# DISPATCH NO. 30 - SPAIN

# NOTES ON THE SPANISH SUPREME COURT RULING THAT CONSIDERS RIDERS TO BE EMPLOYEES

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## I. THE RULING

Spain is one of the countries with the highest levels of judicialisation of the dispute over the classification of platform working. Dozens of rulings have been issued in recent years. Most of them pointed out the labor relation of platform service providers in the transport sector, although some argued that they were actually self-employed. This contradiction in judicial doctrine allowed / forced the Spanish Supreme Court to rule on the matter. This ruling of 25 September 2020 (rec. 4746/2019) was issued by the plenary session of the Supreme Court on social matters, the decision being adopted unanimously by all the magistrates.

The ruling has its origins in the case of a delivery rider who filed an individual lawsuit before the Social Courts of Madrid in order to be reclassified as an employee. The Court's ruling declared him to be truly self-employed. This ruling was later confirmed by the High Court of Justice in Madrid but was finally overturned by the national Supreme Court, which unanimously considered him to be an employee.

In this short commentary we will first summarize the facts considered proven and then go on to describe the arguments used to declare the employment status of the Glovo delivery riders. The work ends with a short reflection.

## II. FACTS PROVEN BY THE RULING

A. The rider started providing services for Glovo, a company dedicated to the delivery of food and other products, on 3 March 2016. The services continued until, after a period of illness, the company stopped sending him

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jobs (orders to be picked up and delivered) on 19 October 2017. The delivery rider claimed for tacit dismissal.

B. After reserving the time slot in which he wanted to work, the claimant activated the auto-allocation position (GPS) on his mobile phone and from then on began to receive orders that fitted his time slot and geographical area.

C. The delivery rider had to accept the order, which could be done either automatically or manually.

1. In the first mode (AA), the platform allocated an automatic dispatch of messages that the worker could reject manually. In the manual mode (MA), the platform did not allocate the order to the delivery rider, who had to choose which delivery he wanted to perform from those available. Once the order had been accepted, the delivery rider had to carry it out as required by the customer, with whom he had direct contact. If he had any doubts about how to deal with the order, he had to get in touch with the customer in order to resolve them.

2. The automatic allocation system used the Glovo algorithm to assign the orders by electronic means, following a cost-benefit function that sought the best possible combination of order and delivery rider that minimized the total costs. The worker could refuse a previously accepted order halfway through the process, in which case the job was reassigned to another delivery rider in the same area without any kind of penalty.

D. The worker decided when to start and end his working day, as well as the activity he undertook while working by selecting the orders he wanted to carry out and rejecting those he did not want to do. He was not obliged to perform a certain number of orders or to be active for a minimum number of hours per day or week, and the Company did not indicate the rides to be carried out or when he had to start or end his workday. If it was not placed in the 'auto-allocation' position, he would not receive any orders. The delivery rider could refuse an order halfway through the job without any kind of penalty. In fact, the claimant rejected previously accepted orders on eight occasions during the period between July and October 2017 without suffering any unfavourable consequences and without having his score reduced for this reason.

E. The company established a scoring system for the 'glovers', classifying them into three categories: beginner, junior and senior. If a delivery rider had not accepted any services for more than three months, the Company could decide to downgrade them.

F. Glovo implemented two different versions of the ranking system: the Fidelity version, which was used until July 2017, and the Excellence version, used from that date on. In both systems, the delivery person's score was based on three factors: the end customer's appraisal, the efficiency demonstrated in carrying out the most recent orders, and how the services were performed during the periods of greatest demand, which the Company called 'diamond

hours'. The maximum score that could be obtained was 5 points. There was a 0.3 point penalty every time a delivery rider was not operational in the time slot he had previously reserved. If he was unavailable due to a justified reason, there was a procedure to notify the company and justify the cause, and no kind of penalty was imposed. The highest scoring delivery riders were given preference as regards access to incoming services or rides.

