DIFFERENT RIGHTS FOR DIFFERENT WORKERS

Drivers and riders engaged through apps.

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Summary. I. Introduction: On demand economy. II. The business model of ride-hailing services or ride-sharing services engaged through apps. III. The relationship between drivers and companies owning apps in light of comparative case law. IV. The delivery business model engaged through apps. V. The relationship between riders and companies owning apps in light of comparative case law. VI. Venezuelan employment test and its hypothetical application to drivers and riders engaged through digital platforms. VII. Limits of the employee and independent contractor categories to address the work forms in a sharing economy. VIII. The convenience of having a legislative approach on work engaged through digital platforms in Venezuela.

I. Introduction

The so-called on demand economy, sharing economy or gig economy is based on digital platforms or apps that act as intermediaries between final customers and service providers.

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A few examples on platform intermediation of on-demand work are *Uber*, *Lyft*, *Cabify* and *Didi Chuxing*, involving non-public transportation of people; *Deliveroo*, *Glovo*, *Uber Eats*, *Take It Easy*, *Pedidos Ya* and *Meituan Dianping* when it comes to food delivery services; *Mechanical Turk* and *Upwork* in the areas of occasional online micro-tasks; and *Task Rabbit* involving domestic tasks.[2]

The growth of "*on demand economy*" or "*gig economy*" has revealed the shortcomings of the worker-independent contractor dichotomy in addressing the new forms of work engaged through digital platforms. While it may be true that service providers work "at their own will" and "for whoever they want" (they may work for several platforms and accept or refuse orders), and that they frequently use this sort of work arrangement as a "side gig" to their main occupation, such service providers may also be subject to an important degree of control from the platform owner ("not work at will"), on which they may also have an economic dependency. The imminent rise of these work forms in Venezuela leads us to ask ourselves: Is the employment test conceived through Venezuelan case law, appropriate to classify and govern the new work forms in a digital economy? Should the judges be responsible for settling employee/independent contractor disputes on a case-by-case basis? Or rather, should legislature be set to the task of designing a specialized employment test adapted to the new work forms in an on demand economy in order to ascertain who may or may not have access to the protections afforded by labor laws under an "all" (employee) or "nothing" (independent contractor) approach? Or should the legislator opt towards the creation of an intermediate category between employee and independent contractor in which certain, but not all labor rights are granted? Which

[2] *Meituan Dianping*, for instance, surpasses 400 million users and 5 million affiliated restaurants, manages 20 million orders per day, has almost 600 thousand active riders and for the first quarter fo the year it closed with transactions valued at 10,700 million dollars, 38.6% higer than the same period by 2018. According to the company, the pace of its service —an average of 28 minutes— is largely owed to the artificial intelligence system that determines in 0.55 miliseconds the best route for the deliveries. Such figures allow us to have an idea of the dimensions that the on demand economy is gaining globally. (Aldama, Zigor: *La revolución de la logística China que deja a Amazon por los suelos*. Retina, El País Economía, July 7, 2019). Just in London city alone there 30 thousand Uber drivers and in Australia the number of drivers reaches 60 thousand. There are close to 3 million Uber drivers in the world and 1.3 million Lyft drivers, a platform that operates in USA exclusively.

option is better to incentivize occupation through digital platforms as part of a recovery program for Venezuelan economy?

This paper focuses on the relationship between drivers and riders, on one side, and companies with apps that allow them to engage transport and delivery services, on the other. We do not address occasional work contracted through digital platforms (*crowdsourcing*) in the form of micro-tasks (domestic works, translations, web page designs, and digital publicity, video production and editing, virtual assistant, among others), which bring about lesser issues regarding their classification and regulation.[3]

II. The business model of ride-hailing services or ride-sharing services engaged through apps.

Intermediary technology companies develop an app that establishes a communication channel between clients who require transport and private drivers who offer it. The company may predefine certain eligibility requirements for drivers to register and use the app, such as, for example, the need for the vehicle to meet certain conditions, driver's license and absence of criminal records. The driver decides when she connects/ logs on to the platform and what rides (clients) she accepts or not. Drivers also decide the route for each destination, even though the app may suggest a quicker track. Once the ride is completed the client is given the opportunity to rate the service. The price for the ride is set by the app based on a dynamic algorithm that processes supply and demand for various zones and hours of the day. The customer, who has previously provided her bank information, pays to an account (generally an escrow account) from which the rate charged to the client is distributed between the intermediary company and the driver. Drivers may offer their services simultaneously through several competing platforms or combine their

[3] In these cases, the involvement of apps in the business activity is limited to enable contact between the service seeker and freelancer without influence on the price setting or the way in which the service is performed. The relationship between the parties is not continued in time either.

driver activity with a subordinate employment at a company of an alternate business branch.

III. The relationship between drivers and companies owning apps in the light of comparative case law.

Conclusions reached by comparative case law on whether drivers are employees or independent contractors have been disparate and at times contradictory.

The High Court of Brazil in a decision dated 08/28/2019[4] found that drivers engaged through the app do not hold a hierarchical relation with Uber because their services are provided eventually, without a predetermined schedule or fixed salary, which was deemed enough to rule out the existence of an employment relationship between the parties. The Court concludes that the drivers are independent entrepreneurs.

The Fair Work Commission of Australia, in decisions dated 07/12/2019 and 12/21/2017 [5]applied the established test for identifying an employment relationship, only to conclude that an Uber was not an employee covered by the law against unfair dismissal, and could not even be considered a temporary worker. In this decision a detailed account of the indicia of the employment test was examined: (i) Control: the driver had complete control in providing services, deciding himself when to accept and reject rides (albeit the Commission concedes that the imposition of service standards and pricing parameters could limit the driver's control to a point). (ii) Equipment: the driver provided his own vehicle, phone and mobile data and funded his own insurance. (iii) Uniform: the services agreement prohibited the driver from

[4]https://ww2.stj.jus.br/jurisprudencia/externo/informativo/?acao=pesquisar&livre=UBER&operador=mesmo&b=INFJ&thesaurus=JURIDICO&p=true.

[5] https://www.fwc.gov.au/documents/decisionssigned/html/2017fwc6610.htm y https://www.fwc.gov.au/documents/decisionssigned/html/2019fwc4807.htm

wearing a uniform, Uber distinctive or displaying the Uber logo on his car. (iv) Taxes: the driver was registered with the social security as an autonomous entrepreneur. (v) How the services agreement categorized the relationship: the agreement described Uber as a payment collection agent and provider of technology services. (vi) Payment method: the driver shared the fee charged to the client with Uber and did not receive a fixed income or was entitled to paid leave.

