HUNGARIAN LABOUR LAW
E - J O U R N A L

Easier done than said?

An Empirical Analysis of Case Law on Platform Work in the EU

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1. Introduction

Over the last few years, hardly a month has passed without a news item on yet another judgment concerning Deliveroo, Glovo, Uber, or similar digital labour platforms. Decisions qualifying platform workers as employees have been intertwined with those recognising them as self-employed or, more sporadically, as persons falling into a third, intermediate category. The growing number of cases, in the European Union and globally, has given a sense of a persisting lack of clarity on employment classification of platform workers,[1] and the academic debate on this issue continues nearly unabated.

This paper contributes to the voluminous body of comparative literature on the classification of platform workers[2] by providing a quantitative case law analysis. My analysis draws from the database created by Professor Christina Hiessl, funded by the European Commission and obtained thanks to the courtesy of the author in late October 2022.[3] At the time of writing, this database is the most

* Post-doctoral researcher at Ca' Foscari University in Venice. This paper draws on a part of Chapter 2 of my doctoral dissertation completed at the European University Institute in Florence. An earlier version of this paper was presented at the "Decent Work in the Digital Age" conference held on the 28th of April 2023 at Pázmány Péter Catholic University in Budapest. I am thankful to Professor Christina Hiessl for sharing with me her case law database on which this analysis is based, and for her helpful comments on my presentation. I also gratefully acknowledge feedback on earlier versions of this analysis received from Professors Antonio Aloisi, Valerio De Stefano, Claire Kilpatrick, Eva Kocher, and Mathias Siems, as well as from Hannah Adzakpa, Sophie Duroy, Aikaterini Orfanidi, and Marc Steinert. The usual disclaimers apply.

1 In this paper, the term "platform worker" is used to describe any person performing platform work, irrespective of employment classification.

2 E.g., Valerio De Stefano – Ilda Durri – Charalampos Stylogiannis – Mathias Wouters: Platform work and the employment relationship. *ILO Working Paper,* Vol. 27., March 2021.; *Taken for a Ride: Litigating the Digital Platform Model*. The International Lawyers Assisting Workers (ILAW) Network, 2021. Hereinafter: ILAW Network. Available at https://www.ilawnetwork.com/issue-briefs-reports/taken-for-a-ride-litigating-the-digital-platform-model/; Jeremias Adams-Prassl – Sylvaine Laulom – Yolanda M Vázquez: The Role of National Courts in Protecting Platform Workers: A Comparative Analysis. In: José María Miranda Boto – Elisabeth Brameshuber (eds.): *Collective bargaining and the gig economy: A traditional tool for new business models*. Hart, 2022.; Emanuele Menegatti: The Classification of Platform Workers through the Lens of Judiciaries: A Comparative Analysis. In: Tamás Gyulavári – Emanuele Menegatti (eds.): *Decent work in the digital age: European and comparative perspectives.* Hart, 2022.; Kamila Naumowicz: Some remarks to the legal status of platform workers in the light of the latest European jurisprudence. *Studia z zakresu Prawa Pracy i Polityki Społecznej,* vol. 28, no. 3. (2021).

3 For the authors' in-depth case law analysis based on this data base, see e.g., Christina Hiessl: The classification of platform workers in case law: A cross-European comparative analysis. *Comparative Labour Law & Policy Journal,* vol. 42, no. 2. (2022) 465–518.;

comprehensive resource on case law concerning platform work in Europe.[4] Notably, it comprises not only court judgments but also relevant administrative decisions issued by *inter alia* labour inspections, social security institutions, and regulatory authorities. It includes the EU Member States, Norway, Switzerland, Turkey, the UK, the US, and the Court of Justice of the European Union case law. However, I have modified the scope of this database by focusing only on EU Member States. Moreover, I analyse only platform-based companies in a narrow sense, excluding "traditional" companies with some features resembling those used by platforms that were included in the original database.[5] In a similar vein, Blabla car, as a company representing a true sharing economy rather than a digital labour platform,[6] and Cool Company, which is an umbrella company offering freelancers working for various clients the possibility of working based on a fixed-term employment contract, fall out of the scope of this analysis. Overall, my sample comprises 279 decisions of courts and administrative bodies in the EU27 issued by October 2022.[7]

The main goal of this analysis is to systematise the evolution of case law on platform work in the EU Member States and to allow for its more granular understanding. The remainder of the paper is structured as follows. Section 2 provides a chronological, year-by-year deconstruction of judicial and administrative decisions on platform work, starting from 2015 when the first decision was issued until October 2022. Section 3 highlights the salient sectoral and geographical limitations of case law. Section 4 shows the reclassification rates per sector, revealing great discrepancies also in this regard. Finally, Section 5 seeks to explore the legal reasoning behind the decisions classifying platform workers as self-employed or employees. It identifies criteria that were most referred to when deciding about the employment status of platform workers in all sectors. In view of the high reclassification rates and the validity of the "traditional" employment tests to accommodate platform workers within the existing labour law categories, Section 6 concludes that classification of certain categories of platform workers as employees, even though not a child's play, appears to have been "easier done than said". However, it needs stressing this claim holds only for the most "visible" type of platform work that attracted the highest number of judgments in the EU, i.e., work in the (food) delivery sector, and, to a lesser extent, work in the transport sector. The reclassification of other categories of platform

Christina Hiessl: The legal status of platform workers: regulatory approaches and prospects of a European solution. *Italian Labour Law e-Journal,* Vol. 15, no. 1. (2022).

4 Several other noteworthy compilations of judgments on platform work include the Eurofound's repository on initiatives concerning platform work, available at https://www.eurofound.europa.eu/data/platform-economy; *Digital Platform Observatory,* available at https://digitalplatformobservatory.org/legal-case/; and the blog by Ignasi Beltran de Heredia Ruiz, https://ignasibeltran.com/employment-status-of-platform-workers-national-courts-decisions-overview-argentina-australia-belgium-brazil-canada-chile-france-germany-italy-nederland-new-zealand-panama-spain-switzerl/#ita2.

5 Pimlico Plumbers, Domino's Pizza, CitySprint, Excel, Addison Lee, Hermes and Yodel.

6 Art. 2 (2) of the proposed Platform Work Directive expressly states that the definition of a digital labour platform excludes providers of a service 'whose primary purpose is to exploit or share assets.' Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work. COM(2021) 762 final 2021/0414 (COD).

7 The paper reflects the version of the database at the date of 20th of October 2022. Subsequent changes to this database, including the addition of several decisions that appeared before October 2022 but have been found retroactively, have not been included in the analysis presented in this paper.

workers, especially those providing household services or working through web-based platforms, is much more challenging. The paper calls for a refocusing of the debate on employment classification on the under-researched sectors of platform work. Moreover, by showing the case law limitations, it emphasises the need for effective, comprehensive regulation that would bring systemic change to the platform business models.

1. Case law evolution and main patterns

The first decision on the classification of platform workers in the EU dates to 2015, but it was not until 2017 when the number of cases became more significant, and 2018 when the case law gained real attention. Figure 1, below, illustrates the case law evolution from 2015 until October 2022, showing the number of decisions issued by administrative bodies and courts in the first, second, and, where applicable, third instance.[8]

Figure 1. Case law evolution in the EU (2015–2022)

