



Flexibility or Insecurity? Exploring the Concept of gig Contracts from Ukrainian Regulatory Experience

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Abstract

The emergence of the gig economy has led to significant changes to employment and work relationships worldwide. While companies seek more flexible and cost-effective solutions for hiring workers, policymakers consider adjusting the regulatory framework to the challenges of gig work. Ukraine, a country that has undergone economic and social transitions, has experienced growth in the gig economy, particularly in the digital sector. Against this background the recent launch of Diia City, a legal framework for IT businesses, and the introduction of gig contracts for IT workers have raised questions about this employment model's potential benefits and challenges and the boundary between civil and employment law. This paper aims to explore the concept of gig contracts from the Ukrainian regulatory experience, discussing their potential as a solution to social insecurity in the digital economy while also considering potential issues with their implementation. First, the specific features of gig contracts are highlighted and their advantages and disadvantages for both IT workers and companies are outlined. In the second section, the author points out terminological differences in the generally recognized concept of gig workers in European labour law doctrine and in Ukrainian law. The third section of the paper focuses on the challenges of gig contracts' dual nature in the context of the classification of employment status and fundamental labour rights implementation. Finally, in the last section, the risks of exclusion of workers in the IT sphere from the scope of labour law for the further legal regulation of work in the gig economy in a broader context are discussed.

Keywords: gig contract, gig workers, gig economy, digital economy, IT industry, IT workers, labour rights, the scope of labour law, social guarantees, platform work.

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1. Introduction

The digitalisation and rise of the gig economy in recent decades has transformed the nature of work and employment all over the world. Traditional employment contracts cannot meet all the digital era's challenges. Therefore, companies are looking for the most optimal types of work relations, which would be more flexible, dynamic and cost-effective. It leads to the emergence of new forms of employment which in turn put on the doctrinal agenda questions of the future of labour law as a regulatory approach to work, employment classifications and protection of fundamental labour rights¹.

Beyond these global trends, the challenges for Ukrainian labour law that have existed for recent decades are caused not only by the development of new technologies. Ukraine is a country that has undergone significant economic and social changes in the past few decades, including the transition from a planned economy to a market economy and the integration into global markets. As a result, the labour market has become more diverse and dynamic, with a growing number of workers engaging in the gig economy. In 2013-2017 Ukraine ranked first in Europe and fourth in the world in relation to financial flows and the number of tasks performed on digital platforms². Also, over the past decades the Ukrainian IT sector has turned into a highly intelligent industry, employing almost 300 thousand professionals and growing by 25-30% annually and being now one of the largest exporters of IT services in Europe³.

Against this background, the Labour Code⁴ (LC), adopted in 1971 when the country was a part of the Soviet Union and amended about 140 times is 'still not in sync with the structural economic landscape changes and social relations'⁵. According to EU Analytical Report 'national legislation needs to be updated to protect workers such as those subject to non-standard forms of work'⁶. Given this narrative about the outdated and rigid labour regulation, employers in Ukraine often attempt to 'get around' or avoid using a traditional employment contract because of excessive guarantees and benefits for

¹ Perulli ADALBERTO – Tiziano TREU: *The Future of Work : Labour Law and Labour Market Regulation in the Digital Era*. Kluwer Law International B.V., 2021.; Kurt PÄRLI: Impacts of Digitalisation on Employment Relationships and the Need for more Democracy at Work. *Industrial Law Journal*, Volume 51, Issue 1. (March 2022) 84–108. <https://doi.org/10.1093/indlaw/dwaa029>; Tamás GYULAVÁRI – Emanuele MENEGATTI (ed.): *Decent Work in the Digital Age: European and Comparative Perspectives*. Oxford, Hart Publishing, 2022.

² Mariya ALEKSYNSKA – Anastasia BASTRAKOVA – Natalia KHARCHENKO: *Work on Digital Labour Platforms in Ukraine: Issues and Policy Perspectives*. Geneva, ILO, 2018. 6–8. Available at: <https://tinyurl.com/4zrvuteb>

³ IT Ukraine Association: *Ukraine IT Report*, 2021. Published on January 23, 2022. Available at: <https://reports.itukraine.org.ua/en>

⁴ The Labour Code of Ukraine, approved by Law No. 322-VIII of 10.12.71. Verkhovna Rada of Ukraine. Official web portal. Available at: <https://zakon.rada.gov.ua/laws/show/322-08?lang=en#Text>

⁵ Labour Market Profile Ukraine – 2022. Danish Trade Union Development Agency, 3. Available at: <https://tinyurl.com/3afedts8>

⁶ Analytical Report following the Communication from the Commission to the European Parliament, the European Council and the Council Commission Opinion on Ukraine's application for membership of the European Union. Brussels, 1.2.2023 SWD (2023) 30 final, P. 36. Available at: https://neighbourhood-enlargement.ec.europa.eu/system/files/2023-02/SWD_2023_30_Ukraine.pdf

employees arising from the attributes of the LC.⁷ By way of example, it is much more difficult to dismiss an employee drawn up under the rules of the LC than to terminate relations with an entrepreneur⁸.