Despite the above, it is telling that the Commission expressed its concern in that the conventional test does not cover aspects such as the agreement on the distribution of income between the parties (how much does the driver receive for each ride v. how much Uber takes), the relative bargaining power of each party and the driver's eventual economic dependence on Uber. This concern also appears in other case law from this country as will be argued later on.

An identical conclusion is reached in the Australian Fair Work *Ombusdman*'s decision of June 7, 2019[6]. According to the Australian Ombudsman, for an employment relationship to exist, there must be, at a minimum, an obligation for an employee to perform work when it is demanded by the employer. The *Ombusdman* goes on to consider that Uber Australia does not require drivers to perform work at particular times and that drivers have control over whether, when and for how long they perform work, on any given day or week.

So the freedom that drivers have in organizing their time is perceived as the defining factor by both Brazilian and Australian case law, in assessing that the commercial arrangement between Uber and the drivers does not amount to an employment relationship.

[6] https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/june-2019/20190607-uber-media-release

A glance at how United States' case law has evolved shows the complexities and challenges that the traditional employment test faces when dealing with work hired through digital platforms. On March 11, 2015 the District Court of the Northern District of California overruled the defendants' (Uber and Lyft) motion to decide the case under a summary judgment and not a jury trial which would require an exhaustive examination of proof and where facts would be set and used as grounds for the judge to pass her ruling (in this case to adjudge employment or not). The Court concluded that the employment presumption had been laid down based on the degree of control test (*Borello* test named after the leading case that established it) [7]. Such test is oriented towards determining the degree of control an employer has -or retains the right to have- over the work performance details. Uber and Lyft held that they were not private transport companies but rather technology companies to which the drivers do not provide a personal service, but that quite contrarily, they are costumers of and benefit from the platform that Uber and Lyft sets at their disposal to generate rides. While the judge did find that Uber and Lyft not only sell software but also sell "journeys" "rides" or "trips" and that the services performed by the drivers are an essential and indispensable part of the business structure of those companies, it is in the conclusions of both rulings where the judge acknowledges the limitations of the traditional employment tests in assessing work engaged through digital platforms. To this effect, the decision *O´Connor v. Uber* concludes:

> The application of the traditional test of employment—a test which evolved under an economic model very different from the new "sharing economy"—to Uber's business model creates significant challenges. Arguably, many of the factors in that test appear outmoded in this context. Other factors, which might arguably be reflective of the current economic realities (such as the proportion of revenues generated and shared by the respective parties, their relative bargaining power, and the range of alternatives available to each), are not expressly encompassed by the Borello test. It may be that the legislature or appellate courts may eventually refine or revise that test in the context of the

[7] S.G. Borello & Sons, Inc. V. Department of Industrial Relations (1989) 48 Cal. 3d.341

new economy. It is conceivable that the legislature would enact rules particular to the new so-called "sharing economy." Until then, this Court is tasked with applying the traditional multifactor test of Borello and its progeny to the facts at hand. For the reasons stated above, apart from the preliminary finding that Uber drivers are presumptive employees, the Borello test does not yield an unambiguous result. The matter cannot on this record be decided as a matter of law. Uber's motion for summary judgment is therefore denied.

Similarly, the *Cotter v. Lyft* judgement closes with the following admonition:

> "As should now be clear, the jury in this case will be handed a square peg (the service performed by the Lyft driver) and asked to choose between two round holes (employee or independent contractor). The test the California courts have developed over the 20th Century for classifying workers isn't very helpful in addressing this 21st Century problem. Some factors point in one direction, some point in the other, and some are ambiguous. Perhaps Lyft drivers who work more than a certain number of hours should be employees while the others should be independent contractors. Or perhaps Lyft drivers should be considered a new category of worker altogether, requiring a different set of protections. But absent legislative intervention, California's outmoded test for classifying workers will apply in cases like this. And because the test provides nothing remotely close to a clear answer, it will often be for juries to decide". (Parenthesis added by the author to better understand the "*fit a square peg in a round hole*" reference)[8].

[8] In 2016, the Uber case was almost settled when Uber agreed to pay as much as $100 million to the roughly 385,000 drivers that were in a similar position as those from *O'Connor* which had previously been given a class certification status by a court (class action), so long as it could continue to classify them as freelancers. But the settlement was later rejected by a federal judge, who argued that the amount was insufficient. Adding to what already was a distressful case, in 2018 the Ninth US Circuit Court of Appeals reversed the *O'Connor v. Uber's* class certification status, nullifying the decision on the ground that Uber's arbitration clause prohibits class actions, ultimately reducing the size of the class to about 13,600 drivers, and with it, the impact of such decision was significantly mitigated.

The reasoning followed by Uber and Lyft, and the resignation and skepticism shown by the North American judges in applying traditional employment tests to new forms of work, bring forward the need to either update or redefine such tests, whether through case law or especial legal reform in order to ensure a higher degree of certainty in the legal world.

That was precisely the intention of the California Supreme Court with its 04/30/2018 ruling (*Dynamex* Case). Dynamex is an express courier company similar to Fedex, DHL, Zoom or MRW that treated its couriers (package deliverers) as worker until 2004, when it decided to reclassify them as independent contractors. In *Dynamex*, the California Supreme Court was faced with the task of analyzing which standard or test was adequate to determine if the Dynamex couriers were employees or independent contractors under the minimum wage and other working conditions executive orders (surprisingly enough, in the United States certain service providers can be employees pursuant to certain type of regulations, but not under others). Instead of applying the multifactorial test from the *Borello* case, that stresses the degree of control, the Court adopts the ABC test which can be found in Codes, Laws and case law from other States, because it was deemed to be more accurate and consistent with the "*suffer or permit to work standard*" required by the Californian executive orders on minimum wage to establish its applicability (who should be considered employer?). According to this general enunciation, if an entity requires, tolerates or allows an individual to work, then it must be held as its employer, all the more if that individual works in the primary business of the hiring entity[9].

The ABC test ensues the almost universal presumption that deems all personal services providers as employees and allows them to be classified as independent contractors *solely* if they meet *each one* of the following requirements:

[9] This is why companies like Uber and Lyft strongly argue that their main business is the supply of technology platforms or apps, as opposed to private transportation services or supply of travel services "*rides*".

