



IOE Policy Paper on Industrial Relations and Independent Contractors

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Introduction

The future of work has transformed the landscape of the labour market by creating new work opportunities, as well as new challenges to the existing labour framework. In particular, the category of independent contractors, including those working in the gig and platform economy (crowd workers and “workers on demand through an app”¹) can raise in some circumstances challenging legal and policy questions in the context of industrial relations.

As the category of independent contractors continues to diversify in some countries, it is important to gain a better understanding and greater clarification of the current status and rights entailed and to ensure that law and labour policies remain relevant and fit for the changing realities.

This paper focuses particularly on the different definitions and practices, as well as the situation of independent contractors with regards to their ability to access collective representation through joining a trade union or an employers’ organisation, and to negotiate their pay and working conditions individually or collectively. In many countries that have started this debate already, the key question remains as to whether independent contractors, including self-employed workers in the platform economy are so dependent on a single contractor that they should be considered as quasi-equivalent to employees.

The paper is structured as follows: **Part I** will discuss the status of independent contractors and highlight the importance of such a classification in terms of law and practice. It will present some examples of how national legislations and case law define the status of independent contractors across different regions.

Part II will examine the current status of industrial relations for independent contractors in terms of collective representation and collective bargaining through specific examples of new initiatives of representation and collective agreements that have been signed to date. The examples provide a broad illustration and should not be taken as best practices.

“Independent contractors” and “self-employed workers” are used as synonyms throughout the paper.

The Status of Independent Contractors

There is no international legal definition of independent contractors or of employees, since this is a matter for national regulations and practices. Independent contractors refer to individuals who work autonomously to provide goods and services to clients in exchange for payment. Unlike employees who

¹ “Crowdwork” refers to working activities that imply completing a series of tasks through an online platform. “Work on-demand via apps” is a form of work in which the execution of traditional working activities such as transport, cleaning and running errands, but also forms of clerical work, is channelled through apps managed by firms that also intervene in setting minimum quality standards of service and in the selection and management of the workforce. Valerio De Stefano, “The rise of the “just-in-time workforce”: on-demand work, crowdwork and labour protection in the gig-economy”; International Labour Office, Inclusive Labour Markets, Labour Relations and Working Conditions Branch, 2016 Conditions of work and employment series; No. 71.

work under an employment contract with the supervision and control of their employer and do not bear the entrepreneurial risk, independent contractors enjoy the freedom to determine their own working terms and conditions under a contractual agreement of supply of goods and services. Independent contractors own the economic unit for which they work and control their own activities. They may work on their own, or in partnership with other independent contractors. Given their independence and control, they are business undertakings that bear their own economic risks and are responsible for tax and social security obligations.²

Legal definitions of employees or independent contractors are not available in all national systems. The debate over the definitions is resolved mainly by judges called to decide *ex-post* the status of independent contractors or employees. For the case of platform workers, after the judicial intervention, some countries have categorised them as employees (eg. Japan), while other countries (eg. UK) classified them as ‘workers’ – a new category between employees and self-employed with a specific set of rights.

Most national courts determine whether a worker is an employee or self-employed through an assessment based on a wide range of factors. These include financial dependence, degree of control and subordination, ownership of tools and machineries, regularity of payments, extent to which the workers bear financial and entrepreneurial risks and degree of discretion over the continuation of the relationship. Based on these factors, national courts can determine whether the status given to the worker with an employment or contractual arrangement for goods and services supply reflect or not the actual reality. It is worth noting that this legal question is not new and has appeared regularly before Labour Courts. However, given the specific characteristics of workers in the gig and platform economy, such questions have become one of the reasons for reclassification by national courts.

The following sections will focus on illustrating, with some examples, how different countries around the world define or may determine the category of independent contractors in their national regulation and case law. It is important to highlight that the national context of each country varies greatly and therefore these examples should be taken as mere illustrations rather than best practices.

North America

In **Canada**, there is no clear definition of independent contractor at the federal and provincial level. While the federal Canada Labour Code³ and provincial labour laws like Ontario Labour Relations Act⁴ clearly define ‘employee’, ‘employer’ and ‘dependent contractor’, they do not provide any statutory definition of an ‘independent contractor’.

² “Independent workers” have been defined for statistical purposes in the [Resolution](#) concerning statistics on work relationships adopted by the ILO through in October 2018, (ILCS/20/2018/Resolution I) as follows: *“Independent workers own the economic unit for which they work and control its activities. They make the important strategic and operational decisions about the economic unit for which their work is performed and the organization of their work, are not accountable to or supervised by other persons, nor are they dependent on a single other economic unit or person for access to the market, raw materials or capital items. They may work on their own account or in partnership with other independent workers and may or may not provide work for others. The category of “independent workers” in the classification of status in employment provides the best starting point for the identification and compilation of statistics on entrepreneurs”*.

³ Canada, Labour Code, R.S.C, 1985, c. L-2, available at <https://laws-lois.justice.gc.ca/PDF/L-2.pdf>.

⁴ Canada, Labour Relations Act, 1995, S.O. 1995, c.1, Sched. 1, section available at <https://www.ontario.ca/laws/statute/95l01>.

