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The 4th IR: An Analysis of Recent Judgments in Different Countries Regarding Platform Work – Need for Better Protection Regardless of Employee-Status

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Agenda

I) Introduction

II) What is happening...

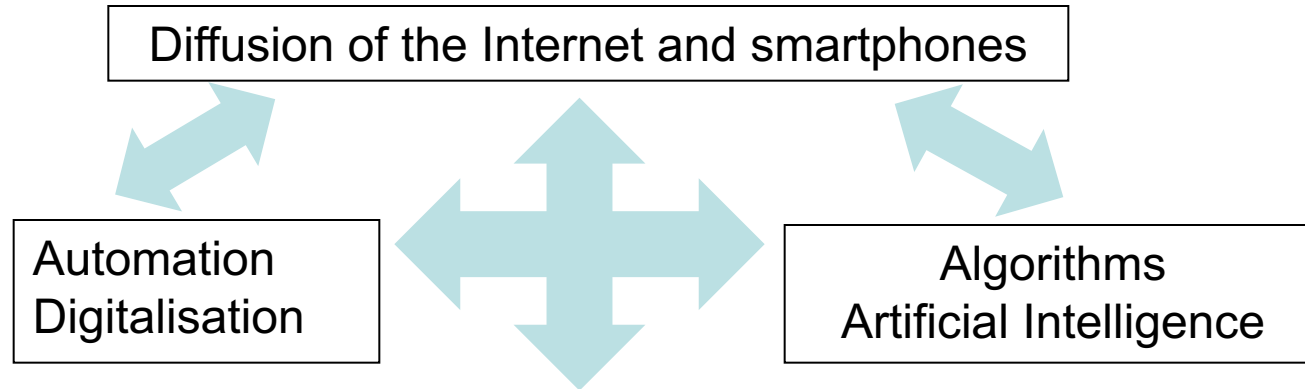
III) Platform-related Labour Law Court Decisions

IV) Analysis

V) Final remarks

VI) Appendix

II) What is happening ...