(a) That the service provider is free from the control and direction of the hirer, both under the contract for the performance of the work and in fact;
(b) That the service provider performs work that is outside the usual course of the hiring entity's business; and
(c) That the service provider is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

Notably, *Dynamex*'s ABC test, does considerably simplify other employment test factors, but it does not constitute a radical shift from the *Borello* test or other multifactorial tests. For example, the ABC test does not consider what proportion of the rate charged to customers is allocated to the courier or whether the courier performs services eventually or occasionally as a "side gig" to a main source of income, (a relevant fact to other relationships, considering that 45% of Uber drivers in California work less than 10 hours per week). Consequently, we do not see in the *Dynamex* ruling, relevant efforts to include new defining elements to the employment test in the context of the sharing economy, as to allow a distinction between workers and freelancers.

Without a doubt, in requiring that employers concurrently meet all three elements of the test to classify a service provider as an independent contractor, who would not be subject to the work executive orders of California, the burden of proof on employers is ever more stringent after *Dynamex*.

Yet, the *Dynamex* ruling did not settle the dispute over which the appropriate standard (test) was, to determine if Uber and Lyft drivers should be treated as employees or independent contractors. A testament to this is the Assembly Bill 170 (AB170) of California approved on October 2, 2019, which seeks to codify and clarify the application of the *Dynamex* ruling[10]. This bill expands the applicability of the ABC

[10] Otros estados han marchado en la dirección opuesta y han aprobado leyes que califican a los conductores de Uber y Lyft como "contratistas independientes" (Indiana) o establecen una presución desvirtuable de que son "contratistas independientes" (South Dakota); y todavía otros

test from the *Dynamex* case, across the Labor Code and other work regulations. However, AB170 then enunciates a long and exhaustive list of professions and business types to which the *Borello* test should apply in order to confirm employment, among which there is no mention of service providers engaged through digital platforms such as Uber and Lyft[11]. The open purpose behind AB170 is to establish the application of a higher and more demanding evidentiary standard in order for these and other companies to classify drivers and deliverers as freelancers. Companies have announced that they intend to propose a referendum on California´s 2020 ballots, and we do not discard the possibility of negotiations with California senators to grant drivers right entitlements belonging to an intermediate status.

Instead of innovating in employment classification or regulating digital platform hiring, California's legislative intent poses an assertion of the ABC test, which contains few original elements to elucidate the condition of services providers engaged through digital platforms.

In the United Kingdom, there are two judicial rulings of special interest: a judgment from the Employment Tribunal of London of 10/26/2016 and another judgement from the Employment Appeal Tribunal of 11/10/2017[12]. Both judgements held that there were obligations upon Uber drivers that they should accept the trips that were offered and that they should not cancel trips once accepted, there being potential penalties for doing so. For instance, the drivers had the obligation to accept at least 80% of trip requests to retain their account status, or if they refused as much as three consecutive trip requests they would be forcibly logged off the Uber App

Estados han diseñado tests de laboralidad para facilitar la exclusión de los conductores del régimen laboral (Arkansas, Nevada).

[11] Insurance agents, doctors, veterinaries, lawyers, accountants, architects, financial advisors, photographers and newspaper editors, vendors, newspaper distributors, among many others.

[12] https://www.gov.uk/employment-appeal-tribunal-decisions/uber-b-v-and-others-v-mr-y-aslam-and-others-ukeat-0056-17-da

between two and ten minutes. So the British courts conclude that the drivers were not at liberty to take on or refuse work as they chose.

The judgements also assert that drivers are not free to negotiate or set their rates as they are established directly by the platform that enables interaction with the customer, and the driver does not take part in the contractual relationship. They further point out that Uber controls the personal data of passengers and bears the loss of fraudulent payments made by customers. In short, the British courts deemed the drivers take part in Uber's business, which is no other than that of transportation services[13].

Notwithstanding the above, the British courts leave room for Uber drivers who are available to work for or through competing apps, to be held as independent contractors and not workers, which highlights the importance of the factual circumstances of each case, in determining the relationship between platforms and drivers.

In France, a recent decision from the Court of Appeal of Paris from 01/10/19[14] considered that the fact that the drivers' activity is carried out through an organized network could suggest the existence of subordination, all the more if the hirer unilaterally lays down the performance conditions. In this particular case, the Court

[13] On the discussion of whether Uber services are merely technological intermediation or an ancillary intermediation service to a main transport business activity, and if this issue should be governed by EU law or domestic law of the Member States, the European Court of Justice has said in a decision from December 20, 2017, that: "the intermediation service provided by Uber is based on the selection of non-professional drivers using their own vehicle, to whom the company provides an application without which (i) those drivers would not be led to provide transport services and (ii) persons who wish to make an urban journey would not use the services provided by those drivers. In addition, Uber exercises decisive influence over the conditions under which that service is provided by those drivers. On the latter point, it appears, inter alia, that Uber determines at least the maximum fare by means of the eponymous application, that the company receives that amount from the client before paying part of it to the non-professional driver of the vehicle, and that it exercises a certain control over the quality of the vehicles, the drivers and their conduct, which can, in some circumstances, result in their exclusion. That intermediation service must thus be regarded as forming an integral part of an overall service whose main component is a transport service."

[14] https://revuefiduciaire.grouperf.com/plussurlenet/complements/CA-Paris-UBER-10-01-2019.pdf

found that, once logged on the app, the drivers must be available to meet trip requests. Uber allocates the costumers and the drivers lack the freedom to limitlessly reject the trip requests, since after three rejections in a row, they receive an app message from Uber, warning them that Uber reserves its right to change their account status or restrict their access to the app. It is Uber who sets the rates through an algorithm and having the ability to set rates is a distinct element of independent contractors. The Court also noted that drivers do not have a real possibility of developing and having their own differentiated client base other than the one provided by the app. It held that Uber not only lays down the route to be followed by the drivers for each trip, but it also establishes behavioral guidelines such as refraining from unpleasant conversation, receiving tips or arranging trips without informing Uber. Overall, the Court considers that there are enough criteria to confirm a subordination relationship between the driver and Uber[15].