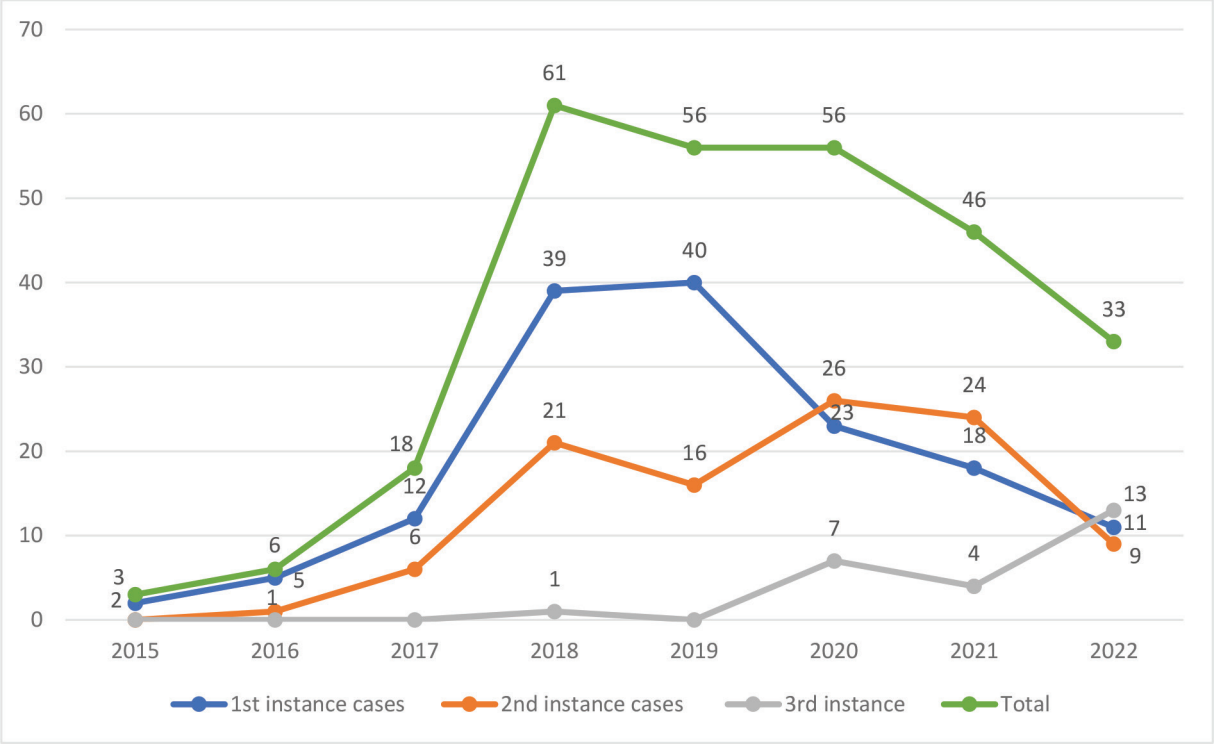
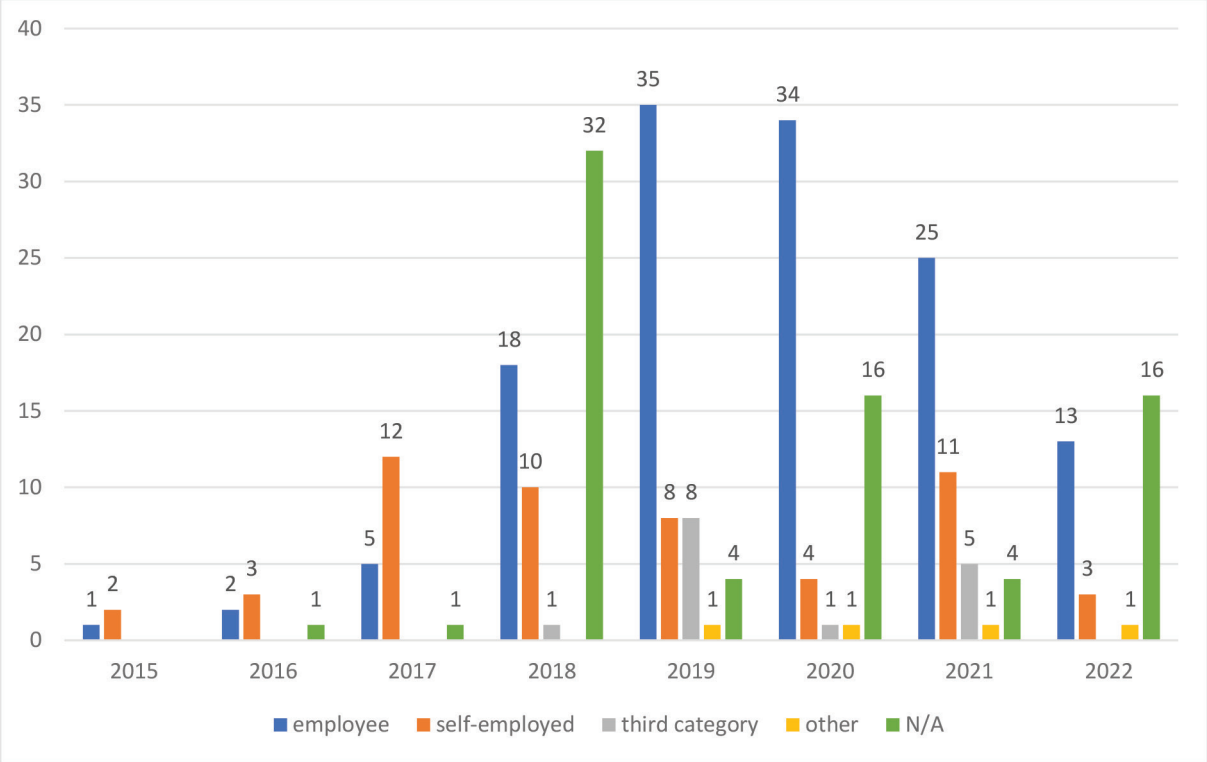


Figure 2, below, presents the outcomes of the employment classification disputes in each year. Apart from recognition of platform workers as self-employed, employees or, in certain jurisdictions

[8] The term "1st instance" refers here both to first instance courts and to administrative bodies. The decisions of administrative bodies were appealed to second instance courts. For example, a decision of the Health Insurance Fund in Vienna was appealed to the Austrian Federal Administrative Court, and a decision of the Administrative Commission for the Regulation of Labour Relations in Brussels was appealed to the Brussels Labour Court. The database included one case where "N/A" was given as an answer. This case concerned the legal expertise commissioned by the Secretary of State for Social Fraud issued by the National Social Security Office in Belgium in 2015. For the sake of readability, Figure 1 illustrates this case as a first instance decision.

where such a category exists, intermediate category workers,[9] four decisions reached another result. "Other" is a residual category referring to decisions that classify platform workers as employees of the subcontractor (2),[10] of the customer (1),[11] or of the temporary work agency (1).[12] Moreover, in a non-negligible number of decisions (74), no determination on the employment classification was made. This was the case, for example, when the final decision is still pending[13] or when the claim was rejected for formal reasons.[14] These cases have been marked as N/A.

Figure 2. Employment classification of platform workers (per year)



In the remainder of this section, I explain the main developments by deconstructing the existing case law year by year. This cross-national analysis reveals the lack of consistency of outcomes not only across various jurisdictions but also within each country. It also shows several notable similarities in the developments of national case law on platform work in the EU.

2015 brought the first decisions on two platforms active in the transportation sector: Uber and LeCab. In March, the Spanish Labour Inspection held that Uber drivers should be reclassified as

9 *"Trabajadores autómonos económicamente dependientes"* (TRADE) in Spain, and *"lavoratori etero-organizzati"* in Italy. A third, "employee-like" category exists also in other EU Member States, e.g., in Austria and Germany, but it has not been considered in any decision on platform work in these countries so far.

10 Dijon Appeals Court, judgment of 6 January 2022, RG n° 20/00002; Madrid Social Court, judgment of 11 December 2020, 347/2020, both in Uber cases. Throughout this paper, the numbers in the parentheses indicate the number of cases.

11 Amsterdam Civil Court, judgment of 1 July 2019, ECLI:NL:RBAMS:2019:4546 (Helpling).

12 Amsterdam Appeals Court, judgment of 21 September 2021, ECLI:NL:GHAMS:2021:2741 (Helpling).

13 E.g., Palermo Civil Court, judgment of 27 May 2020, N. 74/20 M.P.

14 E.g., Aix-en-Provence Appeals Court, judgment of 18 September 2020, RG n° 19/03816.

employees,[15] while in September the Belgian National Social Security Office found the opposite.[16] In June, the Paris Labour Court classified the drivers working through LeCab as self-employed.[17] These three cases, leading to inconsistent results, were the beginning of a long battle that platform workers would face in the years to come.

