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Labour Tribunal of Brussels decides that Deliveroo riders are self-employed workers and not employees (BE)

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Summary

Working as a rider for the Deliveroo platform is a professional activity that can be performed as a self-employed worker, the Labour Tribunal of Brussels has decided, which also ruled out the possibility of Deliveroo riders enjoying the fiscally beneficial status available for workers active on electronic platforms of the collaborative economy (or 'sharing economy').

Legal background

In line with many legal systems, two options are available when setting up a work relationship under Belgian law: entering into an employment contract, which implies a link of subordination over the employee and social security charges for the employer, or entering into a service agreement with a self-employed worker, which implies the absence of any link of subordination between the parties and no social security charges for the client.
Given the fundamentally different financial and administrative consequences which arise from either choice, the Belgian lawmaker has stepped in to provide transparent criteria of assessment and to mitigate the risk of false self-employment. This resulted in the adoption of the Employment Relations Act of 27 December 2006 (the '2006 Act'), that established a list of four general criteria by which to assess the nature of the work relationship, i.e. the will of the parties as expressed in the contract, the worker's freedom to organise his/her working time, the worker's freedom to organise his/her work and the possibility to exercise hierarchical control (Article 333(1)). In addition, for certain specific activities viewed as prone to fraud, the law enacted a list of nine specific criteria to be examined in the first instance and which mainly pertain to the socio-economic dependency of the worker vis-à-vis the client. If more than half of them are met, so that there is a sufficiently high degree of dependency, this triggers the application of a presumption of the existence of an employment relationship. This presumption can be rebutted if an assessment based on the four general criteria mentioned above lead to the opposite conclusion (Article 337/2(1), (2)). Finally, it is possible for the government to enact through Royal Decrees targeted criteria for specific sectors and/or activities, within the framework of the rebuttable presumption for certain sectors or even outside this presumption (Articles 337/2(3), 334). This has been the case for the road transport and logistics sector where a Royal Decree of 29 October 2013 replaced the nine criteria mentioned above by eight, more targeted, criteria.
Aside from these traditional options stands the collaborative economy regime. With a view to facilitating the participation of workers in electronic platforms of the collaborative economy, the Belgian lawmaker has created a specific status in that regard. Upon fulfilling the conditions listed below, workers do not fall under any social security regime (employee/self-employed) and enjoy a low income tax rate for earnings below a certain maximum (EUR 6,390 for earnings in 2021 (Programme Act of 1 July 2016)):

i. Services must only be performed by private individuals and fall outside a professional activity.
ii. Services must only be performed on the basis of agreements concluded through an authorised electronic platform.
iii. Indemnities granted on that basis may only be paid through or by the platform.

Facts

It appeared from the facts of the case that Deliveroo's riders perform their work on the basis of one of the following three regimes: self-employed, student self-employed and collaborative economy, the latter being the most widely used (around 80%). After a lengthy investigation over the actual working conditions of the riders, the Labour Prosecutor disagreed with the appli-

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cation of those regimes. It considered that riders were working under the authority of Deliveroo and should thus be qualified as employees and be subject to the corresponding tax and social security regime.
To obtain this requalification, the Labour Prosecutor commenced an action before the Labour Tribunal of Brussels. Amongst others, the National Office for Social Security intervened as a supporting party for the Labour Prosecutor.
Deliveroo opposed the requalification, arguing that its riders could not be considered as employees.