Moreover, as Ukrainian legislation has no safeguards against using civil contracts with individual entrepreneurs to retain labour or services, such contracts have become a common practice, especially in the IT sphere in recent decades⁹. Another reason is the optimisation and reduction the tax burden, as no social security contribution shall be paid by the employer¹⁰. Thus, civil contracts with individual entrepreneurs have become the most common way of cooperating in the technology industry¹¹.

In order to tackle this practice, the alternative option combining elements of freelancing and social guarantees usually provided by employment contracts was introduced in Ukraine by adopting the Law on Stimulating the Development of the Digital Economy in Ukraine (LSDDE)¹² and a new legal framework for IT businesses called Diia.City¹³ (an eco-system that stimulates the development of the digital economy and advanced technologies) was launched. By February 22, 2022, just two days before the start of the Russian full-scale invasion, 74 companies had already become its residents.¹⁴ As of September 1, 2023, the register of Diia.City contained 654 companies.¹⁵

One of the significant innovations of this law is the introduction of the concept of gig contracts, which, according to its developers, was intended to encourage Ukrainian IT companies to switch to official employment of their employees under these contracts, while retaining the tax advantages of civil contracts with individual entrepreneurs¹⁶. According to the Ministry of Digital Transformation

⁷ N. M. GALKINA – D. R. KOVALCHUK – A. YU. KUNDIY: Legal Regulation of Labour Regulations of IT Practitioners in Ukraine. *Juridical Scientific and Electronic Journal*, No 11, 2022. 333. <https://doi.org/10.32782/2524-0374/2022-11/78> [In Ukrainian].

⁸ Generally, an employer has the right to dismiss an employee only if there are valid grounds, an exhaustive list of which is provided by the LC. In addition, specific categories of employees cannot be terminated on the initiative of the employer at all. These 'protected' employees include: pregnant women; women with children under the age of three, or under the age of six if a registered medical practitioner certifies that home care is necessary; and single parents or the legal guardians of a child under the age of 14 or a handicapped child. The law only allows such employees to be dismissed if the employer is liquidated without legal succession and with the preservation of average salary for three months following the termination.

⁹ Development of Ukrainian IT Industry. Analytical report by the IT Ukraine Association and the Better Regulation Delivery Office (BRDO). Available at: https://brdo.com.ua/wp-content/uploads/2018/12/IT_report_eng_F-1.pdf

¹⁰ If the work is performed by an individual entrepreneur within the framework of entrepreneurial activity, the customer company will not pay single contribution for mandatory state social insurance (22%) or military duty contribution on the remuneration (1,5%) under the contract for the provision of services. All the entrepreneurs and self-employed in Ukraine must pay single social contributions by themselves according to their income.

¹¹ The explanatory note to the draft law on Stimulating the Development of the Digital Economy in Ukraine, 30.10.2020. Verkhovna Rada of Ukraine. Official web portal. Available at: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=70298

¹² The Law of Ukraine "On Stimulating the Development of the Digital Economy in Ukraine" № 1667-IX, July 15, 2021. Verkhovna Rada of Ukraine. Official web portal. Available at: <https://zakon.rada.gov.ua/laws/show/en/1667-20#Text>

¹³ In order to become Diia City residents and maintain their residency tech companies must comply with a number of requirements such as: 1) the entity is engaged in certain digital-related activities (e.g., software development, video game production, educational activities in the sphere of IT, etc.); 2) the average amount of the monthly salary for employees and gig contractors is not less than the EUR 1,200 equivalent; 3) the legal entity's average amount of employees and gig-contractors is no less than nine; 4) the amount of the entity's qualified income is not less than 90%, with qualified income defined as income from activities described above; (5) the entity does not face one of the restrictions on the approved list. *Nota bene*. During martial law, companies are not deprived of their resident status if they do not meet the criteria regarding the number of employees and the average salary.

¹⁴ Taras UTIRALOV: Ukraine: Diia City – a New Legislative Framework for IT Companies During the War. Available at: <https://tinyurl.com/fyrcm7c9>

¹⁵ Diia.City Register. Available at: <https://city.diia.gov.ua/en/registry/resident>

¹⁶ Under Article 4 (4) of the LSDDE, a tech company (a resident of Diia.City) can choose a traditional pattern, such as a fixed-term employment contract to engage a workforce. Alternatively, they may opt for more flexible relations based on a new type of contract, a gig contract.

of Ukraine, Diia.City resident companies employ in total more than 43,000 specialists – more than 14% of the total number of IT specialists in Ukraine.¹⁷ However, a gig contract has been defined as a civil law contract, not a special type of employment contract, and is excluded from the scope of labour law¹⁸. Simultaneously, working arrangements under a gig contract have many features inherent in employment relationships. In this context, it is essential to ask: Is the creation of a special regulatory framework for IT workers with their exclusion from the scope of labour law, but with a certain level of social protection, the right approach to regulating work in the gig economy? Does not this employment model further blur the boundaries between labour and civil law? In order to answer these questions, first the author will highlight the specific features of gig contracts outlining their advantages and disadvantages for both IT workers and companies. In the second section, the paper aims to point out terminological differences in the generally recognized concept of gig workers in European labour law doctrine and Ukrainian law. The third section focuses on the challenges of gig contracts' dual legal nature in the context of the classification of employment status and implementing fundamental labour rights. Finally, in the last section, the risks of exclusion of workers in the IT sphere from the scope of labour law for the further legal regulation of work in gig economy in a broader context are discussed.