2016 saw a few more disputes in the Uber and LeCab cases, all of which were in France. In January, the second instance ruling by the Paris Appeal Court upheld the Paris Labour Court's decision considering LeCab drivers as self-employed.[18] In December, the Paris Labour Court changed its line of case law and reclassified LeCab drivers as employees.[19] 2016 was also the year of the first two decisions issued with regard to platforms operating in the food delivery sector: Deliveroo and Take Eat Easy. Both cases were adjudicated by the Paris Labour Court with the same result: self-employment.[20]

2017 saw a growing number of decisions (18), albeit only in two countries: France (17) and Spain (1). In Spain, Deliveroo riders were reclassified as employees.[21] The French judgments issued in that year on Take Eat Easy, Uber, Le Cab and Deliveroo were inconsistent. For each of these platforms, decisions reached contrary conclusions. Overall, the dominant trend was self-employment (12), which accounted for 70.59% of decisions issued that year.[22]

In 2018, the total number of cases sharply increased to sixty-one. The number of first instance decisions tripled as compared to the previous year (39), there were also twenty-one second instance decisions, and, for the first time, a case reached the third instance tribunal.[23] The overwhelming majority of cases were decided by French courts (51). The rest of the judgments came from Spain (4) and from countries in which decisions on the classification of platform workers were issued for the first time: Belgium (2), Germany (1), Italy (2) and the Netherlands (1). Italian first instance courts classified Foodora and Glovo riders as self-employed,[24] and so did the Amsterdam Civil Court with regard to Deliveroo riders.[25] In contrast, Deliveroo riders were reclassified as employees in Belgium[26] and in Spain.[27] There was a lack of consistency of outcomes not only across various countries but also within jurisdictions. In Spain, for example, Glovo couriers were found to be employees by the

15 Labour Inspection, decision of 9 March 2015, unpublished.

16 Legal expertise commissioned by the Secretary of State for Social Fraud, 12 September 2015.

17 Paris Labour Court, decision of 1 June 2015, RG n° F14/7887.

18 Paris Appeals Court, judgment of 7 January 2016, RG n° 15/06489.

19 Paris Labour Court, judgments of 14 December 2016, RG n° 14/16389 and RG n° 14/11044.

20 Paris Labour Court, judgment of 5 September 2016, RG n° F15/0164; Paris Labour Court, judgment of 17 November 2016, RG n° F16-04592.

21 Labour Inspection, decision of December 2017, unpublished.

22 This percentage does not include one judgment in which no determination on the employment status was made.

23 French Cour de Cassation (Labour Chamber), judgment of 28 November 2018, Arrêt n°1737 (17-20.079).

24 Turin Civil Court, judgment of 7 May 2018, RG n. 4764/2017; Milan Civil Court, judgment of 10 September 2018, RG n. 6719/2017.

25 Amsterdam Civil Court, judgment of 23 July 2018, ECLI:NL:RBAMS:2018:5183.

26 Administrative Commission for the Regulation of Labour Relations, decisions of 23 February 2018 (116 – FR – 20180209) and 9 March 2018 (113 – FR – 20180123).

27 Valencia Social Court, judgment of 1 June 2018 (244/2018).

Labour Inspection in February 2018[28] but as a third category of workers (*trabajadores autómonos económicamente dependientes*, TRADE) by the Madrid Social Court.[29] Overall, the total number of decisions reclassifying platform workers as employees (18) was much higher than in the previous year and constituted 62.1% of all decisions made on the employment status of platform workers. Still, the number of decisions on self-employment was significant (10), amounting to 34.5% of decisions issued that year.[30]

In 2019, the number of decisions continued to be high, amounting to 56 decisions in total. Forty of them were issued in the first instance and sixteen in the second instance. Decisions were made predominantly in Spain (22) and France (20), and to a much lesser extent in Belgium (3), Germany (3), the Netherlands (2), Italy (1), and Austria (4). Thirty-five decisions, i.e., 67.31% of decisions determining the categorisation of platform workers in that year, held that they were employees; and eight decisions (15.38% judgments) classified them as self-employed.[31] Thus, while the reclassification rate was slightly higher than in the previous year, the results of employment classification cases were still inconsistent.

2020 saw an equally high number of litigations as in the previous year (56). France and Spain continued to be the countries with the highest number of decisions (26 and 18 respectively), with a few decisions made in Italy (4), the Netherlands (2), Sweden (2), Finland (2), Denmark (2), Belgium (1), and Germany (1). Notably, 2020 brought several landmark Supreme-court cases to Italy,[32] Spain,[33] Germany,[34] and France,[35] almost all of which classified platform workers as employees.[36] Overall, only in four cases were platform workers classified as self-employed; which is the lowest rate in all years to date (10% of all decisions issued in that year).[37] The number of decisions classifying platform workers into the third category dropped drastically to only one judgment.[38] As many as 85% of decisions classified platform workers as workers, which is the highest employment reclassification rate so far.

2021 brought forty-six new judgments. France continued to have the highest litigation rate, followed by Italy and Spain (9 and 8 judgments respectively). Platform work was also subject to a judicial assessment in Austria (4), the Netherlands (4), Sweden (3), Belgium (1), and Luxemburg (1). The

28 Labour Inspection, decision of of February 2018, unpublished.

29 Madrid Social Court, judgment of 3 September 2018, 284/2018.

30 Note that there were thirty-two cases in which no determination was made on the employment status of platform workers.

31 Note that there were four cases in which no determination was made on the employment status of platform workers.

32 Supreme Court, judgment of 21 January 2020, RG n. 11629/2019 (Foodora).

33 Supreme Court, judgment of 23 September 2020, 4746/2019 (Glovo).

34 Federal Labour Court, judgment of 1 December 2020, 9 AZR 102/20 (Roamler).

35 Supreme Court, judgment of 4 March 2020, Arrêt n° 374 (19-13.316) (Uber).

36 The only exception was the judgment of the Italian Supreme Court of 24 January 2020 classifying platform work as a third category *(lavoro etero-organizzato)* rather than as an employment relationship. See judgment of 24 January 2020, RG n. 11629/2019.

37 Two of them were issued in the household sector (Hilfr and Happy Helper), one in the transport sector (Uber) and one in the delivery sector (Tok Tok Tok).

38 Note that there were sixteen cases in which no determination was made on the employment status of platform workers.

outcomes of the decisions in 2021 have been considerably more varied than in 2020. The number of judgments classifying platform work as self-employment or third category increased compared to the previous two years (eleven and five decisions respectively, accounting for 26.19% and 11.90% of all judgments deciding on the substance of the claim). An employment relationship between a platform worker and a platform was found in twenty-five decisions (59.52% of cases).[39] The developments in 2021 demonstrate that it would be premature to take the employment status of platform workers for granted after the landmark decisions from the previous year. Rather, the decisions continue to be highly inconsistent, even regarding the most litigated platforms in the delivery and transportation sectors. Moreover, the fact that the analysed data suggests a decline in the number of cases can partly be related to the technical challenges of data collection. For some countries, France in particular, first-instance decisions were not easily searchable in the official, national case databases. Thus, some of the first-instance decisions can only be identified retroactively after the publication of higher-instance judgments, which means that the overall number of the judgments might be in fact higher than reported.

The same caveat applies to data for 2022 showing that, as of October 2022, thirty-three judgments have been issued. An employment relationship between the worker and platform was found in thirteen cases (76.47% of cases), self-employment only in three cases (17.65%),[40] and once employment with the subcontractor was determined (5.88%). The reclassification rate was high, even if in relatively many cases (16), there was no determination on the substance of the claim.

Finally, it is noteworthy that, as of October 2022, there were twenty-three decisions in which an appeal before the higher-instance tribunals is still pending. The next months and years will surely see many more proceedings brought before courts and administrative bodies. The saga of the litigation on the employment classification of platform workers continues.

2. Sectoral and geographical limitations of case law

As displayed in Figure 3, below, there are great disparities in the distribution of case law across different sectors and countries. 71% of decisions (197 out of 279) concerned platforms operating in the delivery sector, 19% of decisions (54) were issued on platforms in the transport sector, and only 5% of cases concerned household services and on-location microwork (14 cases each). Notably, almost all platforms mediating household services specialise in the provision of cleaning services.[41] To date,

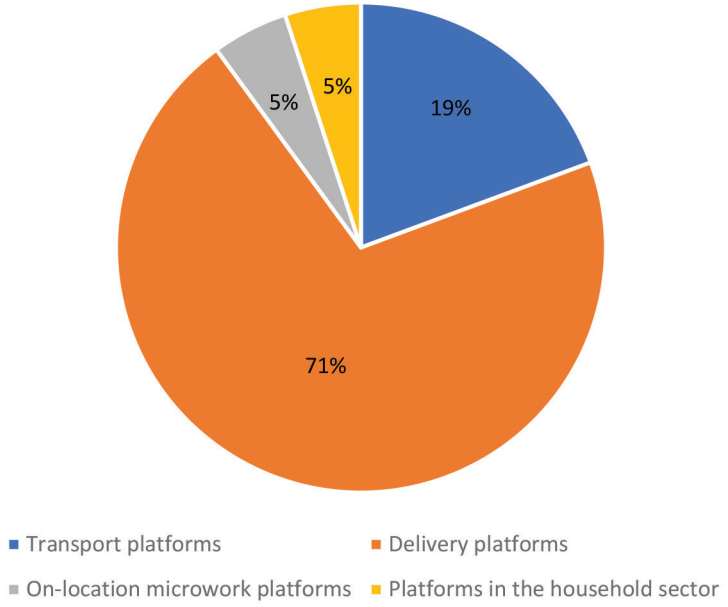
[39] Note that there were four cases in which no determination was made on the employment status of platform workers.