For our purpose, the federal and provincial labour law broadly defines ‘dependant contractor’ as:

*“a person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor”.*⁵

Given the similarities with an employment relationship, dependant contractors are often included under the definition of ‘employee’ and are granted many of the same rights and entitlements as employees, such as the right to collective representation and the right to collective bargaining. The Ontario Labour Relations Act⁶ allows dependent contractors to join other employees in a bargaining unit. Similarly, the British Columbia Labour Relations Code⁷ permits dependent contractors to collectively negotiate certification with the labour board.

In the **United States**, there is no uniform definition of ‘employee’ under federal or state laws, and no single test to determine conclusively whether a worker should be classified as an employee or an independent contractor. Most courts instead adopt the common law test approach to examine whether the hiring party retains the right to control the manner and means by which the work is done.

For instance, in *Raef Lawson, v. Grubhub Inc.*,⁸ the District Court of Northern District of California found that the complainant who delivered food for a platform company, Grubhub, was an independent contractor, as the company lacked all necessary control of his work, including how he performed his deliveries. Similarly, in *Razak v. UberBlack*,⁹ the District Court of Eastern District of Pennsylvania held that the drivers are independent contractors, not employees, due to the company’s lack of control of how the work is to be performed. In addition, the Court noted other factors indicating an independent contractor status, including the control to decline trip requests, the ownership of vehicles and the lack of permanence of the working relationship.

⁵ See Canada, Labour Relations Act, 1995, S.O. 1995, c.1, Sched. 1, section 1 available at <https://www.ontario.ca/laws/statute/95l01>. Note that the wording of the definitions under federal law and other provinces varies slightly.

⁶ Canada, Labour Relations Act 1995, S.O. 1995, c.1, Sched.A, available at <https://www.ontario.ca/laws/statute/95l01>.

⁷ Canada, Labour Relations Code [RSBC 1996] Chapter 244, available at http://www.bclaws.ca/civix/document/id/complete/statreg/96244_01.

⁸ United States, *Raef Lawson, v. Grubhub, Inc*, Case No. 15-cv-05128-JSC, United States District Court of Northern District of California, 8 February 2018, available at <https://www.courthousenews.com/wp-content/uploads/2018/02/grubhub-ruling.pdf>.

⁹ United States, *Razal v. UberBlack*, United States District Court of Eastern District of Pennsylvania, 11 April 2018, available at <https://www.isdc.ch/media/1591/14-razak-v-uber.pdf>.

In terms of collective bargaining, the federal National Labour Relations Act¹⁰ protects the employees' right to form unions and to engage in collective bargaining, but not independent contractors. However, although there are no statutory collective bargaining rights for independent contractors, some collective bargaining agreements have been concluded between independent contractors and companies in the United States (see Part II(B) of this paper).

Asia and Pacific

In **Australia**, there is no statutory definition of “independent contractor” or “employee” at the federal and state levels. The Independent Contractors Act 2006¹¹ merely states that an independent contractor “*is not limited to a natural person*”.

The Courts have adopted common law tests similar to the US in determining the classification of an employee or independent contractor based on the existence of fidelity and loyalty, as well as the degree of control in the contractual relationship.

For example, in *Mr Michail Kaseris v. Rasier Pacific V.O.F.*,¹² the Fair Work Commission¹³ declared that app-based drivers are independent contractors, not employees. The Commission considered that the drivers have full control over the way they provide the service; they possess their own vehicle, smartphone and wireless data plan; and they also fully assume the costs of insurance and did not wear any uniform or logos of the company.

Regarding collective bargaining, independent contractors are subject to the anti-competitive conduct provisions under Part IV of the Competition and Consumer Act 2010.¹⁴ This means that collective bargaining by businesses that may be detrimental to competition and consumer welfare is prohibited. However, in certain circumstances, collective bargaining conduct can be beneficial for competition and Part II(B) of this paper will present an example of a collective agreement signed between a platform company and a trade union in Australia.

In **Japan**, the Labour Standards Law¹⁵ provides a definition of “workers” as “*one who is employed at an enterprise or place of business (hereinafter referred to simply as an enterprise) and receives wages therefrom, without regard to the kind of occupation*” (Article 9). Given the objective of this Act – that is to determine working conditions under employment and labour contracts (“Working conditions should be determined by the workers and employers on an equal basis; The workers and employers shall abide by collective agreements, rules of employment and labour contracts, and shall discharge their

¹⁰ United States, National Labor Relations Act; 29 U.S.C. §§ 151-169, available at <https://www.ilo.org/dyn/travail/docs/2367/NationalLaborRelationsAct.pdf>.

¹¹ Australia, Independent Contractors Act 2006, No. 162, 2006, available at <https://www.legislation.gov.au/Details/C2018C00359>.

¹² Australia, *Mr Michail Kaseris v Rasier Pacific V.O.F.* [2017] FWC 6610 (21 December 2017) available at <https://www.fwc.gov.au/documents/decisionssigned/html/2017fwc6610.htm>.

¹³ Fair Work Commission is Australia's national workplace relations tribunal responsible for administering the provision of the Fair Work Act.

¹⁴ Australia, Competition and Consumer Act 2010 (Cth), Part IV, available at <https://www.australiancompetitionlaw.org/legislation/2010cca.html>.

¹⁵ Japan, Labour Standards Law, Law No. 49 of 7 April 1947 as amended through Law No. 107 of 9 June 1995, available in English at <https://www.ilo.org/dyn/natlex/docs/WEBTEXT/27776/64846/>.

respective duties faithfully”), this definition is most probably related to employees and not self-employed workers. There is no definition of ‘independent contractor’ in this Law.