2. The advantages and disadvantages of gig contracts for both IT workers and companies

As it was mentioned despite the legal definition of the gig contract as a civil contract, working relations based on a gig contract have many features specific to employment relations, governed by labour law. It is worth highlighting the most important of them. For example, a Diia.City resident shall provide work assignments to its gig specialists, including the equipment necessary for the performance of work/provision of services or compensation if a gig specialist uses personal equipment. Moreover, a company has a right to control the performance of work/provision of services by monitoring the resident's equipment or communication networks, video surveillance in public places or other means of monitoring under a gig contract. All in all, a gig specialist must perform work/provide services in a place established by the parties in a gig contract, although a resident of Diia.City may unilaterally change the place of work of a gig specialist, including to a new city or other locality, with compensation of all relocation and accommodation expenses.

A gig contract may include engaging in probation periods and limiting the gig specialist's liability (20% of his monthly remuneration). Furthermore, within the limits established by the LSDDE, gig

¹⁷ Diia.City after 1.5 years of implementation. Norwegian–Ukrainian Chamber of Commerce (NUCC), July 12, 2023. Available at: <https://nucc.no/diia-city/> Nonetheless, to date it is difficult to determine the particular number of gig contracts concluded since the launch of Diia.City, as there is no such statistics available.

¹⁸ Following Article 1 of the LSDDE, gig contracts are civil law contracts under which an individual (a gig specialist) undertakes to perform work or provide services on behalf of a tech company – resident of Diia.City (a customer). Concurrently, the latter undertakes to pay for the work performed or the services provided, ensuring the gig specialist performs work or supplies services in appropriate conditions and according to statutory protection.

contracts or internal documents of Diia.City resident may specify the following conditions: working hours (the maximum duration of working time under a gig contract is 8 hours per day, 40 hours per week but under certain circumstances, the parties may agree on the irregular work schedule of a gig specialist); rest time (a gig specialist is entitled to breaks from work, as well as an annual paid break of at least 17 working days); working conditions and the place where work will be carried out; the rules established by Diia.City resident (e.g. labour protection) and liability in case of violation; the procedure for processing personal data; provision of additional compensation.

Further exploration of the gig contracts' regulation allows us to outline some advantages of this model for IT companies as employers in comparison to regular employment contracts. First, a gig contract unlike an employment contract under the rules of the LC provides IT employers with ample opportunities to determine the grounds for termination of the contract. By default, the employer under a gig contract is required to notify the gig specialist of the termination of the relationship in writing or electronically no later than 30 days before the scheduled termination date or 3 days if the contractual relationship lasted no more than 3 months. If the DiiaCity resident company does not intend to wait for 30 days, it has the right to shorten the notice period for the gig contractor by paying a compensation payment in favour of the gig contractor in the amount specified in the gig contract, but not less than the gig specialist's daily remuneration for each working day of the shortened period. At the same time, gig specialists do not have the option to terminate a gig contract within a period of less than 30 days¹⁹. Second, the IT company has a right to impose restrictive obligations on the gig contractor that are typical for non-competition and non-disclosure agreements, which are not directly provided for by the current labour laws.

In fairness, as opposed to ordinary civil law contracts with an individual entrepreneur, there are also advantages of gig contracts. Concretely, IT workers as gig contractors are provided with social guarantees, including the right to sick leave (they are subject to mandatory state social security for temporary disability and may have sick breaks and maternity or adoption breaks, partially payable from the state social security fund) and paid vacation. In a similar vein, the unilateral termination of a gig contract at the initiative of a Diia.City resident is prohibited during a maternity leave break or temporary disability of a gig specialist (unless such temporary disability lasts continuously for more than one month). The single social contribution is paid by the employer and at the employer's expense, not by the gig contract, as it would be in the model with an individual entrepreneur and a gig specialist, unlike an individual entrepreneur, is not obliged to keep accounting records and report to the tax authorities on their own²⁰.

¹⁹ This period is twice as long as the one provided for in the Labour Code.

²⁰ Under a gig contract, the Diia.City resident acts as a tax agent and independently calculates personal income tax and military duty, as well as submits reports to the tax authorities for all gig contractors.

In contrast to an employee, as some scholars argue, a gig contractor is more likely to dictate his terms and conditions and insist on their being enshrined in a gig contract with a Diia City resident²¹. Nonetheless, it sounds too good to be true if we acknowledge that situation on the labour market and in the IT industry in particular, can be unfavourable to the workforce, when offers are far exceeding demand. In this case, despite formal ‘freedom of contract’ workers (with some rare exception of senior positions) are unlikely to be able to impose their own terms and conditions on IT employers, and thus will be subject to standard gig contracts with mostly rigid terms and conditions. The regulation of work relations under the gig contract primarily only within the framework of individual agreements between the parties has a significant risk of imbalance in these relations. Undoubtedly, an employer is more justified and can impose unfavourable conditions for a single worker who has little, if any, power to negotiate and likely is forced to choose between a highly exploitative contract or unemployment.