G. The worker was not obliged to give the company any kind of justification for his absences from the service, but only to give prior notice. This did actually happen on several occasions.

H. The contract stated that there was no exclusivity agreement.

I. The plaintiff assumed responsibility for performing the service correctly (being paid for it only if it was completed to the customer's satisfaction), as well as being liable to the user (end customer) for any damage or loss that the products or goods might suffer during transport.

J. While the worker was carrying out his activity he was permanently located by means of a GPS geolocator that registered the kilometres he travelled in each service, although he was free to choose the route he wished to follow to each destination.

K. In order to carry out his activity, the plaintiff used a motorcycle and a phone of his own, bearing all the expenses incurred by their use.

L. As regards remuneration, according to the ruling the customer paid EUR 2.75 for a delivery, of which the delivery rider received EUR 2.50. The rest of the price was kept by Glovo as commission for the intermediation carried out.

## III. REQUEST FOR A PRELIMINARY RULING BEFORE THE CJEU.

The company, Glovo, requested a preliminary ruling from the CJEU. It maintained that the dispute in question was a matter of European scope which affected the freedom of establishment and the freedom to provide services as set out in Arts. 49 and 56 of the Treaty on the Functioning of the European Union (TFEU), as well as the fundamental rights to free choice of profession and to engage in enterprise in Arts. 15 and 16 of the Charter of Fundamental Rights of the European Union.

However, in its ruling, the Spanish Supreme Court refused to refer this preliminary ruling to the CJEU for the following reasons:

First, it stated that here "it is debatable whether the defining notes of the contract of employment between a Glovo delivery rider and this company are fulfilled" and that in this context "there is no reasonable doubt as to the application of the law."

Second, the Reasoned Order of the CJEU of 22 April 2020, Case C-692/19, provides for the application of Directive 2003/88/EC, where the independence of the service provider appears to be fictitious and where there is a relationship of subordination between that person and his alleged

employer, which should be determined by the national court. Consequently, if it were concluded that the independence of the claimant was merely apparent and that he was in fact a subordinate of Glovo, the edict of the CJEU does not preclude the classification of a labor relation for those purposes.[1]

Finally, the Supreme Court concluded that the aforementioned edict of the CJEU showed that no preliminary ruling should be considered in this dispute. The dispute concerned whether there was subordination between the plaintiff and Glovo, and it had to be resolved by this national court by assessing the specific circumstances of the alleged dispute, without there being any reasonable doubt as to the interpretation of European Union law.

## IV. ARGUMENTS OF THE RULING TO CONSIDER THAT THE DELIVERY RIDER IS AN EMPLOYEE OF THE PLATFORM

### A. New criteria to classify an employment contract

The first thing the Supreme Court did was to point out the importance of the "new criteria to classify an employment contract"[2] in the following terms:

Since the creation of labor law to the present we have seen an evolution of the requirement of dependency–subordination. The Supreme Court ruling of 11 May 1979 already qualified this requirement, explaining that dependence does not imply absolute subordination, but only insertion into the governing, organisational and disciplinary circle of the company. In post-industrial society the note of dependency has become more flexible. Technological innovations have led to the introduction of digitalized control systems for the provision of services. The existence of a new productive reality makes it necessary to adapt the notes of dependency and alienation to the social reality of the time in which the rules must be applied.

### B. Working under another brand

The ruling expressly cited the fact that the delivery rider worked under another brand as evidence of an employment contract. In other words, it recognized that the delivery rider actually provided the service which the company that owns the brand offered on the market. In actual fact, this indication is not far from the criteria used in the ABC test by the California Supreme Court, which are incorporated into the AB5 Act. A service provider who provides services belonging to the essential core of his principal's activities must be considered an employee. One way to determine whether

1. *See also* Adrián Todolí-Signes, *The Concept of Worker in European Union Law and its Application to the New Economic Realities: Is the Reasoned Order of the CJEU in the Case of Food Delivery Riders a Good Solution?*, SSRN (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3717603.