Decision

The Labour Tribunal adopted a cautious, phased approach to the dispute at hand. As a first step, it examined whether or not Deliveroo riders were carrying on a professional activity at all, bearing in mind that a positive answer to this question would deem the collaborative economy regime inapplicable.
After a detailed analysis of the working conditions, the Tribunal found that (i) the work performed amounted to delivery of goods and not of services to third parties, (ii) the activity should be considered as 'professional' *inter alia* in view of the fact that, until 2017, riders could work under the employee status, (iii) services were not only rendered to private persons but also to the restaurants themselves, i.e. professional clients and (iv) there was no agreement between the rider and the final consumer. None of the above conditions of the collaborative economy regime being fulfilled except the one related to payment through the platform, its applicability – concerning 80% of the riders – was rejected.
This finding led to the second step in the Tribunal's analysis, i.e. the qualification of the work relationship at stake when carrying out this – now acknowledged – professional activity (self-employed or employee). To do this, the Tribunal turned to the specific rules set out by the 2006 Act in that matter.
Firstly, the Tribunal deemed applicable the specific criteria applicable in the road transport and logistics sector (Joint Committee no. 140.03, Royal Decree of 29 October 2013). It is worth noting that Deliveroo unsuccessfully challenged its inclusion in this sector on the ground that transport or logistics was not its main business. The Tribunal dismissed this by stating that only the activities performed by the riders, i.e. the transport of goods, had to be taken into account and that even if one should focus on the activities of Deliveroo itself the same conclusion would be reached, since Deliveroo whatever it says is a company active in the road transport and logistics sector.
The Tribunal therefore examined whether at least five of the eight specific criteria applicable in the road transport and logistics sector were met, upon which the riders would then be presumed to be employees. It found that at least seven criteria were met as the riders (i) did not bear any financial risk, (ii) had no responsibility nor decision-making power on the financial resources of the company, (iii) had no decision-making power on the purchase policy of the company, (iv) had no decision-making power on the pricing and remuneration of delivered services, (v) had no result obligations, (vi) did not appear as a separate company to third parties, and (vii) could not subcontract.
The only criterion indisputably not being met was that Deliveroo riders may use their own equipment and, should they wish to use Deliveroo equipment, they would have to buy it. The application of the specific criteria thus led the Tribunal to qualify the riders as employees. However, that conclusion could be reversed if the analysis of the riders' situation on the basis of the four general criteria would point towards a self-employed relationship (Article 333(1) of the 2006 Act).
The Tribunal thus assessed whether the riders met the general criteria:

i. Will of the parties: The Tribunal underlined that the parties had willingly signed a service agreement.
ii. Freedom to organise working time: Factual analysis of Deliveroo's functioning showed that riders did not have an obligation to follow working schedules nor to work at a specific time. The mere fact that the algorithm used by Deliveroo granted priority to certain riders or told them when to make a delivery was of no impact in that regard.
iii. Freedom to organise work: The Tribunal noted that Deliveroo riders could refuse work, could depart from the suggested delivery itinerary and were not obliged to use Deliveroo equipment. Additionally, the Tribunal considered that elements such as price-fixing or requirement to use a bike was not of such a nature as to restrict the freedom to organise work.
iv. Hierarchical control: The Tribunal noted that Deliveroo did not impose sanctions on the riders and did not perform controls in practice.

All of the general criteria being met, the presumption triggered by the specific criteria was rebutted. As a consequence, the qualification of self-employed for Deliveroo riders was retained, rejecting both the application of the employee status and of the collaborative economy regime. The Labour Prosecutor has indicated that an appeal would be filed.

Commentary

In this case against Deliveroo this is the first time that a Belgian judge has ruled on the status of platform economy workers. The legal criteria for establishing the nature of the work relationship have been examined in depth, which in itself deserves to be mentioned.
This judgment shows how Belgian law still relies predominantly on legal subordination for determining the nature of the work relationship. Whereas all the socio-economic criteria set out in the Royal Decree of

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29 October 2013 were met except for one, the Labour Tribunal rebutted the presumption of employment on the grounds that the Deliveroo riders are free to organise their work as well as their working time and that they do not fall under the hierarchical control of Deliveroo.

This judgment shows how important it is to assess the circumstances of the matter in detail without generalising about the nature of platform work which may vary from one provider to another but also from one country to another. In that respect, the Labour Tribunal duly took note of the foreign judgments invoked by the Labour Prosecutor, in particular against Deliveroo in France and in the Netherlands, but highlighted that the matter at hand differed significantly since Deliveroo in Belgium does not exercise any surveillance over its workers or sanction them as in France nor does it use an employment contract with them as was the case in the Netherlands.

This decision also runs contrary to a prior decision of the Administrative Commission in charge of delivering opinions on the nature of work relationships in Belgium and which decided that Deliveroo riders were employees. For the Labour Tribunal, the process by which this Commission has ruled was one-sided and non-adversarial so that its decisions should not be taken into account.

Technical aspects have been of the utmost importance in this case. Many references are made by the judge to the expert commissioned by the Labour Prosecutor with a view to analysing the algorithm named 'FRANK' found in the application and who did not find any evidence of hierarchical control embedded therein. For the remainder of the evidence, the Tribunal relied extensively on the declarations of both the platform workers and of the representatives of Deliveroo.