With regards to the classification of workers, in the case of *Niigata Chiho Saibansho*,¹⁶ the Niigata District Court held that a worker who delivered concrete products should be categorised as an employee, even though he used his own truck for making deliveries. The Court found that, after deducting the maintenance expenses for the truck, the worker’s salary was not high enough to be deemed as an independent contractor. In other words, the worker was dependant on the company as an employee and therefore subject to the protection under the labour standards Law.

Japanese regulation has also a specific definition of “workers” that have access to collective representation and negotiate through collective agreements. Article 3 of the Labour Union Act defines “workers” as those “persons who live on their wages, salaries, or other equivalent income, regardless of the kind of occupation”. These “workers” may form a union and negotiate collective agreements, despite their status of employees or independent contractors.

For example, in the case of *INAX Maintenance Co*,¹⁷ the Supreme Court recognised self-employed contractors of a household maintenance and cleaning company as “workers” under the Labour Union Act. The self-employed contractors established their own union affiliated with the All Japan Construction, Transport and General Workers Union. They attempted to negotiate with the company for higher wages and paid overtime work. The Court held that they were “workers” under the Labour Act on the fact that their service was unilaterally determined and controlled by the company.

Europe and Central Asia

At the European Union (EU) level, there is a clear set of rules and definitions that prevails over the national laws of the EU member States. **The extension of the right to collective bargaining to self-employed workers is not supported by EU Law**, since it is in conflict with the competition rules of EU law, especially with regards to the scope of [Article 101\(1\) of the TFEU](#), which provides:

“[t]he following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, [...]”.¹⁸

The conflict lies in the fact that “self-employed” (as defined by the national legislations) are considered as “undertakings” under the competition rules of EU law and therefore subject to Article 101(1) of the

¹⁶ Japan, *Niigata Chiho Saibansho*, 22 December 1992, Rohan No. 629, 117. See <https://onlabor.org/employees-or-independent-contractors-insights-from-japan/>.

¹⁷ Japan, *INAX Maintenance Co*. S.C. 12 April 2011. See <https://www.idiproject.com/sites/default/files/materials/21-Kozuka.ppt>.

¹⁸ EU, Consolidated versions of the Treaty on the Functioning of the European Union, 2012/C, 326/01, article 101(1), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>.

TFEU. Therefore, independent contractors have no legitimate possibility to negotiate and sign a “collective agreement”.

This situation appeared in the case of *FNV Kunsten Informatie en Media v Staat der Nederlanden*,¹⁹ where a trade union concluded a collective agreement with a company for and on behalf of its members, who were self-employed musicians. The European Court of Justice (ECJ) held that:

“it must be held in that regard that, although they perform the same activities as employees, service providers such as the substitutes at issue in the main proceedings, are in principle ‘undertakings’ within the meaning of Article 101(1) TFEU, for they offer their services for remuneration on a given market and perform their activities as independent economic operators in relation to their principal.

[...]

*In those circumstances, it follows that a provision of a collective labour agreement, such as that at issue in the main proceedings, in so far as it was concluded by an employees’ organisation in the name, and on behalf, of the self-employed services providers who are its members, does not constitute the result of a collective negotiation between employers and employees, and cannot be excluded, by reason of its nature, from the scope of the Article 101(1) TFEU.”*²⁰

In other words, the ECJ specified the meaning of “undertaking” and of employees and stated that there should be a double test both with regards to subordination (labour law) and economic dependence (competition law) with regards to self-employed workers. The ECJ also acknowledged the need to distinguish between false self-employed workers and genuine self-employed (who are undertakings).

Now turning to the national legislation of some EU member States, in **France**, independent workers were considered as anyone not meeting the basic characteristics of a ‘wage-earner’ and who are subject to legal subordination in exchange for remuneration. In 2008, a proper legal definition of ‘independent contractor’ was established to qualify any person who provides goods or services for a client under a contractual agreement. More recently, the Law of 8 August 2016 introduced a separate category of self-employed who work for online platforms. This law grants platform workers the right to constitute and to join a trade union, as well as the right to assert their collective interests through its intermediary.²¹

¹⁹ ECJ, *FNV Kunsten Informatie en Media v. Staat der Nederlanden*, C-413-13, Jugement of the Court (First Chamber). 4 December 2014.

²⁰ ECJ, *FNV Kunsten Informatie en Media v. Staat der Nederlanden*, C-413-13, Jugement of the Court (First Chamber). 4 December 2014, paras 27 and 30.

²¹ France, Article 60 of Law No. 2016-1088 of 8 August 2016 Regarding Labor, Modernizing Labor Relations, and Securing Career Tracks (1), available at <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000032983213&categorieLien=id>.

Concerning case law, the French Courts have confirmed that platform workers are independent contractors in two separate cases. In *M. Dubost v. Take Eat Easy*,²² the Paris Court of Appeal held that riders of the platform cannot be classified as employees as they have wide freedom to choose when they want to work. It held that the existence of disciplinary power and actions to the rider was not sufficient to be characterised as a subordinate relationship. Similarly, in *Florain Ménard v. SAS Uber France*,²³ the Court ruled out employee status because the company had no control of the workers' working hours and the driver was under no obligation of presence or duration of the connection.