[15] In Spain, Uber and Cabify have adopted an organization model that has spared such platforms from judicial debate. This is due to the fact that in Spain, these companies have chosen to license their technological platforms to third parties, in exchange for royalties. Those companies are responsible for hiring a fleet of drivers under an employment contract and paying them labor benefits under Spanish labor law, excluding from the get-go any debate on the classification of the relationship. In general, these companies pay their employed drivers a minimum wage (900 Euros) plus an amount equal to 40% of the trips that have been invoiced in excess of the invoice threshold (for example, 4000 Euros) although, because they are licensed technology companies, the terms of the individual agreements usually vary. The licensed companies also bear the costs for gas, vehicle maintenance and repair. According to Spanish newspaper *La Razón*, the Spanish Taxi Federation would be preparing a claim under the assertion that there is an illegal assignment of workers (forbidden outsourcing or subcontracting) between Uber and Cabify and the companies that operate the vehicle fleet, pursuant to article 43 of the Spanish Statute of Workers. The counsels of the Federation argue that in order to clarify if there is an illegal assignment of employees, the dependence on the means and the performance to benefit of a third party, as well as earnings and risks, must be assessed. While it may be true that the licensed companies provided the vehicles (means), they cannot provide services without the intermediation of the app offered by Uber and Cabify. As for the earnings, they argue that Uber and Cabify get the best out of the business and that they are not subcontracting a incidental or sideline activity, but that it is a central activity to the business, without which it would be inconceivable to provide services. Concerning the risks, they argue that even though the licensed company is liable in case of accidents, the rating of the services is carried out through the application and to the final client, Uber and Cabify are responsible for the services at all times, as for them, the licensed company does not exist. With respect to the dependence element, they argue that the app algorithm allocates the services and not the licensed companies and so, the instructions come from Uber and Cabify and not the licensed companies. Surely, for a successful claim, the Taxi Federation must not only prove the aforementioned features, but also prove that this arrangement has the purpose of evading labor obligations. A true challenge if one considers that the drivers hired through the operating companies are already entitled to the labor benefits afforded by Spanish law to employees.
Even so, the position of the Spanish Taxi Federation shows once more, that inasmuch as the relationship models of the sharing economy continue to be analyzed through the lens of conventional

IV. The delivery business model engaged through apps.

In general terms, the delivery business hired *via* apps, functions as follows. The company owning the app ("the Company") executes contracts with restaurants in Venezuela. Pursuant to said contracts, the Company advertises restaurant products in its website and app and facilitates delivery requests between the final client and the restaurant, acting as an agent to the restaurant. Under the contracts with the restaurants, the final client can order restaurant products through the Company's computer app. The final client chooses the products from the restaurant menus displayed in the app and pays for the product through a safe payment platform set by the Company. The Company provides a pick-up service from the restaurant and ensures delivery to the place indicated by the final client, by means of riders hired by the Company. Once the purchase order is accepted by the restaurant, the Company app selects a rider that is best located to meet the request, based on an algorithm that takes into account, among other things, the proximity of the deliverer to the pick-up place. Once the deliverer is chosen, the app notifies her, and she must decide in turn whether or not to accept or refuse the request. If the chosen deliverer does not accept the request, the app automatically allocates the request to another deliverer with the aforementioned criteria. If the deliverer accepts, she must head for the restaurant using a vehicle of her own (motorbike, bike, car), collect the order and transport it to the place designated by the final client. Once the order is accepted, the rider receives both the pick-up and delivery address. After the order is delivered, the Company pays the restaurant the corresponding amount, minus the intermediary commission as agreed between both parties. On their side, the riders, periodically, as agreed by the parties (weekly or biweekly), invoice the Company for the deliveries. The Company recruits the riders by way of its website or app. To perform their activities, the riders have to download, sign up in the app and sign a lease of services standard contract prepared by the Company. The

labor laws, the risks and legal uncertainty will continue to be present in platform companies and drivers relationships.

deliverers inform the Company *via* the app, of the schedule they choose to perform services, and when necessary, of their presence at one of the various meeting points and time agreed, and will start to receive requests through the app. The app allows the Company to follow-up on the activity and location of the deliverers via GPS from the time they accept the request, until the product is delivered to the final client.

V. The relationship between riders and companies owning apps in the light of comparative case law.

Unlike with drivers, there is abundant case law in Spain involving riders treated as independent contractors, workers or under a third/intermediate category: self-employed workers or economically-dependent self-employed workers '*trabajadores autónomos*' or '*trabajadores autónomos económicamente dependientes'*.

Firstly, there is the 39 Social Court of Madrid ruling of 09/03/2018, confirmed by the Supreme Court of Justice of Madrid (Social Chamber) in its ruling of 09/19/2019[16]. These rulings classified a rider from *Glovo* as an economically-dependent self-employed worker ("TRADE" by its initials in Spanish), adopting the classification the parties had agreed to in the contract between them whereby they excluded the existence of an employment relationship. Because this category does not exist in and is not governed by Venezuelan law we include an extract of the description offered by the Court of Madrid:

> There are several features in the relationship, that are common to those of the TRADE worker contract, as defined in articles 11 and on of the 20/2007 Law, of July 11, of the Statute on self-employed work. Article 11 refers that "economically-dependent self-employed workers are those who perform an economic or professional activity, for profit, in a habitual, personal, direct

[16] http://www.poderjudicial.es/search/indexAN.jsp?org=ap-tsj&comunidad=13

manner, and predominantly for an individual or legal entity called client, over which they are financially dependent, as they make up for at least 75% of their income from works and economic activity." And the second paragraph adds that to qualify as TRADE the following conditions must concur:

a) A TRADE must not have employees or contract or subcontract a part or the whole of the activities with third parties, with respect to the activity engaged by the client on which she is financially dependent, and also with respect to activities engaged by other clients. (...)
b) TRADES must not perform their activity in the same way as employees perform services under any employment scheme, for the client.
c) A TRADE must have a production infrastructure and its own resources, necessary for the activity and independent from that of the clients', when they are financially relevant in said activity.
d) TRADES must develop their activity with an organizational criteria of their own, regardless of the technical instructions they may receive from their client.
e) TRADES must receive a monetary compensation based on the result of their activity, according to what has been agreed with the client, and bearing the risks of the activity. (...)

The performance of services (by the rider) matches the described features, since he did not employ workers, performed the activities in a differentiated way that separated him from other workers that were employed by the defendant, had an infrastructure and materials needed for the activity (motorbike and mobile phone), developed his activity with his own organizational criteria (he chose the schedule, services, the route and resting time periods, without having to justify absences), he received certain technical indications from the defendant (related to the geographical area to be covered, the use of the company app, the means to make purchases for clients, using a GLOVO card), and received a monetary compensation based on the result of his activity, bearing the risks of it. Added to this, is the fact that it was the claimant himself

> who, after a year of service, informed the defendant on his condition of TRADE (and not an employee) in formalizing the respective contract, as was effectively executed. Ultimately, the proven material reality of the relationship, considerably differs from an employment relationship, absent its primary features, but perfectly adjusts to the defining conditions of the TRADE type of work, which coincides with the classification given to the relationship by the parties themselves under the second contract, and not precisely by initiative of the defendant but rather of the claimant. (Translation is our own).