2. *See Nuevos Indicios de Laboralidad*, *in* TRABAJO EN PLATAFORMAS DIGITALES: INNOVACIÓN, DERECHO Y MERCADO 177-294 (Adrián Todolí-Signes & Macarena Hernández-Bejarano eds., 2018).

the service provider is providing the essential or core services of the company is to know whether they are related to the services advertised by the company or to it brand name.

C. Digital platform as a means of production

The ruling made it clear that the essential means of production in this activity were not the delivery rider's mobile phone and motorcycle but the digital platform belonging to the company. In addition, the ruling also took into account the fact that without the platform (App) the delivery riders could not provide the services in this business model.

D. Digital rating

The Supreme Court established that digital rating is a form of surveillance and control over service providers, as well as a form of work organisation decided by the company.[3] It is thus understood that the fact that "the highest scoring deliverers are given preference in access to incoming services or rides" is a form of control over the delivery riders. The Supreme Court therefore concluded that "In practice, this scoring system for each delivery rider conditions their freedom to choose their working hours, because if they are not available to provide services at the time of greatest demand, their score will decrease and with it the possibility of being commissioned in the future to provide more services and achieve the economic return they seek, which is equivalent to losing employment and pay. In addition, the company penalizes the delivery riders by not assigning them orders when they are not operating in the slots they have reserved, unless there is a justified reason that has been duly communicated and accredited. The consequence is that the delivery riders compete with each other for the most productive time slots, and commission-based remuneration without any guarantee of a minimum number of orders gives rise to economic insecurity, which in turn leads the delivery riders to try to be available for as long as possible in order to have access to more orders and greater remuneration."

E. The company is not just an intermediary

The Supreme Court based its conclusions on the ruling of the CJEU of 20 December 2017, Case C-434/15, Elite Taxi Professional Association, which declared that Uber's intermediation service, which, in return for payment, used a smartphone application to put non-professional drivers using their own vehicle in contact with people wishing to make a journey of an urban nature, must be classified as a "service in the field of transport."

Hence, the CJEU denied that the activity carried out by Uber was merely that of an intermediary. This company carried out an underlying transport activity, which it organized and managed for its own benefit.

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3. Adrián Todolí-Signes, *The Evaluation of Workers by Customers as a Method of Control and Monitoring in Firms: Digital Reputation and the European Union's Regulation on Data Protection*, INT'L LAB. REV. (forthcoming 2021).

So, the Supreme Court used this European ruling to make it clear that, in the same way, Glovo was not a mere intermediary but in fact a delivery company. In doing so, the Supreme Court also clarified the issue for the purposes of the applicable sectoral collective agreement.

F. Other arguments pointed out by the ruling

The Supreme Court's ruling considered that riders were also employees for the following reasons:

1. The company made all the commercial decisions in the business.

2. The price of the services provided, the method of payment and the remuneration of the delivery riders were set exclusively by that company.

3. The delivery riders did not receive payment directly from the end customers of the platform, but instead the cost of the service was received by Glovo, which then paid the delivery riders their remuneration.

4. The company took over the work of the delivery rider to offer it to its own customers.

5. The rider was in no way involved in the agreements between Glovo and the businesses whose products were distributed or in the relationship between Glovo and the customers that placed the orders.

## V. FINAL EVALUATION

In recent years the Spanish Supreme Court has been undertaking a comprehensive reinterpretation of the concept of employee. In fact, the highest Court seems to have abandoned – or at least reduced to the minimum expression – the requirement of legal dependency or the "control test" as a way of identifying employees.