In **Ireland**, Part 2B of the Competition Amendment Act of May 2017 entitled "Application of section 4 of Principal Act to collective bargaining and agreements in respect of certain categories of workers"²⁴ introduced exemptions to the application of competition law for certain categories of self-employed workers, including voice-over actors, session musicians, freelance journalists, fake self-employed and fully dependent self-employed. These categories of workers are exempted from the application of Article 101(1) of the TFEU within the Irish context and may conclude collective agreements with companies.

According to the Competition Amendment Act of 2017, the list of exempted workers may be extended by the Minister of Labour, upon the request of trade unions and by demonstrating that the proposed category of fake self-employed and fully dependent self-employed: "(i) will have no or minimal economic effect on the market in which the class of self-employed worker concerned operates, (ii) will not lead to or result in significant costs to the State, and (iii) will not otherwise contravene the requirements of this Act or any other enactment or rule of law (including the law in relation to the European Union) relating to the prohibition on the prevention, restriction or distortion of competition in trade in any goods or services" (Article 15F (2)).

However, despite this Act being passed in Ireland, it is still contrary to EU competition law which prevails over national legislation. Hence, if a dispute under this law arises, the Irish Government could be held accountable before the ECJ or through an infringement procedure under Article 258 of the TFEU.²⁵

In **Germany**, there is no single statutory definition of independent contractor. The distinction between an employee and an independent contractor is determined under various criteria, partly from German regulations and from decisions of labour or administrative courts. The Commercial Code (*Handelsgesetzbuch*)²⁶ indicates that an independent contractor has the distinction of being able to freely determine his or her performance as well as his or her working time.

The German Federal Labour Court (*Bundesarbeitsgericht*) has generally adopted the principle of dependence in determining whether an individual should be considered an employee or an independent contractor. The assessment is based on the scope of instructions which the

²² France, *M. Dubost v. Take Eat Easy and CGEA ILE DE FRANCE OUEST*, Cour d'appel de Paris, 20 April 2017, available at <http://www.gov-up.com/wp-content/uploads/2017/07/TEE-CA-Paris-Ruling-of-April-20-2017.pdf>.

²³ France, *Florain Ménard v. SAS Uber France, Uber B V*, Conseil de Prud' hommes de Paris, 29 January 2018, available at <http://www.diritto-lavoro.com/wp-content/uploads/2018/02/sentenza-del-29-gennaio-2018.pdf>.

²⁴ Ireland, Competition (Amendment) Act 2017, Part 2B, available at <http://www.irishstatutebook.ie/eli/2017/act/12/section/2/enacted/en/html#sec2>

²⁵ EU, Consolidated versions of the Treaty on the Functioning of the European Union, 2012/C, 326/01, article 258, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>.

²⁶ German, Commercial Code, Act of 18 July 2017 (Federal Law Gazette Part I p. 2745), available in English at https://www.gesetze-im-internet.de/englisch_hgb/index.html.

client/employer may give on the content, type, time, duration and place of the performance. In other words, the more the client/employer may determine the work performance of the contractor, the more likely that the contractor is an employee.

Relating to collective bargaining, antitrust regulation prohibits self-employed workers who are recognised as companies to agree on price fixing. However, Article 12a of the German Collective Agreement Act (*Tarifvertragsgesetz*)²⁷ allows for the conclusion of collective agreements for self-employed workers who are legally considered to be ‘similar to employees’ on grounds of their ‘economic dependence’, where more than 50% of their income – or 30% in the media sector – derives from contracts with a single client or employer. On this basis, a number of single-employer collective agreements exist with many broadcasting companies on compensation for self-employed workers.

In **Spain**, the Self-employed Workers’ Statute (Act 201 of 11 July 2017)²⁸ introduced a third category of workers in between employees and self-employed workers, known as ‘*trabajadores autónomos económicamente dependientes*’ (TRADE) in Spanish or ‘economically dependent self-employed’ in English. In particular, Article 11 defines these ‘economically dependent self-employed’ as those who, in return for remuneration, carry out an economic activity or a profession, personally, directly and predominantly for an individual or an organisation on whom they are financially dependent, as granting them at least 75 percent of their income. The dependent self-employed can form their own professional organisations like trade unions and to negotiate working conditions by means of collective agreement (Chapter III of the Law).

An example of this is the case of *D. Doroteo v. Glovo*,²⁹ where the Court held that the rider was not an employee but an ‘economically dependent self-employed worker’ because it did not involve the necessary dependence and subordination for the company. The Court found that the riders had no set working schedule or working hours; Glovo had no disciplinary control over the riders; the riders bear their own risks and liability for each other; the riders’ earnings depended directly on the number of deliveries made; Glovo did not require riders to justify their absence; and there was no exclusive agreement between the two parties.

On the contrary, in the case of *Tesorería General de la Seguridad Social v. Roodfoods Spain SL (owner of the app Deliveroo)*,³⁰ the Valencia Court classified riders of food delivery company Deliveroo as employees and ordered Deliveroo to reinstate the employees or pay them the corresponding compensation for unfair dismissal. The Court found that there were factors indicating dependence and specific to an employment relationship, namely that the company geolocates the riders at all times and has control of each delivery; the company gives instructions and sets the time and performance standards that the riders must follow when carrying out the delivery; the company sets the prices for

²⁷ German, Tarifvertragsgesetz in der Fassung der Bekanntmachung vom 25. August 1969 (BGBl. I S. 1323), das zuletzt durch Artikel 4f des Gesetzes vom 18. Dezember 2018 (BGBl. I S. 2651) geändert worden ist, available in German only at <https://www.gesetze-im-internet.de/tvg/BJNR700550949.html>.