[40] Gothenburg Administrative Appeals Court, judgment of 9 December 2022, Mål nr 6394-21; Paris Appeals Court, judgment of 15 February 2022, RG n° 19/12511.

[41] Helpling, Hilfr, Happy Helper and Temper. Only TaskRunner offers a wider array of household services, from cleaning to furniture assembly, gardening, goods transport and repair work, and Tiptapp provides help with deliveries, shopping, moves and recycling of items.

no decision concerned platform workers performing care services, and those whose work is executed fully online via digital labour platforms (be it on "macrowork"[42] or "microwork" platforms[43]).

Figure 3. Sectoral division of case law on platform work



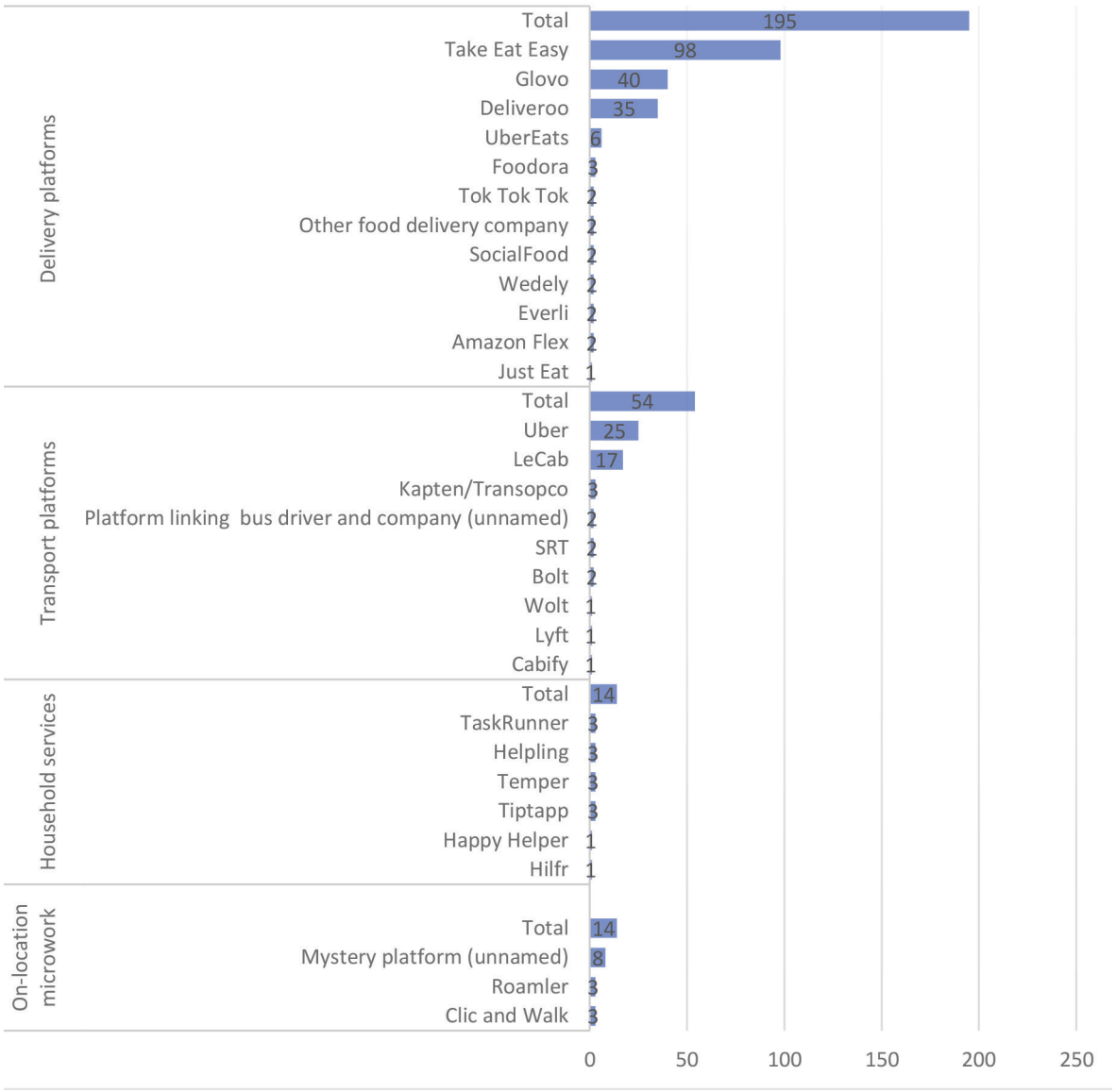
Moreover, the litigation in each sector was strongly dominated by cases concerning only several platforms. Figure 4, below, illustrates the detailed breakdown of all cases per platform. The three most litigated platforms were Take Eat Easy (98),[44] Glovo (40), and Deliveroo (35), all in the delivery sector. Overall, case law on these three platforms amounts to 88.72% of all decisions issued on this sector, and 62.01% of all decisions issued on platform work in the EU Member States. In the transport sector, most decisions concerned Uber (25), constituting 46.29% of all cases in this segment.

42 Macrowork (i.e., freelance work) typically refers to mid-to-high level tasks that require higher qualifications and longer engagement. Examples include IT professions (e.g., programming, software development, data analytics), translation, marketing, consultancy, project management, legal services, and financial services.

43 Microwork, also known as clickwork or crowdwork, is characterised by the extremely short duration of tasks and low skill level required to perform them. It is associated with repetitive information processing tasks such as text transcription or content moderation, as well as - and increasingly so - tasks related to AI training, namely data annotation and categorisation.

44 The company ceased its operation already in July 2016. For an analysis of the reasons, see Paul Belleflamme – Nicolas Neysen: The rise and fall of take eat easy, or why markets are not easy to take in the sharing economy. *Digiworld Economic Journal,* Vol. 108, no. 4. (2017). The particularly high number of decisions on this platform is partly due to the fact that multiple decisions were issued in single cases. E.g., the case decided by the Paris Appeals Court on 6 December 2018 resulted in nine judgments, and the case decided by the same court on 13 December 2018- in twelve judgments.

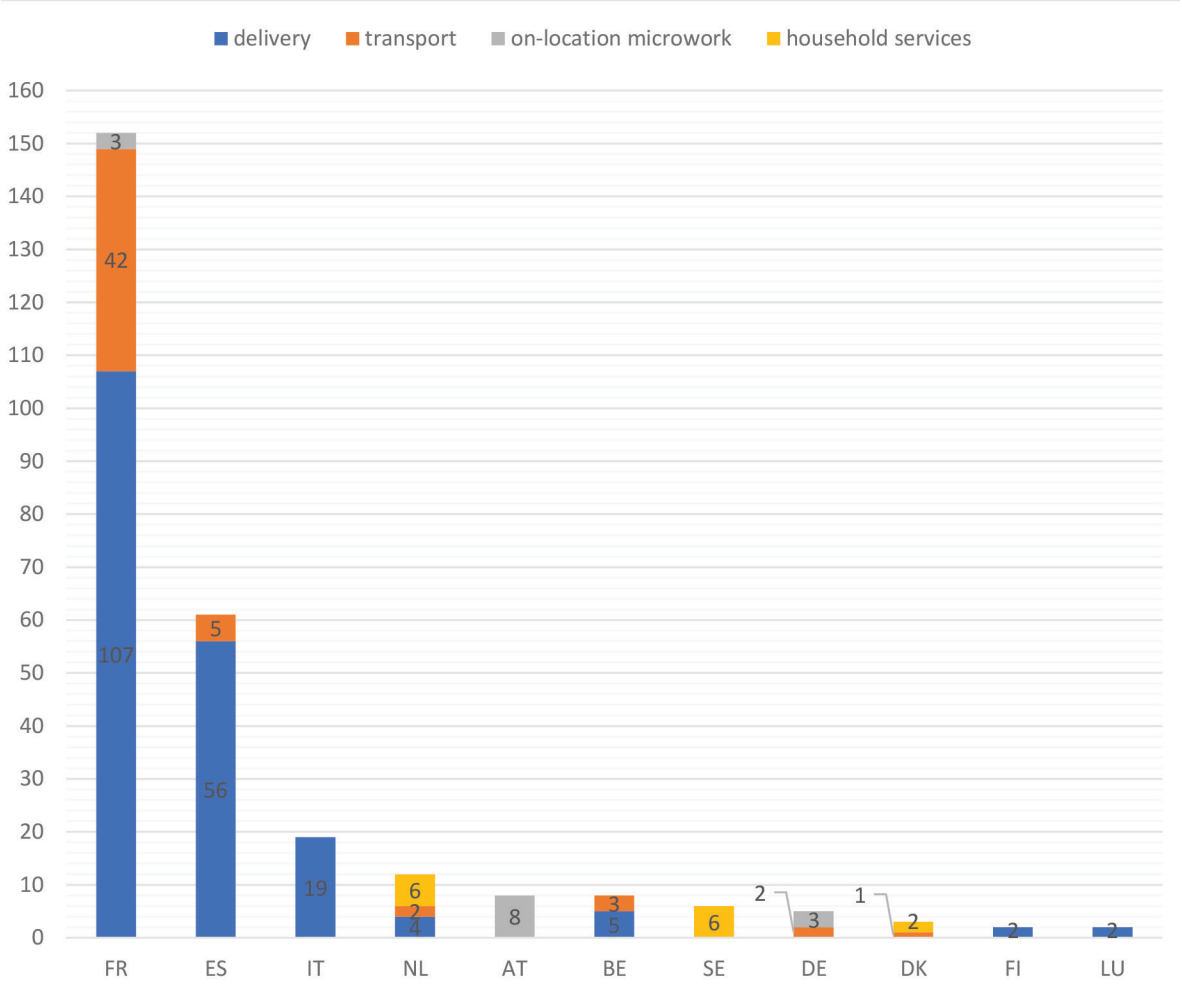
Figure 4. Division of case law per sector and platform