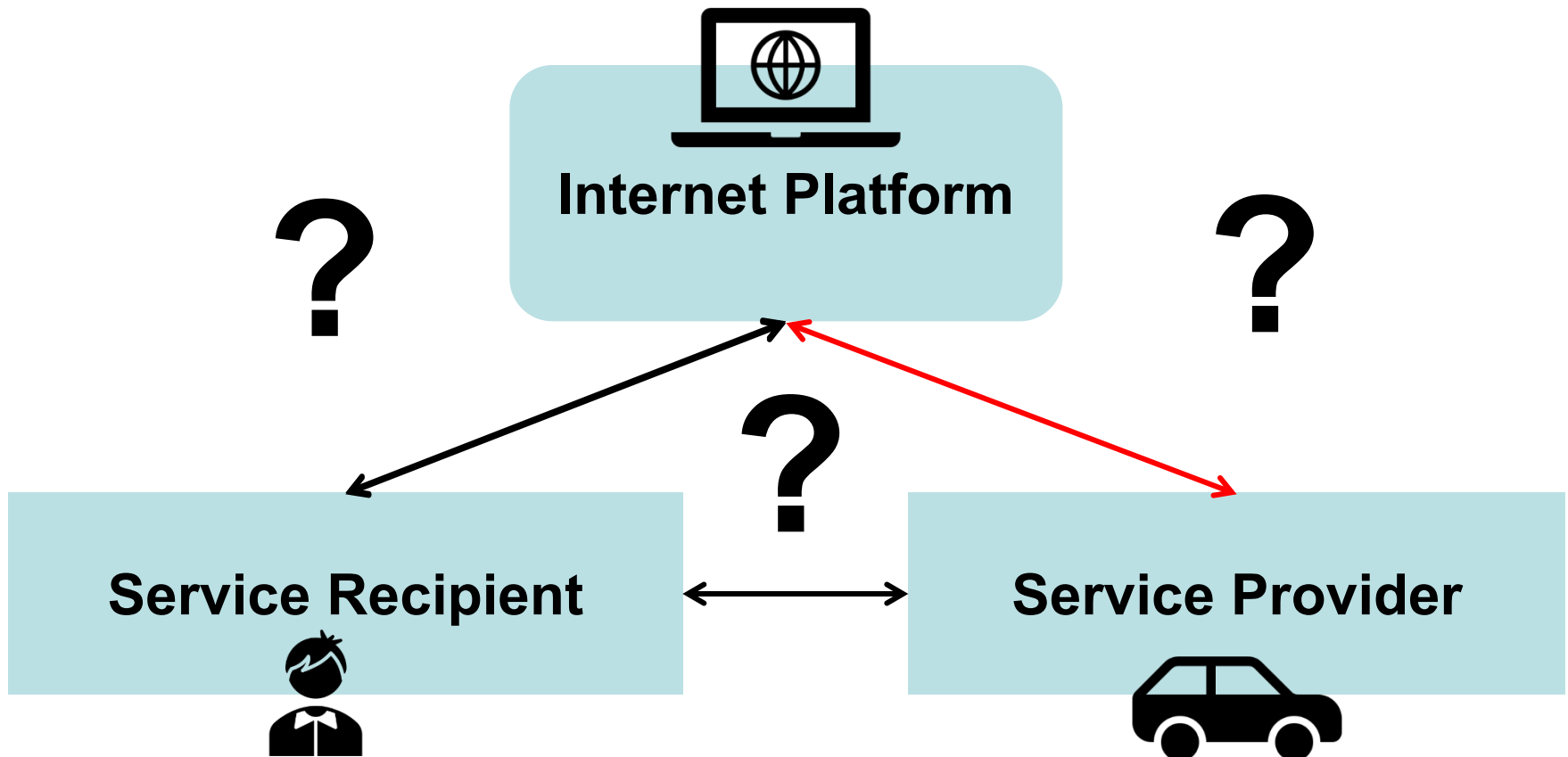


- Workers will be replaced by robots
- Work processes are becoming more standardised and transparent
- Extension of employee surveillance
- De-localisation of work
- Risk of overwork, health problems and negative effects on family life
- Backwards step in terms of protecting the privacy of employees
- Analytics predicting future employee behaviour - potential for exclusion and stigmatisation of particularly vulnerable people

Something interesting is happening ...

“Uber, the world’s largest taxi company, owns no vehicles. Facebook, the world’s most popular media owner, creates no content. Alibaba, the most valuable retailer, has no inventory. And Airbnb, the world’s largest accommodation provider, owns no real estate. Something interesting is happening.” (Tom Goodwin, 2015)

The Platform Business: How does it work?



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Some words about the preliminary question....

- Court of Justice of the European Union
 - *Asociacion Profesional Elite Taxi v Uber Systems Spain SL*, C-434/15
 - See as well *Uber France SAS*, C-320/16

ECJ-Case *Asociacion Profesional Elite Taxi v Uber Systems Spain SL*, C-434/15ns

National Procedure:

- Elite Spain vs UBER (Unfair Competition)
- UBER-Activities = Transport service or not (EU-Law concerned or not)?

The ECJ-Judgment:

- Holistic approach – Intermediation of drivers and customers is part of a complex framework, the main activity is transport
- UBER organizes & controls the transport service
- UBER activity = transport service

The UBER-Test:

- Interdependence of services (brokerage and transport)
- Definition and control of the service

Judgments in Canada

- 01/2019: *Heller v. Uber Technologies Inc.*, 2019 ONCA 1
 - Now pending at the Supreme Court: *Uber Technologies Inc., et al. v. David Heller*, Case No. 38534
- *Agence du revenu du Québec, et al. v. Uber Canada Inc.*, Case No. 36882 (pending at the Supreme Court, concerning tax law)
- *Uber Canada Inc. v. Agence du revenu du Québec, et al.*, Case No. 37248 (pending at the Supreme Court, concerning tax law)
- Ontario Labour Relations Board: case against Foodora (concerning union rights of Foodora couriers in Toronto), (2020) OLRB Case No: 1346-19-R (“Foodora”).

Judgments in the UK

UK: three different types of "worker-status"

–Independent worker

–Worker

–Employee

- 12/2018: *Uber v Aslam* [2018] EWCA Civ 2748, pending before the Supreme Court
 - Uber dictated various aspects of the work carried out by its drivers = worker status for the drivers
- 01/2017: *Dewhurst v Citysprint UK Ltd*, Case No. 2202512/2016
 - The self-employed status is in simply fictitious = worker status for the drivers
- 06/2018: *Pimlico Plumbers Ltd & Anor v Smith* [2018] UKSC 29
 - Some flexibility over the working hours and classification as self-employed for tax is not relevant = worker status for the drivers
- 12/2018: *Independent Workers Union of Great Britain v Rooffoods Limited (t/a Deliveroo)* [2018] EWHC 3342
 - Deliveroo drivers can substitute their tasks = independent contractors