Moreover, restrictions on the freedom to change employers may be speculated due to the integration of non-competition and non-disclosure agreements in gig contracts. However, the most significant risks of this model for IT workers are the implicit deprivation of at least two internationally recognised fundamental labour rights, namely: freedom of association and the effective recognition of the right to collective bargaining and a safe and healthy working environment, which will be discussed further in the third section.

3. Critical reflections on legal formalizing the concepts ‘gig contract’ and ‘gig specialist’

Bearing in mind the Latin expression ‘*nomen est omen*’, one of the questions arising while exploring gig contracts refers to the use of the term ‘gig’ by Ukrainian lawmakers. In this regard, it is worth paying attention to the definition of problematic phenomena which is essential for the strategies of legal regulation and determination of the proper volume of legal interventions for regulating social relations. The LSDDE has introduced new legal concepts such as ‘gig contract’ and ‘gig specialist’, which are not legally defined or applied in other jurisdictions as well as in EU law.

Along with this, the term ‘gig economy’ has recently become ubiquitous and increasingly a part of the critical lexicon of scholars and researchers concerned with contemporary transformations of the global political economy and international affairs.²² There is no single, agreed definition of the gig

²¹ Serhii TARASIUK: Peculiarities of Gig Contracts Stated by Residents of the Legal Regime Diia City. *Scientific Works of National Aviation University. Series: Law Journal “Air and Space Law”*, Vol 2, No. 63. (2022) 133–142. <https://doi.org/10.18372/2307-9061.63.16721> [In Ukrainian]; Halyna KUZMENKO: The influence of non-standard forms of employment on the legal regulation of labour relations in Ukraine. *Law and Society*, No 5, 2022. 117–121. Available at: <https://tinyurl.com/mr322nvu>

²² Immanuel NESS (ed.): *The Routledge Handbook of the Gig Economy*. (Ser. Routledge international handbooks). Routledge, 2022. 1. DOI.org/10.4324/9781003161875

economy²³. For example, ‘gig economy’ in the Cambridge Dictionary is defined as “a way of working based on people having temporary jobs or doing separate pieces of work, each paid separately, rather than working for an employer.”²⁴ According to Andrew Stewart and Jim Stanford, several vital features typify most forms of gig work despite the wide variety of situations and terminology, namely: irregular work schedules; using some or all of the own equipment; payments on a piecework basis, defined according to specific tasks rather than per unit of time; being organised around some form of digital mediation, like a web-based platform.²⁵

It is also important to note that gig work is usually associated with precarious work conditions.²⁶ “It provides work opportunities and flexibility for workers but at the cost of working conditions that are chronically precarious, and which may contribute to social inequalities, for example, between gig workers and those in more formal employment”.²⁷ Acknowledging that all gig work involves some physical activity and also the creation of digital data with a potential value, researchers divide gig work into two types: physical gig work involves location-bound physical activity such as taxi driving, food delivery and house cleaning managed via platforms such as Uber, Deliveroo, Glovo etc.; digital gig work involves location-independent digitally-centered activity such as data entry, translation, and web development managed via platforms such as Amazon Mechanical Turk, Upwork, and Freelancer²⁸. At any rate, the use of the term ‘gig’ is associated with digital platforms and fragmented activity, exercised outside the framework of traditional forms of employment with irregular or additional income without proper guarantees of labour protection.

Taking into consideration that “as in the offline markets, digital work reflects a diversity of situations, in which good and bad jobs, secure and insecure workers coexist, and where various risks are present for everyone”²⁹, the categories ‘gig contract’ or ‘gig specialist’, which are the only connection between this Law and the gig economy and obviously have quite a negative connotation from a labour law perspective, are hardly the appropriate terms to formalise in the law when it comes to the work arrangements of a group of high-paid IT developers. In light of this, the attempts to put the work relations in the IT sphere into the appropriate legal framework and to achieve the goals of economic development have turned out a large-scale introduction of a civilian element in the regulation of work relations, exclusion from the scope of labour law of a number of IT workers and the legitimization of

²³ *The characteristics of those in the gig economy*. London, BEIS (Department for Business, Energy and Industrial Strategy), 2018. Available at: <https://www.gov.uk/government/publications/gig-economy-research>

²⁴ Cambridge Dictionary. Available at: <https://dictionary.cambridge.org/dictionary/english/gig-economy>

²⁵ Andrew STEWART – Jim STANFORD: Regulating work in the gig economy: What are the options? *The Economic and Labour Relations Review*, Vol. 28, No. 3. (2017) 362. DOI: 10.1177/1035304617722461

²⁶ Jason MOYER-LEE – Nicola KOUNTOURIS: Taken for a Ride: Litigating the Digital Platform Model. *International Lawyers Assisting Workers Network*, 2021, 6. Available at: <https://tinyurl.com/4hbbde24>

²⁷ Richard HECKS – Mark GRAHAM – Paul MUNGAI – Jean-Paul VAN BELLE – Jamie WOODCOCK: Systematic evaluation of gig work against decent work standards: The development and application of the Fairwork framework. *The Information Society*, Vol. 37, No. 5. (2021) 268. DOI: 10.1080/01972243.2021.1942356

²⁸ Ibid. 268.