Along these lines, the Court 17 of Madrid held in a ruling of 01/11/2019[17], with greater emphasis on the autonomy degree of the deliverer in determining the service conditions:

> In conclusion and to assert the aforementioned, it has been demonstrated that the rider has complete freedom to choose the days in which he wishes to provide services to GLOVO and the delivery schedule for each work day, and to decide his rest periods. He can also choose whether he wants to provide all the services proposed by the company (automatic allocation setting), however with the possibility to refuse orders that he has no interest in carrying out without having to justify why (but still required to inform his refusal, so that the order may be allocated to another rider) or just as well, accept one or more available orders (manual allocation setting). Even when the service is set to begin, the deliverer may choose to quit the order to carry out another one or conclude services. He also has complete freedom in organizing and deciding on the route from his initial location to the pick-up and delivery destination without having a pre-established route assigned or a particular location point to start services, and he accepts a linear distance or real-time optimum invoicing model.

[17] https://www.laboral-social.com/sites/laboral-social.com/files/NSJ059449.pdf

On account of the above, the claimant's motion to be classified as an employee is dismissed." (Translation is our own).

An opposite conclusion was reached in the ruling from the Social Court 33 of Madrid of February 11, 2019[18] which deemed Glovo riders as employees based on this reasoning:

> The deliverer, hired for an indefinite term (claimant has been hired since 11/18/2016), has to necessarily sign up to the platform in order to carry out his activity and from it he receives service orders preselected by GLOVOAPP23 SL which keeps full control of the activity (the app is able to inform clients and providers at any time where the deliverer is), activity which is governed by a set of precise rules and requires a certain behavior from the deliverer (…), activity which is then assessed through the creation of profiles, and this has an impact on future order allocations, and further, the defendant holds clear disciplinary authority that allows it to dissolve the relationship in case of breach of these rules and also the rate of each assigned task. In this context, the portions of freedom to decide on work days and work time and the acceptance of determined services does not translate into authority or powers that condition the development of the business activity, since GLOVOAPP23 SL relies on a comprehensive staff of riders who in absence of some are willing to work, automatically replacing the absence with their presence, also in cases where the deliverer turns down an assigned service (…). Besides, the rider would never be able to perform her tasks without the digital platform on which she logs on: it is unthinkable to conceive that with her vehicle and mobile the rider would transport goods between providers and clients. If the rider were to undertake this sort of activity by herself as an authentic independent contractor, she would be condemned to failure and the possibilities of expanding as an entrepreneur would be nonexistent, since the success of this type of platforms

[18] https://www.laboral-social.com/sites/laboral-social.com/files/NSJ059448.pdf

> is owed to the technical support afforded by the TIC they use. The unfeasibility in that riders with their own means and without the use of platform, may carry on a business activity of their own, relates to the other key element that establishes a given relationship as employment: the performance of work on another's behalf.

An identical conclusion –that riders work on another's behalf- is reached by the Social Court 19 of Madrid through ruling of 07/22/2019[19], but this time concerning the case of riders engaged through the *Deliveroo* app:

> When it comes to material means, the use of several materials owned by the deliverers, especially the vehicles used for the deliveries, can certainly be asserted. However, this alone is insufficient to rule the 'performance on another's behalf' criteria out, considering that the means and assets relevant in developing the activity are not those, but the Deliveroo app, which is controlled and supplied by the company for the riders' use, and the corresponding brand, which is naturally, controlled by the company and not the riders. On another note, it is not the deliverers but the defendant who is party to the legal transactions existing with the restaurants and the recipients of the food that was transported, as a matter of fact, the deliverers' performance is limited to the transportation service, which is fundamentally a personal activity, that does not partake in such contractual relationships and is not affected by the risks arising from them (…) Proven facts reveal that the riders provided services in a way that is completely organized and governed by the defendant company, to the minimum of details. In all respects, the instructions handed to the riders with a reach beyond the delivery order itself, proved that the company laid down the conditions of the work performance with precision, conditions that were then verified and evaluated by the same company. (Translation is our own).

[19] https://www.laboral-social.com/sites/laboral-social.com/files/Jdo_Social_19_Madrid_22_julio.pdf

Lastly, the decision dated 11/27/2019 of the Supreme Court of Justice of Madrid, of the Social Chamber in plenary session[20], dismissed the existence of a TRADE relationship between a rider and GLOVO platform and found that the elements of subordination and 'performance on another's behalf' were present in the relationship. In reaching this conclusion, the Court dates back to a ruling of 02/26/1986 of the Fourth Chamber of the Supreme Court that classified an employment relationship between a courier and the company assigning the collection and delivery of packages, and held that the only difference was the way in which the company and the couriers communicated in order to assign the package delivery (granted, at the time communications were managed *via* phone line and not through digital platforms like in nowadays). To assert that the performance of work was on another's behalf, the ruling relies on the fact that GLOVO settles the prices with the business establishments and unilaterally sets the rate charged by the rider for each order. It further asserts that the work performance on another's behalf in relation to the means used is undeniable: suffice to compare the paramount importance of the digital platform and the brand, with the scarce material means provided by the riders (motorbike, mobile phone), and it is GLOVO who controls the platform information and software. Finally, the decision stresses the fact that the deliverer performed work within the scope of the company's organization and control and supervision:

> The claimant in this case is required to strictly follow the instructions imposed by the company concerning the way in which the work must be carried out, which as was shown, must be completed in up to 60 minutes. It must also be noted that the company, through its installed geolocation system, exercises effective and continued control over the claimant's activity. Also noteworthy, is the daily evaluation to which the deliverer is subject as described in the sixth

[20] https://diariolaley.laleynext.es/content/Documento.aspx?params=H4sIAAAAAAAEAMtMSbH1CjUwMDAzNTAwMTRRK0stKs7Mz7Mty0xPzStJBfEz0ypd8pNDKgtSbdMSc4pT1RKTivNzSktSQ4sybUOKSlMBZMtUAEUAAAA=WKE

item of this judicial account. In short, there is no self-organization, rather a hetero-organized service, managed by the company that receives and benefits from them. (Translation is our own).