Apart from the sectoral division of case law, there is a large discrepancy between the number of decisions issued in each country. The first thing that needs to be highlighted is that case law on platform work is entirely missing in sixteen EU Member States. Figure 5, below, shows the sectoral distribution of case law in the eleven EU countries in which decisions concerning platform work have been issued. In the delivery sector, most decisions came from France (107) and Spain (56), but also from Italy (19), Belgium (5), the Netherlands (4), Finland (2), and Luxemburg (2). In the transport sector, similarly, France was the country with the most decisions (42). Far fewer cases were adjudicated in other countries: Spain (5), Belgium (3), the Netherlands (2), Germany (2), and Denmark (1). Decisions concerning on-location microwork have so far appeared only in Austria (8), Germany (3), and France (3). In the household services sector, case law exists in the Netherlands (6), Sweden (3), and Denmark (2). Remarkably, there is not a single country where case law exists on platforms in all sectors. These findings can only be partly explained by the geographical scope of the operations of

platforms. For instance, Uber is prohibited in Italy, Germany, and Denmark, which accounts for the lack of judgments on it in these countries. On the other hand, some platforms operate in multiple EU markets but were brought to courts only in a fraction of them. For example, Take Eat Easy, which is a Belgium-founded company operating in France, Belgium, and Spain, was subject to ninety-seven decisions in France and only one in Spain.

Figure 5. Case law distribution (per country and sector)



3. Employment classification per sector

Figure 6, below, illustrates the outcome of the litigations in each sector, showing the number of decisions arriving at a given result. The highest reclassification rate was in the delivery sector. Out of all decisions in which the determination on the employment status in this sector was made,[45] platform workers were classified as platforms' employees in 75.97% of cases. The classification of delivery riders as self-employed was relatively rare, amounting to 12.4% of cases that adjudicated on employment status, and a similar number of decisions found them to fall under the third category of

[45] Throughout this section, these numbers exclude the results marked as N/A.

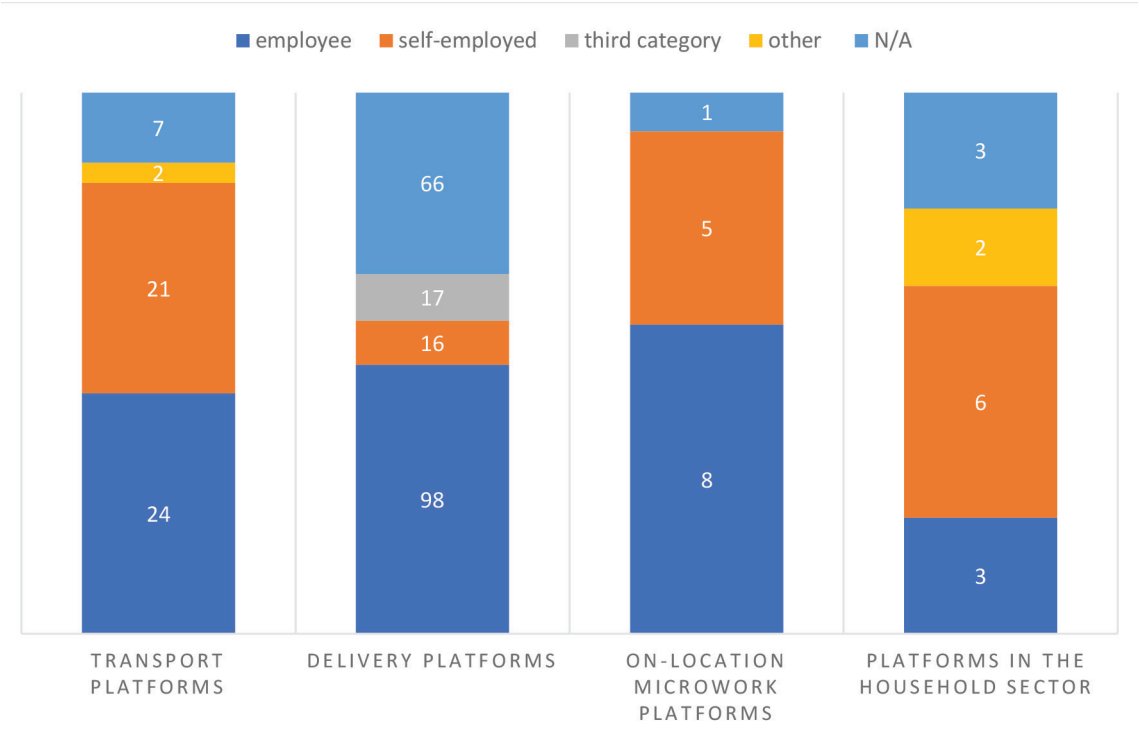
workers (13.18%). This result needs to be read with an important caveat that in a high number of cases in this sector (66), no determination on the employment status was made.

The second highest reclassification rate was in on-location microwork platforms (61.54% of decisions), and 38.46% of workers in this sector were considered to be self-employed. One decision did not lead to any determination on the employment status.

In the transport sector, drivers were classified as platform employees in twenty-four decisions (51.06% of cases). Twenty-one decisions classified them as self-employed (44.68% of cases)[46], and two decisions held they were employed by a platform's subcontractor (4.26% of cases). The drivers' status was not determined in seven cases.

In the case of platforms providing household services, the percentage of cases in which workers were found to be self-employed was even higher than in the transport sector, reaching 54.55% of cases. An employment relationship between platforms in the household sector and people working through them was established only in 27.27% of decisions deciding on the employment status. In 18.8% of cases, platform workers in this sector were assigned another status, i.e., they were considered employees of a temporary work agency (1) and employees of the platforms' clients (1). In three cases no decision on the employment status was made.

Figure 6. Employment classification of platform workers (per sector)



46 Seventeen decisions classifying drivers as self-employed were issued in France.

4. Legal reasoning

The following section explores the main criteria for self-employment and employment of platform workers in each sector. Given the high number of decisions issued in the delivery and transport sector, I have limited the analysis of these two sectors to platforms with the highest number of decisions, i.e., Take Eat Easy, Glovo, and Deliveroo in the delivery sector and Uber and Le Cab in the transport sector. Decisions concerning these platforms amount to 88.72% and 77.78% of all decisions issued in each respective sector, which makes them a representative sample. In the case of on-location microwork and household services, given the much smaller number of cases, I have considered all decisions classifying platform workers as employees or self-employed. Considering the space constraints, I have excluded decisions classifying platform workers as an intermediate category of workers[47] or arriving at other results (i.e., classifying them as employees of temporary work agencies, customers, or platforms' subcontractors). This gave me a sample of 163 decisions, out of which forty-two classified platform workers as self-employed and 121 as employees.

It needs to be stressed that the analysis does not show which factors were *decisive* for a given classification of platform workers. Rather, the decisions were always based on a joint consideration of numerous indicators of employment or self-employment of people performing platform work, and none of these factors in isolation was decisive. Another limitation of this quantitative analysis is that some of the most "progressive", yet minoritarian arguments towards employment reclassification of platform workers do not come to the fore since they are "overshadowed" by the much higher number of decisions relying on the notion of subordination and organisational integration. The importance of the "alternative" and inventive judicial approaches should not be underestimated when interpreting this set of data. Despite these limitations, the following analysis uncovers the dominant logic behind the judicial and administrative decisions finding platform workers self-employed or, contrarily, recognising them as employees.