²⁹ Mariya ALEKSYNSKA – Anastasia BASTRAKOVA – Natalia KHARCHENKO: *Work on Digital Labour Platforms in Ukraine: Issues and Policy Perspectives*. ILO, Geneva, 2018. 51. Available at: <https://tinyurl.com/4zrvuteb>

dubious concepts ‘gig specialist’ and ‘gig contract’, which intrinsically is neither employment nor a civil law contract as it will be argued in the next section.

4. The challenges of gig contracts’ dual legal nature in the context of the classification of employment status and fundamental labour rights implementation

At first glance, the LSDDE aims to serve a noble purpose – i.e. to govern existing relations in the IT sector. Nonetheless, as mentioned above, the legislator failed to include the arrangements it regulates in the context of labour law. It also can be argued that a gig contract is, in fact, very similar in nature and content to an employment contract and the boundary between a gig contract and an employment contract is somewhat artificial. Since with the adoption of the LSDDE, Article 3 of the LC was supplemented with the provision that this Code and labour legislation do not apply to relations between gig specialists and Diia.City residents. Apparently, the idea of gig contracts might have been a sort of legal way for IT companies to avoid fines for disguised labour relations. In order to avoid any risks of qualifying a gig contract as an employment contract, a particular provision of the LSDDE says that in the absence of evidence that a Diia.City resident misled an individual about the legal nature of the contract, the conclusion or execution of a gig contract cannot be considered as entering into an employment relationship. Hence, regardless of the actual nature of the relationship between the IT company and the gig specialists, the latter are determined as those whose work is regulated specifically by the LSDDE and not the LC.

Some may argue that extending labour standards and social guarantees to IT workers by a civil law contract is better than no social protection at all. The ILO, for example, recognises that “work can have varied contractual forms. The goal is not to make all work standard, but rather to make all work decent.”³⁰ After all, the argument about high monthly remuneration of gig contractors³¹ should also be mentioned in this discourse. Nevertheless, some labour law scholars express fears that gig workers remain unprotected from: uncontrolled conclusion of short-term gig contracts; the possibility of unjustified unilateral termination of a gig contract by a Diia.City resident; violations of the occupational safety and health rights as the Law of Ukraine On Labour Protection does not apply to gig contractors³². Overall, gig contractors are deprived of fundamental labour rights such as

³⁰ *Non-standard employment around the world: Understanding challenges, shaping prospects*. Geneva, ILO, 2016. 3. Available at: https://www.ilo.org/global/publications/books/WCMS_534326/lang--en/index.htm

³¹ The average amount of the monthly salary for gig contractors cannot be less than the EUR 1,200 equivalent according to the LSDDE.

³² Daria ZAIKA: Some issues of defining the categories of “IT worker” and “gig-specialist”. *The Main Directions of Implementing the Rights of Ukrainian Citizens to Labour and Social Protection in the Context of European Integration*: abstracts and scientific reports of the participants of the IX International Scientific and Practical Conference, Pravo, 2021. 232–235. [in Ukrainian]; Iliana ZINOVATNA – Vitalii ZINOVATNYI: Peculiarities of Legal Regulation of Labour in the IT Sphere. *Current Issues in Modern Science*, Vol. 3, No. 3. (2022) 212–225. DOI: [https://doi.org/10.52058/2786-6300-2022-3\(3\)-212-225](https://doi.org/10.52058/2786-6300-2022-3(3)-212-225) [in Ukrainian].

freedom of association and collective bargaining as labour legislation does not apply to them, nor does the LSDDE define the right of gig specialists to form trade unions or other representative bodies or the right to collective bargaining with Diia.City resident. This directly contravenes international and European labour and human rights law, including the rights protected by ILO Conventions, which all workers should be able to exercise without distinction. The 2019 ILO Centenary Declaration recently underscored the “continued relevance of the employment relationship as a means of providing certainty and legal protection to workers” and that “all workers should enjoy adequate protection following the Decent Work Agenda, taking into account... respect for their fundamental rights”.³³

At the stage of consideration of the bill in the parliament, there were serious concerns about some of its provisions. For example, ITUC raised worries regarding the LSDDE that establishes a special category of ‘gig specialists’ and special ‘gig contracts’ that create conditions for exploitation.³⁴ However, all of them were ignored by lawmakers.

The study and comparative analysis of the norms of the LSDDE regulating the content of the gig contract with the provisions of LC allow concluding that most of these norms are an apparent loan from labour law. Notwithstanding, they worsen the position of workers and narrow the scope and content of labour rights and freedoms thus violating fundamental human rights. By way of example, unlike the LC the LSDDE does not provide for any protected categories, in particular, single parents, disabled workers etc, except for pregnant women, any special conditions and additional protection.

