting labour law to complex organisational settings of the enterprise. Why re-thinking the concept of employer is not enough».

2018 **Matteo Avogaro** (University of Milan, Italy), «New perspectives for worker organization in a changing techonological and social environment».

2017 **Nicolas Buenos** (University of Zurich, Switzerland, Insitute of Law), «From the right to work to the freedom from work».

2016 **Mimi Zou**, «Towards Exit and Voice: Redesiging Temporary Migrant Workers's Programmes)».

2015 **Uladzislau Belavusau** (Vrije Universiteit Amsterdam, Pays-Bas), «A Penalty Card for Homophobia from EU Labor Law: Comment on Asociaţia ACCEPT (C-81/12)».

2014 **Lilach Lurie** (Bar-Ilan University, Israel), «Do Unions Promote Gender Equality?».

2013 **Aline Van Bever** (University of Leuven, Belgium), «The Fiduciary Nature of the Employment Relationship».

2012 **Diego Marcelo Ledesma Iturbide** (Buenos Aires University, Argentina), «Una propuesta para la reformulación de la conceptualización tradicional de la relación de trabajo a partir del relevamiento de su especificidad jurídica».

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