4.1. Criteria for self-employment

Figure 7, below, illustrates the most common arguments used by the decision bodies to adjudicate in favour of the self-employed status of platform workers. For greater legibility of sectoral patterns, platforms in the delivery sector have been marked in blue, platforms in the transport sector - in orange, on-location microwork platforms – in red, and the household service sector – in green, with various

[47] For a detailed analysis of judgments classifying platform workers as an intermediate category of workers, see e.g., Antonio Aloisi: 'With Great Power Comes Virtual Freedom'. A Review of the First Italian Case Holding That (Food-Delivery) Platform Workers Are Not Employees. *Comparative Labor Law and Policy Journal*, Dispatch No. 13. (2018); Fernando Fita Ortega: The App-based Employment Relationship: The Spanish Case. In: Maria Teresa Carinci – Filip Dorssemont (eds.): *Platform Work in Europe: Towards Harmonisation?* Intersentia, 2021.

gradients of these colours used to distinguish between the platforms. Factors that have been mentioned only incidentally in less than three decisions in total have not been displayed in the Figure. Out of forty-two decisions deciding that platform workers are self-employed, sixteen concerned platform workers in the transport sector,[48] fifteen in the delivery sector,[49] five in the microwork sector,[50] and six in the household sector.[51]

Figure 7. Main criteria for self-employment

The argument that featured most often in the argumentation of courts and administrative bodies that denied the employment status of platform workers was their lack of obligation to work (35 cases). This rationale was used in all sectors regarding most platforms, although it seems to be more prevalent in the delivery and transport sector[52] than in other industries.[53]

The second most common argument was the freedom to determine working time (31). Notably, it appeared in literally all decisions concerning platforms in the delivery sector and nearly all cases on platforms in the transport sector. It was also used as an argument in deciding about the unnamed mystery platform in Austria, but not in other platforms mediating on-location microwork platforms.

48 Nine on Uber, seven on LeCab.

49 Five on Deliveroo, Eight on Take Eat Easy, and one on Glovo.

50 Two on Roamler, two on the unnamed mystery platform, and one on Clic and Walk.

51 One on TaskRunner, two on Tiptapp, one on Hifr, and one on Happy Helper.

52 The lack of obligation to work was not considered, at least explicitly, in only one decision on Deliveroo (Brussels Labour Court, decision of 8 December 2021, JT 08/12/2021) and two decisions on Uber (Paris Appeals Court, decision of 1 June 2021, RG n° 18/11917; Paris Business Court, decision of 30 January 2017, RG n° 2014054740). In the remaining judgments, it was mentioned expressly.

53 It was not (explicitly) used in the argumentation in decisions concerning Hilfr, Happy Helper, and the unnamed mystery platform.

Interestingly, no case concerning platforms in the household sectors referred to this factor, even though the business model of these platforms does not differ from others in this regard.

The possibility to work for competitors was the third most referred to argument (29 cases). It was particularly relevant for platforms in the delivery, transport, and household services sectors. In contrast, it was of marginal importance for platforms providing on-location microwork services.[54] Another factor which was often considered regarding almost all platforms was the ownership of work tools, i.e., phone and/or vehicle by platform workers (17 cases).[55]

Lack of control, understood as lack of surveillance or monitoring, was used as an argument in eleven cases in total. Interestingly, it was much more common in cases concerning the transport sector than the delivery sector, as only one decision on Deliveroo referred to this indicator.[56] Equally frequent was the reference to workers' entry as self-employed in the business register. This factor, similarly, was relevant mostly for Uber and Le Cab, with only one case concerning Deliveroo referring to it.[57]

Other factors appeared in less than ten decisions, i.e., in less than a quarter of decisions classifying platform workers as self-employed. Seven decisions pointed to the lack of instructions on the work performance, or the lack of their binding character.[58] The same number of cases noted that key aspects of work, e.g., its time, place, and remuneration for it, are determined by the client rather than by the platform. This factor was relevant predominantly for the household sector, as it was mentioned in cases concerning all platforms operating in this sector. The substitution and subcontracting option was noted in four cases in total, while the lack of sanctions and lack of organisational integration- in only three decisions. As for the lack of sanctions, it is remarkable that this criterion appeared only in cases on Deliveroo, in the context of lack of potential consequences for deviating from a suggested route.[59]

4.2. Criteria for employment

Out of the 121 decisions reclassifying platform workers as employees on the platforms considered in this section, there were ninety decisions on delivery platforms,[60] twenty on transport platforms,[61] eight

54 It was referred to only in the judgment of the Federal Labour Court of 1 December 2020, 9 AZR 102/20 (Roamler).

55 Judgments in the Clic and Walk case (Supreme Court, judgment of 4 May 2022, Arrêt n° 20-81.775) and in the case of the unnamed mystery platform (Federal AdministrativeCourt, judgment of 12 January 2021, W209 2219856-1) were an exception.

56 Paris Labour Court, judgment of 5 September 2016, RG n° F15/0164.

57 Amsterdam Civil Court, judgment of 23 July 2018, ECLI:NL:RBAMS:2018:5183.

58 For example, the decision of the Danish Competition Council of 26 August 2020 on Hilfr mentioned that instructions are limited to voluntary video guides available for cleaners and customers, and the judgment of the Brussels Labour Court of 8 December 2021 (JT 08/12/2021) elaborated that only operational instructions, which are compatible with the business relationship, were issued, while individual instructions by clients were not controlled by Deliveroo.

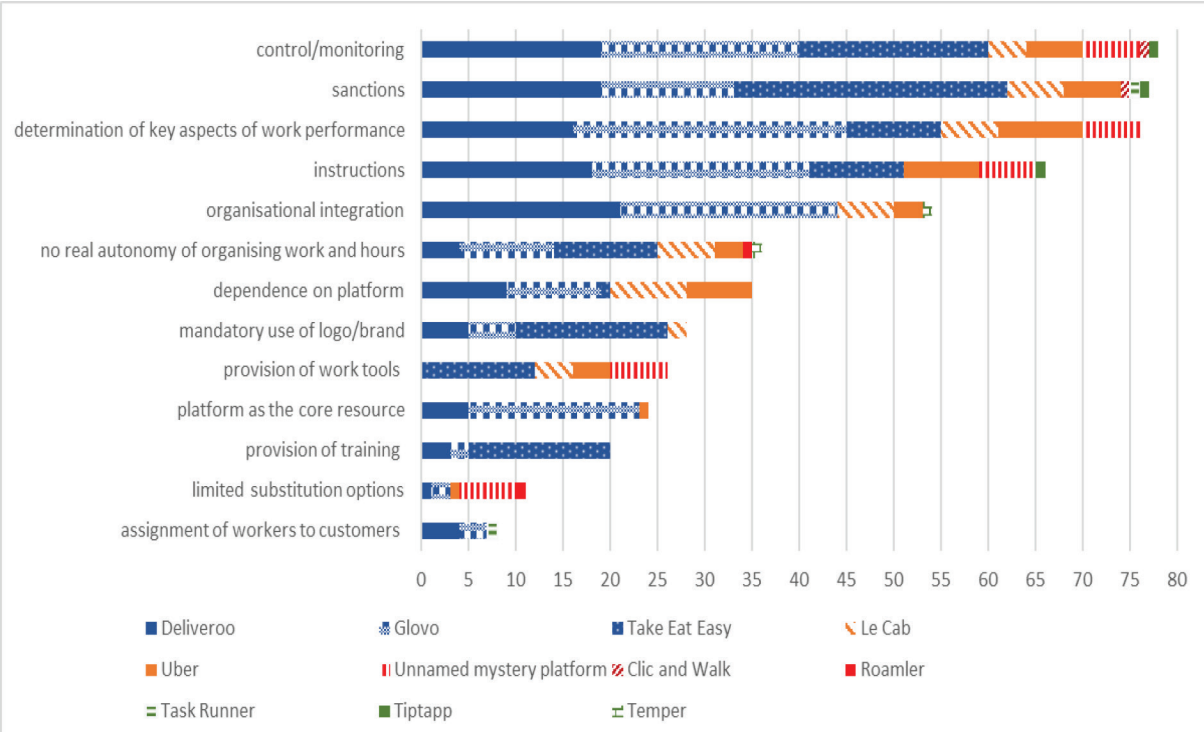
59 Brussels Labour Court, judgment of 8 December 2021, JT 08/12/2021; Paris Appeals Court, judgment of 9 November 2017, RG n° 16/12875.

60 Twenty-three on Deliveroo, thirty-seven on Take Eat Easy, and thirty on Glovo.

61 Twelve on Uber and eight on Le Cab.

concerning on-location microwork platforms,[62] and three regarding platforms providing household services.[63] Figure 8, below, illustrates the main arguments behind these decisions.