In addition, of interest is the discussion on geolocation through the Deliveroo application and which allows clients to know how far their order is from the point of delivery. For the Labour Tribunal, geolocation in itself is not sufficient to create a link of subordination. Only when used to control the worker can this amount to subordination. In this case, the Labour Tribunal found no trace of the application being used for that purpose and which seems to ensure that the food is delivered in accordance with the required standards of health and quality only.

To summarise the position of the Tribunal in this judgment against which an appeal may be filed, Deliveroo riders cannot 'have their cake and eat it'. From the evidence submitted to the file, it appears that they enjoy an important degree of freedom, at least in Belgium, which is the reason why so many riders use the platform. For the judge, this freedom seemed incompatible with the existence of an employment relationship where the riders should be compelled to work in specific places at specific times, under the instructions of the platform. Should (algorithmic) control over the riders increase, we would move closer to an employment relationship. But, is it really what most riders want? An employment relationship is more secure in terms of rights but also less flexible in accommodating the needs of the riders, most of whom perform this job alongside another professional or curricular activity.

Outside the courtroom, the Belgian minister for employment is considering revising the 2006 Act, with a view to adapting the criteria to the collaborative economy and to create a rebuttable presumption of employment in line with the European Commission proposal of 9 December 2021 on improving working conditions in platform work. Yet, there is no consensus within the federal government at this stage. It is also difficult to see what this presumption would have brought as regards Deliveroo since the Tribunal have already come to the conclusion that *prima facie* Deliveroo riders were employees but only to rebut this presumption when analysing the work relationship in view of the general criteria set out in the 2006 Act.

In view of this, maybe it would be useful to think *beyond* the division of employee/self-employed and see whether there are some rights (right to strike, minimum wage, etc.) which could be extended to platform economy workers even if they remain self-employed and without necessarily applying the full package of employment rules. This could go a long way towards levelling up the working conditions of those workers. It would also be in line with some developments one may see in Belgium where self-employed workers progressively see some of their rights put on the same footing as employees such as, for instance, paternity leave or pension rights.

Comments from other jurisdictions

Germany (Othmar K. Traber, Ahlers & Vogel): When setting up a contractual relationship on mostly personal services there are different options regarding the type of work. Especially for platform workers, who are also called crowdworkers, the determination of their working status has not been very clear in the past. The nature of platform work can not only vary from one provider to another but also between different industries. In the end, it is always a question of the particular type of work being actually carried out by crowdworkers.

In Germany, the industrial tribunals and courts of appeal often had different assessments so there had been some very unpredictable case law in the past. But the Federal Labour Court of Germany (BAG) recently decided that a crowdworker can be an employee instead of self-employed (BAG, judgment of 1 December 2020 – 9 AZR 102/20, see **EELC 2021/23**). The status depends on how the conditions of the working relationship are contracted and, also very important, actually carried out.

The task of the crowdworker in the case decided by the BAG consisted in particular of taking photos of product presentations and answering questions about the advertising of products. On the basis of a 'basic agreement'

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and general terms and conditions, the defendant offered the 'microjobs' via an online platform. Via a personally set up account, each user of the online platform, i.e. each crowdworker, could accept jobs related to specific points of sale via an app without being contractually obliged to do so. If the crowdworker accepted an order, they regularly had to complete it within two hours according to the crowdsourcer's detailed specifications. For completed jobs, experience points were credited to their user account. The system increased the level with the number of completed jobs and allowed several jobs to be accepted at the same time. Crowdworkers were not obliged to accept certain jobs and were allowed to decide for themselves how often they were shown jobs and whether they carried them out. No contractual relationship was to be established with the platform's customers and they were also allowed to use their own employees and subcontract work. Therefore, according to previous case law, many features had actually been agreed upon which could lead to the assumption of self-employment.
The BAG took a different view and issued the first important decision on this issue, which will certainly not be the last. According to Section 611a of the German Civil Code (BGB), the status of an employee depends on the employee performing work that is bound by instructions and determined by others in personal dependence. This provision was included in the BGB a few years ago in order to define the status of employee according to the national notion of being an employee and to at least cast the previous contouring by case law into a fundamental legal norm, even if it did not clarify everything by a long shot. If, according to the BAG, the actual implementation of a contractual relationship shows that it is an employment relationship, the designation in the contract is irrelevant. This was already known from decisions of the social courts on the question of the social security obligation of employees. The overall assessment of all circumstances required by law can therefore show that crowdworkers are to be regarded as employees. In detail, the BAG recognised the following: It speaks for an employment relationship if the client controls the cooperation via the online platform operated by them in such a way that the contractor cannot freely organise their activity in terms of place, time and content as a result. This was the case in the ruling. The plaintiff performed work in a manner typical of an employee, bound by instructions and determined by others in personal dependence. They were not contractually obliged to accept offers from the defendant. However, the organisational structure of the online platform operated by the defendant was designed so that users registered and trained via an account continuously accepted bundles of simple, step-by-step, contractually specified small orders in order to complete them personally. Only a level in the evaluation system that increased with the number of completed orders enabled the users of the online platform to accept several orders at the same time in order to complete them on one route and thus in fact to earn a higher hourly wage. Through this incentive system, the plaintiff was induced to continuously perform control activities in the district of their habitual residence. This was assessed as an integration into the employer's organisation and thus the activity was defined as being bound by instructions and externally determined. So, as in the Belgian case, the technology used and the extent of control and incentivising the crowdworkers' performance are of utmost importance and can lead, in the end, to the conclusion that 'freedom' of crowdworkers is in fact actually limited and bound by these apps and tools, usually created to maximise the efficiency of the services provided. The Deliveroo riders, therefore, following the German ruling may be regarded as employees in contrast to the Belgian Court's findings.