Obviously enough that the performance of work under a gig contract is characterised by most of the features of standard employment relationships. It needs to be acknowledged that a gig specialist works under a gig contract for just one company (a Diia City resident), thereby becoming subordinated and financially dependent on it. Nonetheless, the lawmaker considered their relations as civil law relationships, contrary to the generally recognised international and European practice. Thus, such disregard of the employment relationship ‘allowed’ by the LSDDE ignores the well-established legal guidelines for the determination of the existence of employment relationships outlined in the ILO Employment Relationship Recommendation No. 198 of 2006³⁵. Furthermore, it is at odds with the EU law and ECJ case law, which is worth taking into account given the EU membership perspective. Hence, in the 2010 *Danosa* decision, the ECJ formulated its notion of ‘disguised employment’ as follows: “Similarly, formal categorisation as a self-employed person under national law does not exclude the possibility that a person may have to be treated as a worker [under EU law] if that person’s independence is merely notional, thereby disguising an employment relationship within the meaning of that directive.”³⁶ In the ECJ case law the following main criteria for classification as a worker are

³³ ILO Centenary Declaration for the Future of Work. June 21, 2019 Article 3(b). Available at: <https://tinyurl.com/33p87ber>

³⁴ International Trade Union Confederation. Ukraine: ITUC concerned about wave of regressive labour laws. 10. 09. 2021. Available at: <https://www.ituc-csi.org/ukraine-ituc-concerned-about-labour-laws?lang=en>

³⁵ ILO Employment Relationship Recommendation No. 198, 2006. Available at: <https://tinyurl.com/337ruyne>

³⁶ Case C-232/09 *Dita Danosa v LKB Lizings SIA* [2010] ECLI:EU:C:2010:674 , para 41; C-256/01 (n 73), para 71.

distinguished: performance of services for and under the direction of another person; remuneration in return for these services; no share in the employer's commercial risks; forming an integral part of the employer's undertaking, i.e forming an economic unit within it.³⁷

Although the LSDDE names the gig contract as a civil law contract, on the other hand, it permits significant interference of the legislator in the formation of its conditions despite the freedom of contract as a central essence of civil law contracts. To be precise, the LSDDE contains a specific provision according to which the conclusion and execution of a gig contract is not an exercise of entrepreneurial or other economic activity of a gig specialist. This actually removes the gig contract from the sphere of contract law and introduces even more confusion both in terms of understanding the legal nature of the gig contract and the place of gig workers in the employment classification. The provisions of the LSDDE, therefore, do not meet the principle of certainty and clarity of legal regulation. Far from bringing Ukraine into line with the labour standards and practices of other European states and the international community, it constitutes a further departure from established norms and obligations.

The controversial legal construct of gig contracts has not gone unnoticed by Ukrainian labour law scholars. Some of them argue that the definition of a gig contract as a civil law contract is erroneous which the author cannot but agree with. The legal nature of a gig contract should not be interpreted in favour of civil law,³⁸ since it is not such by its content. In light of this, certain peculiarities of IT specialists' employment relations, including more flexibility, in particular, in the grounds for termination of the contract, the registration of intellectual property rights, as well as the protection of confidential information and commercial secrets, should be regulated by the LC as a specific type of employment contract. Among other reasons, this would automatically cover such workers with occupational health and safety legislation and guarantee them the right to unionize and be the subject of collective bargaining agreements.

Moreover, Art. 296 of the EU-Ukraine Association Agreement states that "A Party shall not weaken or reduce the environmental or labour protection afforded by its laws to encourage trade or investment, by waiving or otherwise derogating from, or offering to waive or otherwise derogate from, its laws, regulations or standards, in a manner affecting trade or investment between the Parties".³⁹ However, the LSDDE was introduced to attract investment by depriving internationally recognised labour rights for a specific group of workers – highly paid IT engineers. In turn, there is also an idea among Ukrainian civil law researchers that gig contracts, as a special form of civil law contracts, should

³⁷ Eva KOCHER: *Digital Work Platforms at the Interface of Labour Law: Regulating Market Organisers*. (Bloomsbury Collections, 48) Oxford, Hart, 2022.

³⁸ Olena SEREDA – Alla YUSHKO: New types of contracts in the employment sphere: gig contracts, employment contracts with unspecified working hours. In: Yana SIMUTINA – Mykhailo SHUMYLO (ed.): *Social and Labour Rights and Challenges of Digitalization*. Kyiv, Nika-Center, 2023. 270. [In Ukrainian]

³⁹ Association Agreement between the European Union and its Member States of the one part and Ukraine of the other part. Available at: http://data.europa.eu/cli/agree_internation/2014/295/oj

be extended to all highly qualified and highly paid specialists in the digital economy, and not just to the legal regime of Diia.City⁴⁰, which is something the author of this paper cannot agree with. After all, the range of labour rights and their exercising should not be determined simply by the amount of remuneration received for work.

5. The risks of exclusion of gig workers in the IT sphere from the scope of labour law for the further legal regulation of work in the gig economy.