In this sense, on many occasions the Supreme Court has understood that an employment contract exists even if the worker is free to choose his or her own working hours or schedule.[4] In the same sense, it has also been understood that there can be a labor relation even if there are no instructions from the service commissioner.[5] It is even understood that the worker's right to refuse work commissioned and assigned by the principal does not automatically exclude an employment contract.[6] Likewise, the Spanish

4. S.T.S., Jan. 20, 2015 (rec. 587/2014) (staircase cleaners); S.T.S., July 20, 2010 (rec. 3344/2009) (office cleaner); S.T.S., Jan. 22, 2008 (rec. 626/2007) (carriers with their own vehicle); S.T.S., Apr. 30, 2009 (rec. 1701/2008) (hygiene products collector); S.T.S., July 16, 2010 (rec. 3391/2009 and 2830/2009), S.T.S., July 19, 2010 (rec. 1623/2009 and 2233/2009) (artists and dubbers); S.T.S., May 3, 2005 (rec. 2606/2004) (lawyers); S.T.S., June 21, 2011 (rec. 2355/2010) (insurance sub-brokers); S.T.S., July 14, 2016 (rec. 539/2015) (insurance agents); S.T.S., Nov. 16, 2017 (rec. 2806/2015) (translators); S.T.S., Feb. 8, 2018 (rec. 3205/2015) (lift installers).

5. S.T.S., July 20, 2010 (rec. 3344/2009) (office cleaner); S.T.S., Jan. 22, 2008 (rec. 626/2007) (carriers with their own vehicle); S.T.S., Apr. 30, 2009 (1701/2008) (hygiene products collector); S.T.S., Nov. 16, 2017 (rec. 2806/2015) (translators); S.T.S., Feb. 8, 2018 (rec. 3205/2015) (lift installers).

6. S.T.S., Nov. 16, 2017 (rec. 2806/2015) (translators); S.T.S., July 16, 2010 (rec. 3391/2009 and 2830/2009), S.T.S, July 19, 2010 (rec. 1623/2009 and 2233/2009) (artists and dubbers).

Supreme Court maintains that the ownership of work tools or secondary (or non-relevant) means of production does not exclude classification as an employee.[7] Indeed, even the fact that the service provider assumes part of the risk is no impediment to the existence of a labor relation.[8] Neither does the fact that it has been proven that there is no exclusivity (economic dependency) and that they have carried out work for other companies prevent the contract from being classified as a work contract.[9]

In other words, for some years the Spanish Supreme Court, in order to adapt the concept of employee to the new forms of production, has reinterpreted the concept of employee by expanding its frontiers to non-dependent work (or labor that is not controlled by the employer). Thus, in cases where there is no dependency, the Supreme Court requires the existence of two additional characteristics to determine true self-employment:

First, only the provision of services with another party that has its own business structure will be considered a commercial contract. Such a structure refers, on the one hand, to material elements (machinery, buildings, etc.) or intangible elements (brand, data, goodwill, specific software, etc.) of relevance that belong to the person providing the service. Second, for the contract to be considered commercial, the service provider must have an organisation that is large enough to include not only the performance of the service, but also other elements inherent to the management of a business (marketing policy, business management, relevant decision-making, etc.). In short, those who only provide labor, whether they are subject to the employer's instructions or not, will always be employees.

Hence, in accordance with this interpretation of the case law, delivery riders who provide services in the gig economy are classified as employees by the Spanish Supreme Court.

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7. S.T.S., Jan. 20, 2015 (rec. 587/2014) (staircase cleaners); S.T.S., July 20, 2010 (rec. 3344/2009) (purchase of own cleaning items); S.T.S., Feb. 8, 2018 (rec. 3205/2015); S.T.S., Jan. 22, 2008 (rec. 626/2007) (van ownership); S.T.S., Oct. 7, 2009 (rec. 4169/2008) (office rental and payment secretary).

8. S.T.S., Mar. 9, 2010 (rec. 1443/2009) (where the maintenance costs of the dental clinic were deducted).

9. S.T.S., Jan. 22, 2008 (rec. 626/2007) (carriers with their own vehicle); S.T.S., Apr. 30, 2009 (1701/2008) (hygiene products collector); S.T.S., of May 3, 2005 (rec. 2606/2004) (lawyers).