Figure 8. Main criteria for employment



The most common arguments in favour of the employment classification of platform workers were the control[64] over the work performance by the platform (78) and the imposition of sanctions for workers' misconduct (77). These criteria were referred to in roughly 65% of decisions reclassifying platform workers as employees. As for the control (monitoring), its most "tangible" expression, which the courts referred to in an overwhelming majority of cases in all sectors, was GPS tracking. In addition, consumer rating was indicated as a form of control in some decisions.[65] Quality control (e.g., fraud-detection mechanisms) were also considered an indicia of platform control, and thus – a sign of an employment relationship.[66] Reference to control over platform workers was made in nearly all platforms, with two exceptions in decisions on Roamler and Task Runner.

The imposition of sanctions on platform workers for various kinds of "misconduct" was another "universal" argument that appeared with regard to nearly all platforms across all sectors, except for two on-location microwork platforms: Roamler and the unnamed mystery platform in Austria. The most blatant example of such a sanction is the deregistration of platform workers for a repetitive

62 Six on the mystery shopping platform, one on Clic and Walk, and one on Roamler.

63 One on Tiptapp, one on Task Runner, and one on Temper.

64 The terms "control" and "monitoring" were used in case law interchangeably, and so I use them synonymously in this paper.

65 E.g., Spanish Supreme Court, judgment of 23 September 2020, 4746/2019 (Glovo).

66 E.g., Vienna Health Insurance Fund, decision of 30 April 2019, VA-VR55350193/18-Ed (unnamed mystery shopping platform).

refusal of accepting assignments.[67] Often, a platform stipulates an acceptable number of refusals, after which the account is temporarily or permanently suspended. In other cases, sanctions were imposed for the lack of availability during an announced shift,[68] for late delivery,[69] or negative reviews,[70] or otherwise deficient performance.[71] "Soft" forms of sanctions, such as loss of priority for shift reservation, were also recognised by some courts.[72] Overall, imposition of sanctions was considered one of the core indicators of an employment relationship between platform workers and platforms, across jurisdictions.

The third most significant factor was the determination of key aspects of the work performance, taken into account in seventy-six decisions finding workers to be platforms' employees (i.e., 62.8% of judgments in the sample). Some judgments referred broadly to the (unilateral) determination of terms and conditions of the service performance, while others specified the key aspects determined by the platform. These key aspects include e.g., location and time of the work performance, wages, and conduct with the customer. This was of great relevance for transport platforms (16 out of 20 judgments referred to it) and delivery platforms (55 out of 90 judgments).[73] Besides these two sectors, only in the case of the Austrian platform providing mystery shoping services did the court point to the predetermination of the time and location of the service provision.[74]

Platform-determined instructions on the work performance were another common indicator of an employment relationship. This criterion features in roughly 55% of decisions reclassifying platform workers as employees, mostly in the delivery sector. Courts and administrative bodies drew attention to instructions concerning various aspects of work performance, such as riders' conduct during the delivery process,[75] the timing of the delivery,[76] or the security standards including details (e.g., through which door should they enter restaurants).[77] In the transport sector, eight out of ten decisions on Uber took note of the fact that drivers are bound by detailed instructions, e.g., with regard to the itinerary or comportment while driving.[78] Instructions played a less significant role in the reclassification of microworkers and workers providing household or on-location microwork services. Still, it is worth mentioning that detailed instructions were considered an indication of "externally determined work

67 E.g., Supreme Court, judgment of 23 September 2020, 4746/2019.

68 Decisions of Administrative Commission for the Regulation of Labour Relations of 23 February 2018 (116 – FR – 20180209) and of October 2020 (113 – FR – 20180123) (Deliveroo).

69 E.g., Catalonia Appeals Court, judgment of 12 May 2020 (1449/2020) (Glovo).

70 E.g., Paris Appeals Court, judgment of 16 September 2021, RG n° 20/04929 et seqq.

71 E.g., Douai Appeals Court, judgment of 10 February 2020, RG nº 19/00137.

72 Labour Inspection, decision of December 2017, unpublished (Take Eat Easy).

73 This factor was often referred to in Glovo cases and less so in Deliveroo cases. Notably, the French courts did not take it into account when adjudicating on Take Eat Easy.

74 Vienna Health Insurance Fund, decision of 30 April 2019, VA-VR55350193/18-Ed.

75 Spanish Supreme Court, judgment of 23 September 2020, 4746/2019 (Glovo).

76 E.g., Madrid Social Court, judgment of 11 February 2019, 53/2019 (Glovo).

77 Administrative Commission for the Regulation of Labour Relations, judgment of 9 March 2018, 113 – FR – 20180123.

78 E.g., Paris Appeals Court, judgment of 10 January 2019, RG n° 18/08357.

in personal dependency" in the Roamler case,[79] and Tiptapp's "guidance" on work performance and reminders via e-mail were considered as binding instructions in the Tiptapp case.[80]

Factors related to the organisational integration of platform workers in the platform business also played an important role, featuring in 48% of judgments reclassifying delivery platforms as employees. Various arguments were put forward in this regard. Some decisions argued that platform workers lack their own independent business structure,[81] and that they do not make any significant investments of their own. Other judgments emphasised, in turn, that platform workers appear as representatives of the platform vis-à-vis the client.[82] In a number of judgments, it was pointed out that platform workers are not only an integral part of the platforms' business,[83] but even form its core.[84] Similar reasoning was applied in decisions on Uber and LeCab, highlighting the effective impossibility to work for their own customers.[85] Contrarily, judgments related to the two remaining sectors barely take note of this factor. Only workers on Temper were found to be integrated into the platform's organisation.

Another salient argument was the lack of real autonomy in organising working time that was applied in several judgments regarding all platforms. It was the counterargument to the alleged "freedom" to determine working time, which was an important factor in the decisions classifying platform workers as self-employed. The common reasoning went that despite lack of the formal obligation to perform tasks within a given timeframe, platform workers were *de facto* required to be constantly available for the performance of tasks in a given area and period of time.[86] Free determination of working time was restricted inter alia by the need to announce shifts more than a week in advance and an incentive system for choice of preferred time slots.[87] In some cases, the lack of genuine autonomy over time of the work performance was even more apparent since, as noted in judgments mostly in the delivery sector, the platform organised workers' timetables.

Dependence on the platform was another commonly referred to indicia of an employment relationship. There were multiple facets of this dependence, including the lack of possibility of building up their own clientele[88] or the prohibition of work for competitors.[89] For example, in all judgments concerning Le Cab, the limited possibility to work for competitors was given as one of the grounds for the reclassification of drivers as employees. Some decisions considered the fact that drivers are fully

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79 Federal Labour Court, judgment of 1 December 2020, 9 AZR 102/20 (Roamler).

80 Work Environment Authority, decision of 13 October 2020, 2020/000125.

81 E.g., Extremadura Appeals Court, judgment of 20 June 2022, unpublished.

82 E.g., Amsterdam Appeals Court, judgment of 16 February 2021, ECLI:NL:GHAMS:2021:392.

83 E.g., Palermo Tribunal, judgment of 20 November 2020, RG n. 7283/2020.

84 E.g., Amsterdam Civil Court, judgment of 15 January 2019, ECLI:NL:RBAMS:2019:198.

85 E.g., Paris Appeals Court, judgment of 16 September 2021, RG n° 20/04929 et seqq. (two judgments on Uber).

86 E.g., Federal Labour Court, judgment of 1 December 2020, 9 AZR 102/20 (Roamler).

87 E.g., Administrative Commission for the Regulation of Labour Relations, Brussels, 116 – FR – 20180209 (Deliveroo); Asturias Appeals Court, judgment of 25 July 2019, 1818/2019 (Glovo).

88 E.g., French Supreme Court, judgment of 4 March 2020, Arrêt n° 374 (19-13.316) (Uber).

89 Zurich Social Security Court, judgment of 20 December 2021, AB.2020.00038 et seqq. (Uber)

reliant on the opaque algorithm,[90] depend on the platform for economic activity,[91] or that workers do not come into direct interaction with the clients.[92]

Mandatory use of logo or brand and provision of work tools and training were referred to in twenty or more judgments, albeit only from the delivery and, to a lesser extent, transport sectors. A rather specific factor worth highlighting is the reference to a platform as the core resource made in Glovo and Deliveroo decisions (24 in total). This was a counterargument to the view that workers provide their own work tools, which is in principle an indicia of self-employment. Another interesting observation is that relatively few decisions noted the limitation of substitution options, although examples of such arguments can be found in delivery, transport, and on-location microwork platforms (11 decisions in total).