Germany (Andre Schüttauf and Tolga Topuz, Luther Rechtsanwaltsgesellschaft mbH): Deliveroo suspended its business operations in Germany in August 2019. Here, Deliveroo was almost representative of the entire innovative model of crowdworking, which was reported on in the media, sometimes intensively. Crowdworking stands for job-advertising via a digital platform for which an unspecified number of digitally working people, the so-called 'crowd', can apply. Once the job has been awarded, the selected 'crowdworker' then works on it from home or on the road, without having to come into direct contact with the client.
When it comes to a legal classification of crowdworking, a standardized legal assessment is hardly possible. The possibilities for structuring the work relationship can be too diverse. In contrast to Belgian law, however, there are no precise criteria or rules according to which the distinction between employees, self-employed persons or – as a third category not legally specified here – 'collaborative economy worker' is differentiated.
Since the beginning of 2017, the legal basis for the concept of an employment contract can be found in Section 611a(1) sentence 1 of the German Civil Code (*Bürgerliches Gesetzbuch*, 'BGB'). According to this, an employee is anyone who, on the basis of a private contract, performs work for remuneration in the interest of the employer and on the employer's instructions. The essential distinguishing characteristic of the employee from the freelancer is their personal dependence. This is the case when the employee is integrated into an external work organization. Since crowdsourced workers are generally not integrated into the company in terms of location and operation, their integration into an external work organization can primarily be demonstrated by their being bound by instructions. However, not every instruction leads to the establishment of an employment relationship. Pursuant to Section 611a(1) sentence 3 BGB, a person is bound by instructions if he or she is not essentially free to organize his or her activities and working hours. This is not already the case if the crowdworker is obliged to fulfil the order on time. On the other hand, an employment relationship exists if there is an obligation to start work. Ultimately, in accordance with Section 611a(1) sentence 5 BGB, an overall assessment must always be made.

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In the vast majority of cases – including Deliveroo (at least according to their business system in Germany in the past) – there is probably no employment relationship with the crowdworkers. While for example Uber (which has also withdrawn its business operations from Germany) makes specifications about the car, the background music, the customer contact, the driving route and the price determination, Deliveroo largely does so without instructions. Here, the driver is allowed to decide for themself which route to take and at what speed. Instead, Deliveroo tries to influence the drivers' way of working through a monetary reward system. However, the drivers are allowed to decide for themselves when they work and can also refuse orders without consequence. Since they can decide independently about their activities and working hours, there is usually no employment relationship.

Due to the fact that the crowdworkers are not bound by instructions, there has been some discussion as to whether they fall under the category of a person 'similar to an employee' (*arbeitnehmerähnliche* person). In this case, they would be entitled, among other things, to the statutory minimum vacation (Section 2 sentence 2 of the German Federal Leave Act (*Bundesurlaubsgesetz*, 'BUrlG'), to anti-discrimination protection (Section 6(1) no. 3 of the General Act on Equal Treatment (*Allgemeine Gleichbehandlungsgesetz*, 'AGG') and access to the labour courts (Section 5(1) sentence 2 of the Labour Courts Act (*Arbeitsgerichtsgesetz*, 'ArbGG'). The requirement is that the workers are economically dependent and in need of social protection. For crowdworkers this could be the case under certain circumstances if they are predominantly working for one client. If, on the other hand, they are only active on one platform, which, however, contracts with various clients, no legal relationship similar to that of an employee arises. If that classification of a similarity fails, he or she is considered to be self-employed.