In France's case, we also find conflicting case law regarding the treatment of riders. The *Cour d'appel de Paris* in a ruling of 04/20/17[21] deemed that there were not sufficient elements to characterize the relationship as subordination betweem the riders and the platform *Take Eat Easy* based on:

" (i) The freedom to choose the schedule and his work days, without having to provide justification and without penalties for it. The user registers with the platform and chooses when he wants to work, even choosing the geographic area in which he offers his services. (ii) There is no penalty for not offering services, not even if he terminates the relationship with 48 hours' notice. (iii) The deliverer has his own resources: his bike, a helmet, a coat, the company merely provides, for reasons of product quality and hygiene, an isothermal box, and if necessary, a phone. (iv) The company provides training in starting the services, but it is a short and quick process, exclusively intended to select candidates. (v) The company provides the rider with a guide for *Take Eat Easy* riders, but such guide establishes mere recommendations on health and safety and advices to improve work performance, not instructions or orders. (vi) Contact between riders and *Take Eat Easy* is exclusively *via* phone, and events organized by the platform are not of mandatory attendance. The Court concludes that there is no clear indication of the existence of an employment relationship". (Translation is our own).

This last decision was overruled by the *Cour de Cassation de France* on 11/28/2018[22], which held that there was a subordination relationship between the rider and *Take Eat Easy* because "the app is equipped with a system of geolocation

[21] http://www.gov-up.com/wp-content/uploads/2017/07/TEE-CA-Paris-Ruling-of-April-20-2017.pdf

[22] https://www.courdecassation.fr/jurisprudence_2/chambre_sociale_576/1737_28_40778.html

allowing the real-time monitoring of the rider's position and tracking of the total number of kilometers travelled by the riders. Besides, *Take Eat Easy* had powers to sanction riders, that allowed it to deactivate the rider's account after four failings (delays in deliveries, bad behavior towards company support, client personal data retention, or calling off a shift too late).

In the United Kingdom, we find a decision from the Central Arbitration Committee in the *IWGB* and *RoofFoods Limited* (*Deliveroo*) case of 11/14/2017 [23] which excluded the existence of an employment relationship based on the fact that the rider had substitution rights in engaging someone else to take over the deliveries, so it could not be said that the riders undertake to do personally any work or services for another party. Contrary to the notion that there was an employment relationship, the Committee also considers that the rider in case, had signed up with other food delivery organizations (*Uber Eats*) so they can log on several apps at once and keep them open at the same time. This decision was confirmed by a ruling from the UK High Court (Queens Bench Division) of 12/5/2018[24].

Having gone through several case law concerning riders engaged through digital platforms, we can appreciate just how unreliable the employment test can be –with the high level of discretion from the judiciary it entails- in producing certainty in law operators. Relationships, that essentially unfold in a very similar manner, are treated unevenly contingent on the relative weight the court attributes to a certain factor, at a given time.

VI. The Venezuelan employment test and its hypothetical application to drivers and riders engaged through digital platforms.

[23] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/663126/Acceptance_Decision.pdf

[24] https://www.11kbw.com/wp-content/uploads/CO-810-2018-R-IWUGB-v-Deliveroo-05-12-2018-APPROVED.pdf

The economic, social and institutional collapse that Venezuela has experienced in the last decade has delayed the establishment of technology companies that facilitate hiring drivers and riders through platforms. Yet, as soon as the sharing economy sets about in Venezuela, it is foreseeable that the courts' take on the relationships established through platforms, will be based on the same traditional conceptual framework currently used to elucidate the nature of relationships that are ambiguous. Admittedly, we also anticipate the Venezuelan courts will follow the footsteps of comparative case law, on the matter.

As in other jurisdictions, the Venezuelan courts have developed a multi-prong employment test[25] for "grey area" or "borderline area" relationships, to determine whether they are an employment relationship or not[26].

Based on Venezuelan and comparative case law, the risks of characterizing a relationship between platform companies and drivers or riders as an employment relationship, increase or decrease depending on whether one or more elements of

[25] Such employment test is composed of the following criteria:

(a) The way in which work is determined;
(b) Work time and other employment conditions;
(c) Payment mechanism;
(d) Personal work, supervision and disciplinary control;
(e) Investments, material, tools and equipment supply;
(f) Who bears the losses and profit of the business, work frequency, exclusiveness of services;
(g) The legal business of the alleged employer;
(h) If the alleged employer is a legal entity, its incorporation, social purpose, whether it has operations, complies with tax obligations and duties, accounting records, etc.;
(i) Ownership of the goods and supplies directed to the service performance;
(j) The nature and amount of the monetary compensation paid for the services, all the more if the amount is considerably higher than amounts usually paid for the same or similar services;
(k) Other criteria that determines subordination.

[26] (i) Decision No. 489 of the Social Chamber of the Supreme Court of Justice ("SCS/TSJ" by its initials in Spanish) dated August 13, 2002. *Mireya Beatríz Orta de Silva v. Federación Nacional de Profesionales de la Docencia*; (ii) Decision No. 433 of the SCS/TSJ dated June 17, 2013. *Roberto Thompson Villasmil v. Lubvenca Oriente*, C.A., and (iii) Decision No. 116 of the SCS/TSJ dated February 14, 2014. *Ninoska Natalí Cabello Hernández v. Súper Autos Puerto Ordaz, C.A*. Case law has repeatedly applied said employment test to ambigous relationships such as: commercial dealerships, insurance agents, franchises, independent professionals, transporters, hairdresser, pilots, lawyers, executive presidents, senior vicepresidents, drivers, accountant advisors, graphic reporters, newspaper distributors, radiologists, among others.

the employment test are identified in the service or business activity. However, comparative experience reveals that, no matter the number of elements the conventional employment test may have, the weight given by the judge to each element is defining when classifying the relationship, as we have previously shown. For instance, for some judges the fact that drivers and riders can work whenever and however they choose is an element that excludes all indicia of subordination, while others stress the use of geolocation systems as a clear sign of supervision powers that add to the subordination feature. Some judges consider the fact that drivers and riders provide the material means to perform the services as relevant, others find that such material contribution is irrelevant against the decisive contribution that is the technological platform, since without it, it would be unthinkable for drivers or riders to carry out their activity. Some judges are inclined to interpret that platform companies simply provide the required technology as an intermediary between the final customer and the driver, whereas others consider there is a service of transportation of individuals or food managed by the companies that own the apps, of which the drivers and riders are an integral part of, since these platforms sell trips and rides or deliveries. And then again, other judges see that non-exclusiveness rules out employment whereas there are some that do not give consideration to such factor. And lastly, some judges deem the fact that the service provider can assign the order to a third party as a deal breaker for subordination, in that there is no personal performance of work.