Another critical issue arising from the legalisation of gig contracts lies in the plane of a broader issue of work arrangements in the gig economy and legal determination of employment status on digital platforms in particular. Even though the work of IT professionals under gig contracts is not inherently gig work, as was proved above, the perspective of potential ways to regulate the work of individuals who are real ‘gig’ workers is still relevant in this case. On the one hand, although the LSDDE aims to promote digital technology use in Ukraine, it does not define the general principles and guarantees for doing business in the digital economy as it applies to a number of companies that are part of Diia.City⁴¹. On the other hand, amidst all the optimism about the digitalisation of the economy and the various breakthroughs and achievements of Ukrainian companies and developers, one crucial element of the digital economy – the lowest-level platform workers whose services digital platforms rely on – has still been overlooked⁴².

However, the combination of the inherently precarious nature of platform work and the lack of enforcement of labour laws makes such workers some of the most vulnerable in Ukraine, where platform workers are usually engaged under civil law contracts as service providers or even work without any signed contracts⁴³. Thus, they do not enjoy the rights and benefits of regular employees, such as paid vacations, social benefits, protection against immediate dismissal, etc., not to mention, of course, collective labour rights as so far there are no regulations on a legal mechanism for the unionisation of non-standard workers and platform workers, in particular.

According to Ukraine’s law, such a category of workers, which is between labour and civil law relations, does not exist.⁴⁴ In each case, courts must qualify relations as labour or civil law. As a legal response to the challenges of undeclared or disguised employment, the Ukrainian government in 2021 proposed changes to the LC to define the concept and features of an employment relationship.

⁴⁰ TARASIUK op. cit. 140.

⁴¹ Yana SIMUTINA – Sergii VENEDIKTOV: Non-standard Forms of Employment: Trends and Prospects of Ukraine’s Legal Regulation. *E-Journal of International and Comparative Labour Studies*, Vol. 10, No 2. (2021) 162.

⁴² Christian MAMO: What rights for gig economy workers in Ukraine? April 20, 2021. Available at: <https://tinyurl.com/4u96drt9>

⁴³ Vitalii DUDIN: No return: Precarious Delivery Workers in Ukraine Look to Spain for Inspiration. 3 September 2019. Available at: <https://tinyurl.com/3w8j4nu4>

⁴⁴ As a matter of fact, it had not existed before the category ‘gig specialist’ appeared in the LSDDE.

The corresponding draft law was submitted to the parliament but had yet to be considered.⁴⁵ The bill defines employment relationships as relationships between an employee and an employer, which regulates work performed on behalf of or under the direction and supervision of the employer in exchange for remuneration. The following features characterise the employment relationship: 1) work performed as a result of a specific qualification, profession, position on behalf of and under the control of the person for whom work is carried out; 2) regulation of the labour process, which is permanent and, as a rule, does not establish one's person a specific result of work over a certain period of time; 3) performance of work at a workplace determined by or agreed with the person for whom work is carried out, in compliance with internal labour regulations; 4) organisation of working conditions, in particular, provision of means of production (equipment, tools, materials, raw materials); 5) regular payment of remuneration; 6) establishment of working hours and rest periods; 7) reimbursement of travel and other financial costs associated with work performed. According to this draft law, work can be recognised as being performed within the framework of an employment relationship, regardless of the name and type of contractual relationship between the parties, if three or more features among those outlined above exist. If adopted by parliament, these proposed legislative changes would allow extending labour regulation so that the platform workers would be eligible to enjoy the same rights as employees while the platform companies will have to bear additional tax and social security burdens.

In the meantime, the legislator's real efforts to tackle undeclared employment⁴⁶ are geared in a rather different direction. While the European Union policymakers are trying to solve the problem of gig work by introducing a rebuttable presumption of employment and ensuring platform workers dignified working conditions, including health and safety, access to collective representation and bargaining,⁴⁷ the Ukrainian legislator is creating a sort of hybrid or intermediate model by formalising the categories 'gig contract' and 'gig specialists' without respect to at least two fundamental labour rights.

Although an intermediate category between employees and self-employed has already been identified with varying degrees of protection in many jurisdictions, there is still a broad discussion between labour law academics about the effectiveness of this approach. Supporters of the need to introduce such a category argue that "existing law no longer protects a growing number of persons who once would have enjoyed the status of employees [...] and the lack of any intermediate status effectively provides greater incentives for employers to classify their workers as independent contractors"⁴⁸.

⁴⁵ Draft Law on Amendments to the Labour Code to Define the Concept and Signs of Employment Relationships, Verkhovna Rada of Ukraine: official web portal. Available at: http://w1.cl.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=71071

⁴⁶ For the purposes of this article the undeclared work is used in the definition of the working paper "Undeclared work in Ukraine: nature, scope and measures to tackle it" and refers to any paid activity, lawful in nature but not declared to the public authorities, with due regard to the variety of the EU Member States' regulatory systems. See: <https://tinyurl.com/ycknhawj>

⁴⁷ Commission proposals to improve the working conditions of people working through digital labour platforms. Press release, December 9 2021. Brussels. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6605

⁴⁸ Orly LOBEL: The Gig Economy & The Future of Employment and Labour Law. *University of San Francisco Law Review*, Vol. 51, No. 1. (2017) 12.