²⁸ Spain, Law No. 20/2007, Official Gazette, No. 166, 12 July 2007, pp. 29964–29978, available at <http://www.boe.es/boe/dias/2007/07/12/pdfs/A29964-29978.pdf>.

²⁹ Spain, *D. Doroteo vs Glovo*, Judge No. 17 of Madrid in Sentence no. 12/19, 11 January 2019, available in Spanish [here](#).

³⁰ Spain, *Deliveroo*, Sentencia del Juzgado de lo Social núm. 5 de Valencia (España), de 27 de junio de 2019, available at <http://www.poderjudicial.es/search/openDocument/d2edb9c077f3f521>.

the services; the riders do not have the freedom to reject orders; and the company establishes the terms and conditions with the member restaurants and the customers.

Another case related to Spain, and settled by the ECJ is Case C-434/15, *Asociación Profesional Elite Taxi v. Uber Systems Spain SL*.³¹ The Court concluded that Uber is more than an intermediary service consisting of connecting, by means of a smartphone application, a non-professional driver using his or her own vehicle with a person who wishes to make an urban journey. It must be regarded as being inherently linked to a transport service and, accordingly, must be classified as ‘a service in the field of transport’ under Article 58(1) of the TFEU. Accordingly, this means that such a service must be excluded from the scope of the freedom to provide services in general (Article 58(1) of the TFEU), as well as the Directive on services in the internal market (Directive 2006/123) and the Directive on electronic commerce (Directive 2000/31). Although this case does not have any direct consequences on the status of Uber workers in Spain, it clearly established the type of activity of this platform company, which is important in terms of its obligations and responsibilities under the EU law.

In the **United Kingdom**, there are three categories of workers: employees, self-employed and workers. Section 230(3) of the Employment Rights Act 1996³² defines the mid-category of “workers” as individuals that undertake to do or perform personally any work or services for another party to the contract whose status is not that of a client or customer. Their work is done in exchange of a reward of money or a benefit in kind. “Workers” are entitled to certain employment rights, including: getting the National Minimum Wage; protection against unlawful deductions from wages; the statutory minimum level of paid holiday; the statutory minimum length of rest breaks; to not work more than 48 hours on average per week or to opt out of this right if they choose; protection against unlawful discrimination; protection for ‘whistleblowing’; to not be treated less favourably if they work part-time. They may also be entitled to: Statutory Sick Pay; Statutory Maternity Pay; Statutory Paternity Pay; Statutory Adoption Pay; Shared Parental Pay³³.

In the case of *Uber v. Aslam et al.*,³⁴ the Court of Appeal upheld the Employment Appeal Tribunal’s ruling³⁵ that its drivers should be classified as “workers” with access to basic rights, including minimum wage and paid holidays under Employment Rights Act 1996, the Working Time Regulations 1999 and the National Minimum Wage Act 1998. The Tribunal decided that despite the contractual agreement of self-employed work, the reality illustrated that the drivers were incorporated into the Uber business of providing transportation services, subject to arrangement and control, thus as “workers”. In the case of *Independent Workers’ Union of Great Britain v. RooFoods Limited T/A Deliveroo*,³⁶ the High Court of Justice – Queen’s Beach Division, Administrative Court upheld the Central Arbitration Committee’s

³¹ ECJ, *Asociación Profesional Elite Taxi v Uber Systems Spain SL*, Judgement, Grand Chamber, 20 December 2017, available at <http://curia.europa.eu/juris/document/document.jsf?jsessionid=4621D7576A28FD918683F47C50B302F3?text=&docid=198047&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=7310513>.

³² United Kingdom, Employment Rights Act 1996, section 230(3), available at <https://www.legislation.gov.uk/ukpga/1996/18/section/230>.

³³ Detailed information can be found in the UK Government Website: <https://www.gov.uk/employment-status/worker>

³⁴ United Kingdom, *Uber v. Aslam et al.* [2018] EWCA Civ 2748, 19 December 2018, available at <https://www.judiciary.uk/wp-content/uploads/2018/12/uber-bv-ors-v-aslam-ors-judgment-19.12.18.pdf>.

³⁵ United Kingdom, *Uber v. Aslam et al.*, Judgment, UKEAT/0056/17/DA, 10 November 2017, available at https://assets.publishing.service.gov.uk/media/5a046b06e5274a0ee5a1f171/Uber_B.V. and Others v Mr Y Aslam and Others UKEAT_0056_17_DA.pdf.

³⁶ United Kingdom, *Independent Workers’ Union of Great Britain v. RooFoods Limited T/A Deliveroo* [2018] EWHC 3342 (Admin), 5 December 2018, available at <https://www.bailii.org/ew/cases/EWHC/Admin/2018/3342.pdf>.

decision that platform riders are independent contractors, not workers who are part of an employment relationship. The main grounds for this decision was that the riders can accept or decline jobs, and most importantly they have the right to substitution. The Central Arbitration Committee stated that:

“[t]he central and insuperable difficulty for the union is that we find the substitution right to be genuine, in the sense that Deliveroo have decided in the new contract that riders have a right to substitute themselves both before and after they have accepted a particular job.

[...]

[i]n light of our central finding on substitution, it cannot be said that the riders undertake to do personally any work or services for another party.”³⁷

In terms of the right to collective bargaining, in the UK this right remains exclusive to employees and workers, but not self-employed.