The uncertainty amounting from judicial balancing is costly for both drivers and riders -who are unaware of the benefits they are entitled to- and intermediary companies -who have to deal with uncertain costs in the form of litigations, government inspections, lobbying and public opinion campaigning. Such uncertainty hinges investment on digital platform intermediation and the advancement of occupation and services associated to them.

VII. Limits of the employee and independent contractor categories to address the work forms in a sharing economy.

The notion that drivers and riders develop a type of work that is intermediate between the freelancer category and the subordinate employment one, is increasingly gaining ground in comparative law. Trying to nudge -constrict- this new work form into the already existing categories of employment can threaten the very existence of intermediary work through platforms, with adverse effects on the services providers, the unemployed, technology companies and the economy in general[27]. After all, a significant part of drivers and riders exchange their rights and entitlements under labor law, for flexibility in work time, work execution and an higher day-to-day disposable income[28]. Conversely, to treat these service providers as independent contractors could exclude them from all protection. With the added issue that certain technology companies may forgo offering benefits to the contractors such as, for example, a collective liability insurance, out of fear that it could suggest an employment relationship.

Against the "*all or nothing*" approach involved in this dichotomy, a significant part of scholars posit a "*different rights for different workers*" approach[29], according

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[27] In Venezuela, labor costs unrelated to wages, that is, costs associated to the benefits afforded by labor laws and social security laws, amount to Bs. 0.85 for each bolivar paid to the employee. Further, the Venezuelan law is one of the most rigid laws in the world, in terms of hiring, employment termination and worktime organization.

[28] Research has found that 80% or more of employers' costs of providing employee benefits, such as health insurance or workers' compensation insurance, is ultimately borne by employees in the form of lower wages (*Gruber*, 1994, cited in *Harris* and *Krueger*, in their paper referenced in footnote 13 of this article). In regards to AB170 in California, some Uber drivers have expressed their concern for the loss of independence and flexibility that would come with the classification of employment, *The Wall Street Journal* https://www.wsj.com/articles/Uber-Lyft-drivers-torn-as-california-law-could-reclassify-them-11569063601.

[29] Harris and Krueger: *A proposal for modernizing labor laws for 21st century*, The Hamilton Project, 2015 and Mercader, Jesús R: *Economía Colaborativa y Derecho del Trabajo*, First Edition, Aranzadi 2018. For a sceptical view on the proposal of an intermediate figure see: Dadivov, Guy: *The Status of Uber Drivers*: *A Purposive Approach*, https://doi.org/10.20318/sllerj.2017.3921; Freedland and Prassl: *Employees, workers and the ´sharing economy´ Changing the practices in the United Kingdom*, https://doi.org/10.20318/sllerj.2017.3922; and Suárez Corujo, Borja: *The sharing economy: the emerging debate in Spain*, https://doi.org/10.20318/sllerj.2017.3923.

to which a level of protection is afforded to drivers and riders that share only some characteristics of employees and should be covered by some -not all- protective stipulations of the labor law. This is best accomplished by creating a middle category. After all, this would not be a foreign notion to the Venezuelan labor law, which includes a title on special employment relationships (albeit known to be insufficient and outdated) which offers a differential treatment to various groups of workers.

More than indulging in discussions on whether drivers and riders are or not subordinate workers, the idea would be to raise the level of abstraction and ask ourselves: regardless or not we are in the presence of subordinate work, is there a reason that justifies the legal protection of these service providers due to the particular position they occupy with the respect to the intermediary companies? To answer this question, the "*purposive approach*" posited by *Davidov* is a good starting point. The ultimate aim of labor legislations can be summarized in the need to counterbalance the disproportions of bargaining powers between the subordinate workers and their employer[30]. Are such inequalities present in all or just some of the relationships established between intermediary companies and drivers and riders? If the answer is affirmative, what degree of protection or sets of rights would seem adequate to compensate or make up for such unbalance, considering the way in which the drivers' and riders' work is carried out and the differences in the positions of economic dependence one or the other may find themselves in with respect to the companies (only source of income v. "side gig" to a main occupation).

The manner in which the work is performed *vis a vis* platforms makes it practically impossible -or confusing and impractical at the very least- to apply regulations and benefits that are dependent on work time (over time, minimum wage, severance, profit sharing, vacations). For instance, the case of a driver that is logged on several apps at a time while waiting for a ride request, beyond any discussion on

[30] Power unbalances between the parties is not exclusive to labor matters and constitute one of the most frequent grounds to justify State intervention in economic regulation, as appreciated in laws on leasing, insurance, telecommunications and consumer protection.

whether on-call time is considered work time (since the driver can switch the app off at any given time to do another work or personal task), centers the debate on which of the two companies can tally those hours as theirs.

All of these considerations have led scholars to propose that drivers and riders are entitled to the following rights as acknowledged by law: (i) the right to organize and collectively bargain agreements over aspects of the relationship that are of common interest for the technology companies such as, the prices paid by customers, taking up a liability insurance, pooling opportunities for discounts from auto maintenance and repair services, among others; (ii) civil rights protections on equal treatment and anti-discrimination; (iii) certain social security and health and safety protections; (iv) the obligation to contribute to social security based on a special scheme (50% of the "regular" worker contribution); (v) the mandatory withholding of a percentage of the service providers' earnings to pay for a collective health insurance[31].

This academic tendency resonated in France's law on labor market reform of August 2016, which embodies a set of provisions that covers those who provide services *vis a vis* online platforms that connect the service providers to the final customers[32]. According to this bill, and subject to a threshold of earnings that must be reached by the independent worker, if the platform sets the characteristics of the goods or services and their price, it acquires a social responsibility towards its independent workers that translates into: (i) assuming all costs required for those independent workers to be covered by a social security scheme equal to the protections in case of occupational accidents, and (ii) accountability for their continued training. On the other hand, the reform also ensures this type of workers' right to collectively organize themselves in pursuit of their interests and to put some pressure on employers, within limits, to improve their contractual conditions.