Alternatively, Nicola Countouris expressed concerns that the existence of intermediate categories to a certain extent has aggravated them because, in some sense, they have made it easier for employers to structure their work needs and agreements with the help of contractual forms, which differ from the classification of the hired worker under a labour contract.⁴⁹ Secondly, using the intermediate category refers to exacerbating “the issue of ‘fiscalisation’ where workers are required to classify themselves as ‘quasi-subordinates’ in order to access tax benefits typically reserved for self-employed individuals. In essence, workers who are classified as quasi-employees may resist reclassification as employees if it means forfeiting tax privileges, even if they would receive stronger protection under labour laws”.⁵⁰ Valerio De Stefano agrees that the workers who would qualify for full protection as employees under the traditional legal tests would likely become deprived of many rights if they were crammed into an ‘intermediate bucket’.⁵¹ The fundamental problem with the creation of a novel third status in Martin Gruber-Risak’s view is not only that it would “fail to alleviate the uncertainty and classificatory problems, but it would also provide persons working through platforms with a lower degree of protection even though and they might often be among the most vulnerable participants in the labour market”⁵².

From this observation, we can learn about the risks of having such intermediate categories in the legal system, which should be considered by Ukrainian lawmaker while reforming labour legislation and seeking ways of formalizing work on the digital platforms. On the one hand, such categories may provide some level of protection to workers who fall between the traditional binary of employees and the self-employed. On the other hand, they may also introduce uncertainty and complexity in the legal framework. Such an approach may provide greater flexibility to gig workers and employers but may also deprive the workers of certain fundamental labour rights. The experience of formalising gig contracts and gig specialists is a prompted example of the latter.

Summing up, solving the problem of disguised employment, concretely, civil law contracts with individual entrepreneurs lies not in the creation of exceptions, as in the case with Diia.City, but in taking steps that would be beneficial for the whole society.⁵³ The specificity of labour law is that it should not depend on individual peculiarities of business activities and the vision of the model of labour relations development by an individual employer. For workers, this means that their labour relations will develop in a sustainable legal framework regardless of the change of employment or choice of a new career path. Thus, ensuring more effective legislation and enforcing labour laws rather

⁴⁹ Ibid. 13.

⁵⁰ Nicola COUNTOURIS: *Defining and regulating work relations for the future of work*. Geneva, ILO, 2019. 12–13.

⁵¹ Valerio DE STEFANO: *The Rise of the ‘Just-in-Time Workforce’: On-Demand Work, Crowdwork and Labour Protection in the Gig-Economy*. (Conditions of work and employment series, No. 71) Geneva, ILO, 2016. 20.

⁵² Martin GRUBER-RISAK: *Classification of Platform Workers: a Scholarly Perspective*. In: Tamás GYULAVÁRI – Emmanuel MENEGATTI (eds.): *Decent Work in the Digital Age: European and Comparative Perspectives*. Oxford, Hart, 2022. 100.

⁵³ Ivan HORODYSKYI: *Work Models in the Ukrainian IT Industry: Between Employment and Contractor Models*. *Eastern European Journal of Transnational Relations*, Vol. 5, No. 1. (2021) 65. DOI:org/10.15290/ejtr.2021.05.02.05

than creating new hybrid forms of employment, such as gig contracts, seems more compelling for the ILO's goals of decent work for everyone and transforming Ukraine into a sustainable society.

6. Conclusions

The introduction of Diia.City as a unique legal and tax regime for the IT industry in Ukraine has had some positive economic effects while its implications regarding labour rights are yet to be seen, and gig contracts are hardly a sustainable solution to meet the challenges facing work relations in the digital economy. The main arguments in support of the idea of formalizing gig contracts are that, firstly, labour law is an obstacle to business development, that it is burdensome for business, while civil law is more accessible to the exercise of entrepreneurial initiatives and freedoms. The tendency towards this view is evident partly in the demands for the deregulation of labour relations and partly in the special tax regime for IT companies which are Diia.City residents.

Therefore, the exclusion of a particular category of workers from the scope of labour law despite the factual nature of their work relations and thus their deprivation of fundamental labour rights cannot be justified for tax optimisation, business benefits or flexibility. Such exclusion eventually leads to insecurity for workers. Moreover, this may carry the risk of labour law being absorbed by civil law over time, which is unacceptable from the standpoint of the state's and employers' social responsibility and consistency between the social and economic components of work relations.

The way of legalising gig contracts in Ukrainian law shows that it poses challenges to fundamental labour rights. After all, by creating a specific model of the legal regulation of work relations in the IT sphere, the Ukrainian legislator somewhat deviates from the general international and European trends in ensuring labour rights in the digital economy. However, as the growth of platform work continues worldwide, it is crucial to understand its consequences for all workers, especially platform workers whose work is a real 'gig'.

Starting with IT engineers in Diia.City, the rise of the gig contract model could lead to the fragmentation and atomisation of the labour force, weaken workers' bargaining power, and reduce their ability to influence employment policies or regulations. Thus, the idea of developing labour legislation that represents a relatively universal model of labour relations that any enterprise, regardless of its size or scope of activity, will be able to adapt to use and its effective enforcement rather than creating new hybrid forms of employment, such as gig contracts for a limited circle of workers, seems more compelling for the goals of bringing Ukraine into line with the international and European standards and practices.