Following these sections with national examples of Courts’ decisions, it is worth concluding with a **new instrument adopted at the level of the European Union**. Indeed, on 20 June 2019, the European Parliament and the European Council adopted a new Directive on transparent and predictable working conditions (No. 2019/1152).³⁸ Article 1 provides:

- 1. “The purpose of this Directive is to improve working conditions by promoting more transparent and predictable employment while ensuring labour market adaptability.*
- 2. This Directive lays down minimum rights that apply to every worker in the Union who has an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each Member State with consideration to the case-law of the Court of Justice.”*

Chapter III of the Directive outlines the minimum rights relating to working conditions. These include the maximum duration of any probation period, restrictions for parallel employment, minimum predictability of work, complementary measures for on-demand contractors, conditions for a transition to another form of employment, mandatory training and permission to maintain, negotiate and conclude collective agreements.

³⁷ United Kingdom, *Independent Workers’ Union of Great Britain v. RooFoods Limited T/A Deliveroo* [2018] EWHC 3342 (Admin), 5 December 2018, para 19, available at <https://www.bailii.org/ew/cases/EWHC/Admin/2018/3342.pdf>.

³⁸ EU, Directive 2019/1152 on transparent and predictable working conditions in the European Union, 20 June 2019, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019L1152&from=EN>.

As such, the Directive covers only workers in an employment relationship. However, paragraph 8 of the preamble also indicates that bogus self-employed workers also fall within the scope of this Directive.³⁹

“in its case law, the Court of Justice of the European Union (Court of Justice) has established criteria for determining the status of a worker.⁴⁰ The interpretation of the Court of Justice of those criteria should be taken into account in the implementation of this Directive. Provided that they fulfil those criteria, domestic workers, on-demand workers, intermittent workers, voucher based-workers, platform workers, trainees and apprentices could fall within the scope of this Directive. Genuinely self-employed persons should not fall within the scope of this Directive since they do not fulfil those criteria. The abuse of the status of self-employed persons, as defined in national law, either at national level or in cross-border situations, is a form of falsely declared work that is frequently associated with undeclared work. Bogus self-employment occurs when a person is declared to be self-employed while fulfilling the conditions characteristic of an employment relationship, in order to avoid certain legal or fiscal obligations. Such persons should fall within the scope of this Directive. The determination of the existence of an employment relationship should be guided by the facts relating to the actual performance of the work and not by the parties’ description of the relationship”.

Latin America

In **Brazil**, an employee is defined by the Brazilian Labour Code⁴¹ as an individual who works for an employer on a permanent basis, under its direction and in exchange of a salary. Professional subordination is an essential element in an employment relationship. On the other hand, an independent contractor relationship is regulated by the Brazilian Civil Law,⁴² which establishes that any company may enter into a contract with an individual to provide services as an independent contractor.

³⁹ EU, Directive 2019/1152 on transparent and predictable working conditions in the European Union, 20 June 2019, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019L1152&from=EN>.

⁴⁰ The Judgements mentioned in the Directive are the following: Judgments of the Court of Justice of 3 July 1986, *Deborah Lawrie-Blum v Land Baden-Württemberg*, C-66/85; 14 October 2010, *Union Syndicale Solidaires Isère v Premier ministre and Others*, C-428/09; 9 July 2015, *Ender Balkaya v Kiesel Abbruch- und Recycling Technik GmbH*, C-229/14; 4 December 2014, *FNV Kunsten Informatie en Media v Staat der Nederlanden*, C-413/13,; and 17 November 2016, *Betriebsrat der Ruhrlandklinik gGmbH v Ruhrlandklinik gGmbH*, C-216/15.

⁴¹ Brazil, Consolidation of Labour Laws [CLL], Decree Law No. 5452 (1093), as last amended by Act No 12347 of December 2010.

[Decreto-ley núm. 5452, de 1° de mayo de 1943, por el que se aprueba la Codificación de las Leyes del Trabajo texto compilado), available in Portuguese only at http://www.planalto.gov.br/ccivil_03/Decreto-Lei/Del5452compilado.htm.

⁴² Brazil, Lei n° 10.406, de 10 de janeiro de 2002 (Código Civil), available in Portuguese only at <https://wipo.lex.wipo.int/en/text/226198>.

Brazilian Labour courts have determined that factors indicating subordination include the lack of self-determination to decide how the work should be done; the control of hours of work; and the obligation to present reports and to observe previously established targets. For example, in *Artur Soares Nieto v. Uber Do Brasil Tecnologia Ltda., Uber International B.V. and Uber International Holding B.V.*,⁴³ the Court found that platform drivers are not employees, but independent contractors. It held that subordination is not defined by the driver's need to remain active on the platform. The company has no interference in the evaluation made by the users of the platform and therefore it is a risk assumed by both contracting parties.

In terms of collective bargaining, independent contractors do not have a right to collective bargaining as they are free to negotiate their own terms and conditions, including possible benefits and any other specific feature of their work under their contractual arrangements.

In **Chile**, the employment relationship exists when there is subordination or dependency between the employee and his/her employer. Article 3 of the Labour Code⁴⁴ defines a 'self-employed person' as a person who is in pursuit of the activity in question which is not dependent on any employer or has any workers under his dependence.