[31] Harris and Krueger, op.cit p. 15
[32] Agote, Rubén: *La reforma laboral francesa* en Blog Cuatrecasas Laboral http://blog.cuatrecasas.com/laboral/2016/10/20.

In Spain, law 20/2007 implemented the TRADE (by its initials in Spanish) figure, (economically dependent worker or *Trabajador Económicamente Dependiente*), which was previously described above. This intermediate status entails a limited set of rights similar to those explained above, but also includes certain regulations on work hours, training and contract termination. However, this figure is not commonly used, due to, among other reasons, the fact that it requires the contracting party to acknowledge the TRADE quality of its contractor (that is, that the first stands for at least 75% of the latter's earnings). This has driven some authors to challenge the bill and ask for an updated version in line with the advances of the platform economy[33].

Besides Spain and France, Austria, Canada, Slovenia, South Korea and the United Kingdom have also introduced a hybrid or intermediate category of independent worker[34].

VIII. The convenience of having a legislative approach on work engaged through digital platforms in Venezuela.

Venezuela´s unprecedented economic collapse has been a significant drag in the development of the gig economy. A 62% contraction of its GDP in the last six years, the world's highest inflation rate, the unsettledness of its currency and payment mechanisms, are without a doubt factors that have hampered the adoption of the gig economy. But factors like automotive obsolescence, gas and spare parts shortages, limited access to smartphones and social media by a significant part of the population, the slow development of digital payment mechanisms, and above all, one of the highest crime rates in the world, have also negatively impacted the development of digital platforms. Yet, there are other elements that favor the outreach of these new work forms: the unsatisfied demand of transport services in

[33] Mercader, Jesús, op. cit. p. 18.
[34] *The Gig Economy*, Global HR Lawyers, Ius Laboris, June 2018

Venezuelan cities, the inexistence of taxi associations with members with significant investments in licensing, and therefore more inclined to adopt new technologies, not to mention the over-supply of workforce in search of a main jobs or "side gigs".

¿Which then, would be the best solution we could think of for Venezuela, considering the early development stage of its digital platforms and general labor market exclusion –unemployment and informal work- which characterize the Venezuelan economy[35]?

We have already seen the shortcomings of the traditional employment tests in accommodating the realities of the gig economy and the legal uncertainty and elevated litigiousness associated to it. An undesirable option if the intention is to lure investments in the digital platform sector by way of a predictable legal framework.

A second option, which also requires the involvement of the judiciary, would be for the judges to devise a new employment test applicable to the new work forms of the shared economy, disregarding any indicia that has proved to be inadequate in classifying said work forms (for example, the relevance of material means used to perform services or the control degree) and have it focus on elements such as the share of the drivers or riders in the rates charged to the final client or the degree of economic dependence of the driver or rider on the platform. While this appears to be a preferred option over the first, it is likely that it would continue to produce conflicting or contradictory rulings and that the new employment test would take some time to establish itself until its definite adoption by the Supreme Court, time during which uncertainty would continue to take over cases dealing with gig economies.

One third alternative, which in a way diverts from the former, is that regulators enact a simple and objective employment test that allows the classification of drivers

[35] According to the IMF, unemployment projections in the Venezuelan economy for the year 2020 reach a whopping 47.2%, *IMF World Economic Outlook*, p.59. file:///Users/victorinomarquez/Downloads/text.pdf

and riders as “regular” workers or independent contractors. The simpler the test (fewer elements), the better, as it suggests an easy and transparent application[36]. Along these lines, I argue that the defining criteria of the test should be the proportion of earnings received by the driver or rider (from the price charged to the client) for each ride or order. By way of example, if the driver or rider receives more than 60% of the rate charged to the final client, he would be classified as an independent contractor under Venezuelan labor law[37]. Such an approach would bring several advantages. First, it would be an incentive for technology companies to share a higher percentage of its income deriving from their intermediation, improving the service provider’s financial position and earnings. That is, the potential contractual unbalance is compensated by a greater participation in the rates charged. Second, it allows the technology companies to offer drivers and riders certain benefits (such as liability insurance, for instance) without the risk of it being regarded as an employment indicia. Third, given the country’s economic conditions, it cannot be expected that drivers and riders have their own vehicles or smartphones, and data plans with enough capacity to provide the required services through online platforms and so, technology companies would be at liberty to provide such means without the risk –once again- of it being regarded as an employment indicia. Fourth, this criteria would ensure platform operators, in a direct and swift way, with a solid legal framework, allowing them to focus on the many other challenges that sustaining a business in Venezuela entails. We do not consider it necessary to wait for a comprehensive reform of the labor law to introduce this criteria, since it would be compatible with the framework of the social and economic transitional laws that have been recently worked on by the National Assembly. This would decisively be the option that would allow a boost on investments in the digital economy and the

[36] We think that including other indicia would complicate its application. For instance, if one of the elements to exclude employment in the case of drivers, is that the service be performed during less than a certain number of hour a week -lets say 20 hours- for a platform, this would limit the service supply and work demand. The inclusion of this element would be justified by the need to protect those drivers and riders with a high economic dependence.

[37] The minimum percentage of distribution to the driver or rider so that they may be considered as independent workers, should be legally fixed in consultation with companies from the sector, and taking into consideration the country’s context.

creation of new jobs, and as such, it is the option that better addresses the most urgent needs of the Venezuelan economy.

The fourth and final option, consists in attributing to the service provider engaged through digital platforms, a statute of its own, different from the subordinate worker and the independent contractor, following the examples set by comparative law. We see this proposal materialized in the medium-term, once this sector has established and there is enough experience to comprehend whether regulation is needed, and in what terms, or whether it is desirable that the transitional set of rules remain in force. Certainly, the adoption of this new hybrid type of category through legislative initiative, should be previously subject to public consultation of the social stakeholders (intermediary technology companies, drivers and riders, companies that supply platforms for the payment mechanisms, insurance companies, among others). Such a process would define what rights and benefits would be consistent and compatible with the way in which these types of work take place, where service providers would surely be willing to trade-off certain levels of protections afforded by labor laws for flexibility in work hours and work performance. The parties must have a wide range of freedom of choice in defining the contractual conditions and "self-regulating" their relationship.

The universal claim that labor laws are meant to govern all forms of work has been put to the test with the rise of new technologies. The notion that "one size fits all" appears to be particularly inadequate to address the treatment of work engaged through digital platforms. In times like these, the idea of granting different rights for different workers seems more realistic and promising.

Caracas, January 10, 2020