Judgments in France

01/2019: Uber, Cour d'appel de Paris, N° RG 18/08357

- Uber have the power to control and sanction, so, there was sufficient evidence to hold that the drivers were subordinated when connected to the Uber platform = employee status for Uber-drivers

11/2018: Take eat easy, Cour de Cassation, Arrêt n° 1737

- existence of an employment relationship does not depend either on the will of the parties or on the designation given by the parties to their agreement; it depends on the actual circumstances in which the employees carry out their activity

Judgments in Switzerland

- Switzerland
 - No leading case of the Swiss Federal Supreme Court
 - 05/2019: *Rasier Operations B.V*, Tribunal de Prud'hommes de l'arrondissement de Lausanne
 - Swiss National Accident Insurance (SUVA) is in proceedings against Uber. SUVA has decided that Uber Switzerland is the employer of the driver and is therefore subject to compulsory accident insurance. The Case is pending before the 1st Instance-Court

Judgments in the USA

- Abulzahab et al. v. Uber Technologies et al., 31 Dec 2018, US District Court of Massachusetts
- Cotter et al. v. LYFT, 3 Sep 2013, US District Court for the Northern District of California, San Francisco Division
- Del Rio et al. v. Uber et al., 11 Aug 2015, California Northern District Court
- **Dynamex Operations West v. Superior Court, 2018, Supreme Court of California**
- Hood v. Uber et al., 26 July 2016, US District Court for the Middle District of North Carolina
- Lawson v. GrubHub, 9 Nov 2015, US District Court for the Northern District of California
- O'Connor et al. v. Uber Technologies et al., 16 Aug 2013; California Northern District Court

Judgments in the USA

- Price et al. v. Uber et al., 2014, Superior Court of California
- Razak et al. v. Uber et al., 4 Feb 2016, US District Court for the Eastern District of Pennsylvania
- **Vega v. Postmates, 29 Sep 2016, Unemployment Insurance Appeal Board/State of New York Supreme Court, Appellate division, 3rd Judicial Department**
- Yucesoy et al. v. Uber Technologies et al., 20 Jan 2015, California Northern District Court

The Dynamex – Case

Establishment of the ABC-Test:

- A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
- B) The person performs work that is outside the usual course of the hiring entity's business.
- C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

Judgments in Africa

- Kenya:
 - 03/2017: *Kanuri Limited & 34 others v Uber Kenya Limited* [2017] eKLR
- South Africa:
 - **01/2018: *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others (C449/17)*** [2018] ZALCCT 1; [2018] 4 BLLR 399 (LC); (2018) 39 ILJ 903 (LC)
 - 05/2019: *Mokhutswane v Uber South Africa (Pty) Ltd* (NCT/127401/2019/75(1)(b)) [2019] ZANCT 64
- Nigeria:
 - **12/2018: *Olatunji et al. v. Uber Technologies System Nigeria, No. NICN/LA/546/2017***

Uber Nigeria Case

- Uber-drivers claimed, that their status as "independent" is misclassified and that UBER failed to provide relevant benefits under the Labor Act.
- The Labour Court (2018): " (...:) the point from all of this is that the relationship between the parties is determinable based on the facts (....). Express contractual terms may even be ignored if they are inconsistent with the reality (...) Forms of work have changed and the traditional or orthodox distinctions between the worker/employee and the employer no longer exists or have been stretched to absurd limits. But all of this cannot be determined if there are no facts upon which the inquiry can be done as is the case in the instant suit. The claimants (...) supplied insufficient facts and evidence (...)."

Uber South Africa Case

Uber-riders were deactivated by the UBER app for various motives and claimed an abusive employer termination.

Commission for Conciliation, Mediation and arbitration (CCMA):

- drivers were employees as defined in s 213 of the Labour Relations Act (“LRA”) and that they were accordingly employed by the applicant (“Uber SA”).
- CCMA relied to Paragraph 213 of the LRA and to the statutory Code of Good Practice
- Reasons for the employee-status
 - drivers have to drive in their own name and may not out-source their driving to someone else,
 - Relationship to Uber is depending on the compliance
 - Control-measures of Uber

Uber South Africa Case

The Labour Court:

- Not enough evidence that UBER SA has an actual employer position
- UBER drivers are not employees of UBER SA. However, the Labour Court did not have to decide whether the UBER drivers are at most employees of Uber BV.