The Chilean courts have adopted this principle of dependency. In *R.A.T. CUÑADO v. Uber Chile Spa*,⁴⁵ the Court found that the drivers are self-employed as they are not dependent on the company. The drivers have absolute freedom to connect or disconnect to the system, as well as the control to accept or not the request. Furthermore, the company offered bonuses or incentives for drivers who connect on key dates.

In **conclusion**, the selection of examples above illustrates the different legal provisions and different reasonings national courts have given in determining whether workers have the status of independent contractors or employees. This legal classification is essential in determining access to employees' rights and protections.

⁴³ Brazil, *Artur Soares Nieto v. Uber Do Brasil Tecnologia Ltda., Uber International B.V. and Uber International Holding B.V.*, 30 January 2017, available at <https://www.conjur.com.br/dl/justica-trabalho-fixa-motorista-uber.pdf>.

⁴⁴ Chile, Labor Code [LC], consolidated version, DFL No. 1, as last amended by Act 20949 (Ley 20949) of 17 September 2016 (Código del Trabajo, texto refundido, coordinado y sistematizado), available in Spanish only at <https://www.leychile.cl/Navegar?idNorma=207436&idVersion=2017-06-09>.

⁴⁵ Chile, *R.A.T. CUÑADO v. Uber Chile Spa*, 14 July 2015, available in Spanish only at <https://jurisprudencia.vlex.cl/vid/581981886>.

Industrial Relations and Collective Rights for Independent Contractors

The following section explores whether independent contractors can have access to collective representation and collective bargaining. *The main issues concern whether independent contractors can join or form unions? If so, what is the mandate given to such unions? Can they represent them in negotiating collective agreements?*

Access to Collective Representation

To begin, the right to collective representation is one of the core principles in the ILO Constitution.⁴⁶ It is also contained in the ILO Fundamental Convention on the Freedom of Association and the Protection of the Right to Organise (No. 87)⁴⁷, which 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” (Article 2). Collective representation assists workers and employers to voice their common interests and concerns.

In recent years, some new vehicles and initiatives have emerged to represent individual contractors. Some of them have decided to join a trade union or an employer’s organisation.

New trade unions have emerged. For example, the Workers Centre and the Freelancers Unions were established in the **United States** to advocate for independent workers. Similarly, a new website called “Faircrowd.work” established by a cross-border collaboration of the German IG Metall, the Austrian Union Confederation, the Austrian Chamber of Labour and the Swedish Unionen, provide information and advice to support platform workers on working conditions based on online surveys. In **Italy**, the largest trade union CGIL created a specific branch (NIDIL) devoted for independent workers. In **Slovenia**, Sindikat prekarcev, which is part of the main union confederation, ZSSS, has sought to represent “non-classical workers” since 2016. Furthermore, in **Germany**, IG Metall, the largest trade union amended its statutes in 2015 to allow the self-employed workers to join.⁴⁸

Likewise, employers’ association have also set up branches or separate organisations to assist independent contractors and start-ups, including platform companies. For instance, ICTswitzerland is the umbrella organisation for the digital economy. It was founded in 1980 and brings together 31 large and medium-sized enterprises, along with 21 associations. ICTswitzerland represents their interests towards politicians, the industry and the general public. It aims to promote and develop digital technologies, and to educate and further train ICT specialists.

⁴⁶ ILO Constitution 1919, available at

http://www.ilo.ch/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO.

⁴⁷ ILO Freedom of Association and Protection of the Right to Organise Convention 1948 (No.87), available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C087.

⁴⁸ See OECD, “Chapter 5. Facing the future of work: How to make the most of social dialogue and collective bargaining”, DESLSA/ELSA/WP5(2019)4, 11-12 February 2019.

Furthermore, employers' associations have also extended their membership to include other new innovative companies. For example, in **Denmark**, the Confederation of Danish Industry (*Dansk Industri*) admitted Uber among its members, which resulted in 4x48 TaxiNord, Denmark's second largest taxi company, withdrawing its membership as a sign of protest. The Supreme Court decision fining Uber for violating taxi law led to Uber's withdrawal from the Danish market in 2017, and, as a consequence, Taxi Nord entering again the membership of the Confederation of Danish Industry. In **Italy**, a group of major food delivery companies has set up a new employers' association to represent their business and negotiate with the Government and the couriers' associations. In **Slovakia**, Uber has become a member of the National Union of Employers and the professional association of information technology companies (ITAS).

Access to Collective Bargaining

The effective recognition of the right to collective bargaining is another key principle under the ILO Constitution⁴⁹ and the Declaration of Philadelphia.⁵⁰ In addition, Article 4 of the ILO Fundamental Convention on the Right to Organise and Collective Bargaining (No. 98) establishes that:⁵¹

“[m]easures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements”.

Convention No. 98 is explicitly clear that it only applies to workers who are under an employment relationship as Article 4 refers to “*the regulation of terms and conditions of employment by means of collective agreements*”. Hence, independent contractors are not covered under Convention No. 98, as they work for their self-regulating interests tailored to their own individual needs. The possibility for independent contractors to decide on their working terms and conditions collectively would pose risk to the free markets by forming cartels and engaging in fix pricing, contrary to the principles of fair competition.

However, in practice, some collective agreements between unions and companies on behalf of independent contractors have been signed in several countries. The examples below remain limited and specific to the single case, industry and national context. Therefore, they should be considered as mere examples and not the standard norm or best practices.