To conclude this part of the analysis, the customary employment tests proved to provide valuable guidance for the employment classification of platform workers. In the majority of cases, courts and administrative bodies did not have to fundamentally "reinvent" employment tests to evaluate the status of platform workers and classify them accordingly. Traditional indicia of subordination (i.e., control and monitoring, sanctions, determination of key aspects of the work performance, and instructions on the work performance) were among the employment factors that courts across the EU Member States were most reliant upon. Indeed, as observed by Adams-Prassl et al. in the context of the ruling of the French Court of Cassation in the Uber case, the "classicism of the solution" applied by the court comes across as paradoxical, given the earlier debates on the difficulty of fitting platform workers into the existing judicial approaches. As noted by the authors, it is however "not at all paradoxical but rather shows the prevalence of the discourse of certain platforms that have tried to convince, against the reality of working conditions, that platform workers are independent."[93]

This is not to say, however, that judges showed no "normative creativity".[94] On the contrary, such a high reclassification rate of platform workers would not have been possible without a purposive, adaptive and flexible interpretation of the notion of subordination. The very fact that "indirect" forms of control, such as ratings and GPS systems, have been captured[95] was an important, progressive step. Moreover, factors related to the integration of platform workers into the business organisation of platforms played an important role, ofen complementing the notion of subordination. In some cases, giving much weight to the fact that platform workers were unable to establish their own clientele and to organise their activity independently has been seen as a "qualitative leap" in the judicial

90 Amsterdam Civil Court, judgment of 13 September 2021, ECLI:NL:RBAMS:2021:5029 (Uber)

91 E.g., Amsterdam Appeals Court, judgment of 16 December 2021, ECLI:NL:GHAMS:2021:392 (Deliveroo).

92 Douai Appeals Court in the judgment of 10 February 2020, RG nº 19/07738 (Clic Walker) emphasised the fact that there was no direct connection between microworkers and clients.

93 Adams-Prassl–Laulom–Vázquez op. cit. 83.

94 Silvia Rainone: The Normative Creativity of Judicial Strategies: Insights for an Emancipatory Approach to Platform Work. Forthcoming in Kurt Vandale – Silvia Rainone (eds.) *The Elgar Companion to Regulating Platform Work: Insights from the Food Delivery Sector.* 2024.

95 Eva Kocher: *Digital Work Platforms at the Interface of Labour Law: Regulating Market Organisers*. Bloomsbury Publishing Plc., 2022. 113.

argumentation.[96] All this contributed to the fact that courts and administrative bodies proved to be able to "see through the façade of autonomy" of platform workers.[97]

5. Conclusions

The main aim of the above quantitative analysis was to systematise case law developments in the EU Member States and to provide a possibly full picture, going beyond numerous studies focusing mostly on a national perspective or a handful of "landmark" judgments. Despite the methodological limitations, several conclusions and lessons can be drawn from this analysis.

The first crucial finding is that, although the overall number of decisions concerning the employment classification of platform workers is impressive, litigation has been strongly dominated by cases concerning the food delivery sector.[98] In that sector, the reclassification rate of nearly 76% of cases invites a statement that classification of riders as employees, even if not a child's play, was "easier done than said". Considering the scale of the debate held on the classification of platform workers as workers falling in an intermediate category, it is remarkable that courts made recourse to it only in 17 cases.[99] The tendency towards employment classification of platform workers is now particularly visible in high-instance rulings in several EU Member States, nearly all of which have reclassified platform workers as employees.[100] Still, little is known particularly about the employment classification of platform workers in the household sector and those working via web-based platforms. Despite several judgments in their favour, the scarce case law does not allow us to make any firm conclusions on the judicial approaches towards their employment classification.

Even in the food delivery sector and in the transport sector, employment reclassification should not be taken for granted. While the reclassification rates are relatively high, it is clear that the discrepancies in the rulings persist. This is hardly surprising given the diversity in the contexts of these decisions and the legal construction of employment relations in each jurisdiction. Another important factor accounting for the inconsistency of rulings are the differences in the platform business models. In yet other cases, it is harder to find a "logical" explanation for a decision which is not consistent with the line of case law in a given country. To give an example, Lyon Appeals Court classified Uber drivers as

96 Maria Teresa Carinci – Filip Dorssemont: Platform Work In Europe: A Comparative Analysis. In: Carinci–Dorssemont op. cit. 232. With reference to the judgment of the French *Court de Cassation* of 4 March 2020, Arrêt n° 374 (19-13.316) in the Uber case.

97 ILAW Network op. cit. 23.

98 Tellingly, decisions on only three platforms, i.e., Take Eat Easy, Glovo and Deliveroo, amount to 62.01% of all decisions issued on platform work in the EU Member States. See Section 3 of this paper.

99 Eight out of these seventeen cases have been overruled by higher instances. See, e.g., the judgment of the Salamanca Social Court of 14 June 2019 classifying Glovo riders as TRADE and overruled by the Castilla Appeals Court on 7 May 2020.

100 See, however, the judgment of the Italian Supreme Court of 24 January 2020, RG n. 11629/2019, classifying work performed by Foodora riders as a third category *(lavoro etero-organizzato)* rather than as an employment relationship.

self-employed,[101] despite a previous Supreme Court decision reaching the contrary result.[102] "Judicial subjectivism" seems to be "more widespread than usual" in cases on platform work.[103] Overall, it would be unrealistic to expect full convergence of judgments, and this "carnival of litigation"[104] is unlikely to come to an end anytime soon.

There is one more important reason why the reliance on the outcome of litigations is not enough: the lack of effective enforcement mechanisms that would prevent platforms from tweaking their terms and conditions. There are very few examples of fundamental changes implemented by platform companies as a result of extensive litigation. Following the UK Supreme Court ruling on Uber, the company announced that, even though it "could have continued to dispute drivers' rights to any of these protections in court", it decided to "turn the page" and treat all Uber drivers in the UK as workers.[105] As much as this is a positive development, the narrative about the "voluntary" move in this direction is alarming, signalling that platforms can just as well continue to consider platform workers as self-employed, confining their response to a narrow group of claimants directly involved in the litigation.

In sum, relying on strategic litigation to ensure that platform workers' rights are respected is not enough. For a systemic change, a regulatory intervention is needed. Several EU Member States have introduced laws providing for a rebuttable presumption of employment of platform workers,[106] and such a solution is one of the core provisions envisaged in the currently discussed Platform Work Directive Proposal.[107] While these measures are crucial for combating the widespread employment misclassification of platform workers and are certainly an important method of dealing with the misuse of the platform business model,[108] they are not a panacea to all problems platform workers face. It is fundamental to think not only about the correct employment classification of platform workers but also about a more universalistic set of protections applicable irrespective of their employment status.

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101 Lyon Appeals Court, judgment of 16 January 2021, RG n° 19/08056.

102 Cour de cassation, judgment of 4 March 2020, Arrêt n° 374 (19-13.316).

103 Menegatti op. cit. 118.

104 Valerio De Stefano – Ilda Durri – Charalampos Stylogiannis – Mathias Wouters: Exclusion by default: Platform workers' quest for labour protections. In Valerio De Stefano – Ilda Durri – Charalampos Stylogiannis – Mathias Wouters (eds.): *A research agenda for the gig economy and society*. (Elgar research agendas.) Edward Elgar Publishing, 2022. 22.

105 Dara Khosrowshahi: Uber chief executive Dara Khosrowshahi says 'we're turning the page on driver rights. *Evening Standard,* 17 March 2021. https://www.standard.co.uk/comment/comment/uber-chief-executive-dara-khosrowhahi-drivers-rights-turning-page-b924529.html Accessed 27 March 2023.

106 The first regulation of this kind, albeit limited to platforms in the delivery sector, was the Spanish 'Riders' Law' (Royal Decree-law 9/2021, of May 11, which modifies the revised text of the Workers' Statute Law, approved by Legislative Royal Decree 2/2015, of October 23). Rebuttable employment presumption for all platform workers, irrespective of the sector they are working in as long as the enlisted conditions for a presumption are met, has been recently introduced in Belgium (the Act implementing the so-called 'Labour Deal', in force since 1 January 2023) and Portugal (Law 13/2023, in force since 1 May 2023). Moreover, the Greek law 4808/2021 explicitly mentions the conditions under which the contract between a digital platform and a service provider shall be presumed *not* to be a contract of employment.

107 Art. 4 of the Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work. COM(2021) 762 final 2021/0414 (COD).

108 For the discussion on the benefits and limitations of an employment presumption in the context of platform work, see Miriam Kullmann: 'Platformisation' of work: An EU perspective on introducting a legal presumption. *European Labour Law Journal*, vol. 13, no. 1 (2022).