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- Platform economy raises questions in different areas of law (with different regulations in each country):
 - Labour law
 - Social security law
 - Competition law and antitrust law
 - Tax law and further more...
- Lessons learned from the Case-Law
 - Arbitration clauses may be declared illegal (Heller)
 - Importance of the actual circumstances (doesn't matter how the parties describe the contractual relationship)
 - Subordination is decisive for employment status (nowadays subordination may also be effected by an algorithm)
 - Lawsuits from trade unions with varying successes
 - Who is an employee? Is the ABC-test useful?
 - Who is the employer?

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- Right to work under decent conditions for all workers (regardless of the status of "employee")
- Platform work: often precarious and in the informal sector
- How can Labour Rights and Social protection be safeguarded for this group of workers?
 - Need for special regulation for platform-work?
 - Broader interpretation of the concept of employee?
 - What is the role for social partners?
 - What may be the potential for co-operative platforms?
 - Is there a chance for fair platform-work?

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Appendix I

- Notes on specific court rulings (which have not been mentioned previously)
- Federation of Dutch Trade Unions v. Deliveroo Netherlands, 2018, Court of Amsterdam, Netherlands (civil division)
 - Federation of Dutch Trade Unions v. Deliveroo Netherlands, 2018, Court of Amsterdam, Netherlands (civil division) [two cases in the CLA Annual Briefing]
 - Florian Ménard v. SAS Uber France et al., 23 Nov 2016, Conseil des prud'hommes de Paris (Paris Industrial Tribunal)
 - IWGB v. RooFoods Ltd, CAC, 28 Nov 2016, UK Central Arbitration Committee (CAC)/ 15 June 2018 High Court of Justice (Administrative division)
 - Plaintiff v. Deliveroo Netherlands, 2018, Court of Amsterdam, Netherlands (civil division)
 - Plaintiff v. Uber, Minas Gerais state labour court, Brazil
 - Víctor Sánchez v. Roofoods Spain, 2017, Juzgado de lo social N 6 de Valencia (Labour Court N 6 of Valencia)

Appendix II

Notes on legal articles:

- Benjamin Paul (2004): An Accident of History: Who Is (and Who Should Be) an Employee under South African Labour Law, *Industrial Law Journal*, p. 787 et seqq.
- Benjamin Paul (2010): Decent Work and Non-standard Employees Options for Legislative Reform in South Africa – A Discussion Document, *Industrial Law Journal*, p. 845 et seqq.
- Malherbe Kitty/Mokoena Kgomotso (2019): Le droit du travail et la «révolution technologique» en Afrique du Sud, *Revue de droit comparé du travail et de la sécurité sociale*, p. 90 et seqq.
- Mokoena Kgomotso (2016): Are Uber drivers employees: A look at the emerging business models and whether they can be accommodated by South African Labour Law, *Industrial Law Journal*, p. 1574 et seqq.
- Van Eck Stefan/Nemusimbori Enerst (2018): Sad to say, but not employees of Uber SA., *THRHR* 81, p. 473 et seqq.

Appendix III

Notes on legal articles:

- Countouris Nicola (2014), Uses and Misuses of ‘Mutuality of Obligations’ and the Autonomy of Labour Law, in: Bogg/Costello/Davies/Adams-Prassl, The Autonomy of Labour Law, p. 169 et seqq.
- Davidov Guy (2005): Who is a Worker?, Industrial Law Journal, p. 57 et seqq.
- Davidov Guy (2016): A purposive approach to labour law, Oxford
- De Stefano Valerio (2015): The Rise of the «Just-in-Time Workforce»: On-Demand Work, Crowd Work and Labour Protection in the «Gig-Economy», ILO, Conditions of work and employment series, No. 71
- De Stefano Valerio/Aloisi Antonio (2019), Fundamental Labour Rights, Platform Work and Human-Rights Protection of Non-Standard Workers, in: Bellace/ter Haar, Research Handbook on Labour, Business and Human Rights Law, p. 528 et seqq.
- Graham Mark/Woodcock Jamie (2018): Towards a Fairer Platform Economy Introducing the Fairwork Foundation, Alternate Routes 29, p. 242 et seqq.
- ILO (2018): Digital labour platforms and the future of work: Towards decent work in the online world

Thank you

for your attention.