⁴⁹ ILO Constitution 1919, available at

http://www.ilo.ch/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO.

⁵⁰ ILO, Annex to the ILO Constitution, Declaration of Philadelphia 1919, available at

https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO#declaration.

⁵¹ ILO, Right to Organise and Collective Bargaining Convention 1949 (No. 98), available at

https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C098.

For example, in the **United States**, an agreement between the International Association of Machinists and Uber was signed to enable its members to engage with local Uber management in a consultative dialogue forum.⁵²

Similarly, in **Australia**, Airtasker, a job-posting platform which connects households and workers, reached an agreement with Unions New South Wales in 2017.⁵³ This agreement establishes minimum working conditions, complies with health and safety national standards, provides workers insurance similar to employees' compensation, as well as establishes an independent dispute resolution system overseen by the Australian Fair Work Commission.⁵⁴

In **Sweden**, Bztt, an innovative, environmentally-friendly electric vehicles company signed an agreement with Swedish transport workers' union to allow their drivers the same terms and conditions as taxi drivers covered by the Taxi Agreement.⁵⁵ Similarly, Gigstr and Instajobs, platforms for low-skills jobs for students, signed agreements with Unionen for Workers to be covered by the sectoral collective agreement for temporary agency workers.

In **Denmark**, HILDRF, an online platform for cleaning services in private homes signed a collective agreement with trade union 3F in April 2018,⁵⁶ whereby any worker on the platform will automatically change their independent contractor status to that of an employee after completion of 100 hours of work. The employee status allows access to paid sick leave, holiday allowance and pension contribution. Furthermore, Voocali, a translation service company, signed an agreement with the Union HK Privat for employees and a special agreement that covered work performed via the platform by those that are not employees.⁵⁷

In **Austria**, the transport and services union, Vida, announced in April 2017 the creation of a workers' council (*Betriebsrat*) for the couriers of Foodora with the main goal of an agreement on working conditions. In **Germany**, in April 2018, an agreement establishing a European Work Council in Delivery Hero, a publicly listed online food-delivery service based in Berlin (Foodora is owned by Delivery Hero) was signed including a provision to have employee representatives on the supervisory board.

In short, some countries have started to gradually admit collective agreements covering independent contractors in contrary to existing competition regulation and practices.

⁵² See New York Times, "Uber Recognizes New York Drivers' Group, Short of a Union", 10 May 2016, available at <https://www.nytimes.com/2016/05/11/technology/uber-agrees-to-union-deal-in-new-york.html>.

⁵³ See Anna Patty, "Airtasker and unions make landmark agreement to improve pay rates and conditions" (The Sydney Morning Herald), 30 April 2017, available at <https://www.smh.com.au/business/workplace/airtasker-and-unions-make-landmark-agreement-to-improve-pay-rates-and-conditions-20170427-gvtvpo.html>.

⁵⁴ Fair Work Commission is Australia's national workplace relations tribunal responsible for administering the provision of the Fair Work Act.

⁵⁵ See Kristin Jesnes et al., "Collective agreements for platform workers? Examples from the Nordic countries" (Nordic future of work Brief 3, March 2019), available at <https://faos.ku.dk/pdf/faktaark/Nfow-brief3.pdf>.

⁵⁶ HILFR, "Historic Agreement: First Ever Collective Agreement for the Platform Economy Signed in Denmark", available at <https://blog.hilfr.dk/en/historic-agreement-first-ever-collective-agreement-platform-economy-signed-denmark/>.

⁵⁷ Denmark, Agreement between Voocali and HK Privat, available at <https://www.hk.dk/-/media/dokumenter/raad-og-stoette-v2/freelancer/agreementvoocalihkprivat.pdf?la=da&hash=59B0822A6225832782BC8A8CB61761EA>.

Conclusion

The category of independent contractors can challenge the existing labour framework in some cases. On one end, there is a group of individuals who are self-employed working as undertakings and are fully capable of negotiating their compensation and services in the market. On the other end, there is a group of individuals who are labelled self-employed but work like employees (false, bogus or disguised self-employed workers). Some courts have reclassified this second group as “employees” and as such they may negotiate collective agreements with their employer through a trade union. Some countries have recognised a third or mid-category of “workers” who perform work for another party who is not a client or customer. This group is entitled to minimum rights relating to working conditions and some enlarged social protection benefits.

Governments and national courts have dealt with the classification of independent contractors, as well as their access to collective representations and collective bargaining in different ways. The example of Uber is a prominent example examined in this paper, as it is a well-known platform that exists globally but operates differently based on the national context. While the selection of examples provides a helpful illustration of what is happening around the world, these examples do not reflect any particular standard nor provide a full picture of the situation.

The short analysis contained in this paper emphasized that industrial relations systems are not based on a one-size-fits-all approach, but are rather based on different historical, social and economic contexts. New forms of work often emerge in response to the real needs of both companies and workers. Diversity and continuous innovation in employment contracts offer both companies and workers the necessary flexibility to find arrangements which best serves their interests.

Given the complexity of the topic of independent contractors examined here, it is highly recommended to be cautious in the policy and law-making process. The starting position should be that independent contractors have access to collective representation but are excluded from collective negotiation of agreements for terms and conditions of employment as it would alter fair competition among companies and ultimately the entire economy. Any extension of employment rights to independent contractors should be carefully determined based on national circumstances and labour law should be applied purposively and pragmatically considering the changing labour market.



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