Italy (Ornella Patanè, Toffoletto De Luca Tamajo e Soci): As in Belgium also in Italy, in principle, riders could lawfully be hired as employees or can be contracted as independent contractors. According to general rules and principles this depends on how work is actually carried out and the monitoring that the employer has over the riders and their activity.

However, according to Italian pieces of legislation of 2015 and 2019, as construed by the Labour Inspectorate and the Ministry of Labour and as implemented by unions in a dedicated collective bargaining agreement, although it is possible for a digital platform to lawfully use contractors as riders, a very similar regulation and remuneration to the one provided for employees apply.

Indeed, if the riders have a collaboration with the digital platform that takes the form of mainly personal and continuous work and whose performance methods are organized by the principal or through platforms including digital platforms, employment regulations apply.

Furthermore, if instead the riders are independent contractors and do not fall within the above-mentioned regulation, they are in any case entitled to some protection similar to that for employees (e.g. minimum salary, indemnity for night-work, non-discrimination principles, insurance against accidents, compliance with health and safety rules).

The consequence of the above provisions is that, even when riders are independent contractors, they may have the right to work conditions very similar to those of employees.

In line with the above-mentioned principles, in a recent decision of the Tribunal of Florence dated 24 November 2021 between unions and Deliveroo, the Court held that the rules and the protection provided for in case of collective redundancy (e.g. information and consultation procedure) are also applicable to riders of digital platforms.

United Kingdom (Bethan Carney, Lewis Silkin LLP): The UK Court of Appeal also ruled last year that Deliveroo riders are not employees or 'workers' for broadly similar reasons to those set out in the case report above. The Independent Workers Union of Great Britain (IWGB), a trade union, had brought a claim to the Central Arbitration Committee (CAC) applying for collective bargaining rights for Deliveroo riders. The CAC rejected this application on the basis that Deliveroo riders were not 'workers' within the meaning of the relevant definition (in Section 296 of the Trade Union and Labour Relations (Consolidation) Act 1992). An individual is a 'worker' if they work (or normally work or seek to work) (a) under a contract of employment, or (b) under any other contract whereby they undertake to do or perform personally any work or services for another party to the contract who is not a professional client of theirs. The CAC found that Deliveroo riders could not be employees or limb (b) workers because they had a genuine right to use a substitute to perform deliveries for them. This right was incompatible with an obligation to provide services personally which has been held to be necessary for any kind of worker or employee status.

The IWGB appealed, first to the High Court and then to the Court of Appeal. Both appeals failed. The Court of Appeal agreed that the CAC had been entitled to find that the riders were genuinely under no obligation to provide services personally and that they had a virtually unlimited right of substitution. The Court of Appeal said that an obligation of personal service was an "indispensable feature of the relationship of employer and worker".

In its decision, the Court of Appeal addressed the recent Supreme Court (SC) decision in the *Uber* case, in which the SC found that Uber drivers *were* workers. The *Uber* decision is the leading case in the UK on employment status. The Uber drivers did not have a right of substitution and Uber had sought to exercise much more control over its drivers than Deliveroo sought to exercise over its riders.

The SC observed that the general purpose of employment legislation governing working hours and minimum

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wage etc. is to protect vulnerable workers. The fact that a business is often in a position to dictate contract terms gives rise to the need for statutory protections in the first place. This is similar to the Belgium approach which determines 'subordination' to be a key factor in an employment relationship.

Adopting this approach to determining whether Uber drivers were 'workers', the SC concluded that, although the drivers had substantial autonomy and independence in some respects, the factual findings of the Employment Tribunal justified its conclusion that the drivers were workers. In particular, Uber's control over their remuneration was of major importance. The drivers' ability to charge less but not more than the fare suggested by Uber meant that their notional freedom was of no possible benefit to them. Overall, drivers' services were in fact "very tightly defined and controlled by Uber".

As in the Belgium case above, the UK courts have noted the considerable freedom Deliveroo riders have and lack of control exercised by Deliveroo over them and deemed this incompatible with worker status.

One significant difference, however, between UK employment law and that in Belgium is that in the UK there is no equivalent of the 'collaborative economy regime' special status. There are three possible employment statuses for employment law purposes – employee, worker or self-employed. And none of these are specific to the 'gig' economy.

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